

THE RIGHT TO LEAVE AND ITS RAMIFICATIONS IN ERITREA

Simon M. Weldehaimanot*

ABSTRACT

As part of the massive and serious human rights violations prevalent in Eritrea, the right to leave their country of many Eritreans between 10 to 50 years old is severely curtailed; giving rise to the apt designation of Eritrea as an “open air prison”. However, fraught by the overall repression of human rights, in spite of the draconian restrictions on the right to leave such as deadly measures of blocking the borders of the country and severely punishing apprehended attempters and deportees with no reference to due process of law, thousands of Eritrean youth are fleeing Eritrea every year in a manner the Government of Eritrea (GoE) calls “illegal”. This article analyzes the related rights to leave and to return to one’s own country as provided in three human rights treaties which bind Eritrea and in the 1997 Constitution of Eritrea. A depiction of glaring violations is made and consequences discussed.

I. INTRODUCTION

I made four failed attempts to cross the border, three times to Ethiopia and once to the Sudan. But I never gave up and succeeded with the fifth one. After six days of exhausting walk, I managed to get in to the Sudan on 17 November, 2007 via Sawa military training camp, along two other colleagues. It was very risky ... Had it not to be for one Sudanese nomad to rescue our life, we could all have vanished without trace in the deserts of eastern Sudan.¹

An early expression of the right to leave one’s birthplace appeared in the *Crito*, where Plato quotes Socrates proudly explain: “we further proclaim to any Athenian by the

* JSD candidate, Notre Dame Law School, Indiana. Email: <sweldeha@nd.edu> The author thanks Dr Daniel R. Mekonnen for his valuable comments and Yohannes Teclmichael (LLM) for sharing his experience. The usual disclaimer applies. Certain parts of this article were presented at the 1st Human Rights Symposium of the Eritrean Global Solidarity (EGS) held in Washington, DC on 20 June 2009.

1. T. Abraham, A Refugee at Last (11 September 2009) <<http://delina.org/en/articles/303-a-refugee-at-last>> (accessed on 13 September 2009). Abraham’s testimony is not unique but the fate of thousands of Eritrea youth including the author who, himself being a victim, in 2007 filed a communication (*Communication 349/07 Simon Weldehaimanot v. Eritrea*) before the African Commission on Human and Peoples’ Rights (the African Commission) mainly on account of violation of the right to leave and to return to their country of Eritrean youth (herein after referred as Communication filed).

liberty which we allow him, that if he does not like us when he has become of age and has seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him.”² Early formal acknowledgment of the right to freedom of movement in national law can be found in the *Magna Carta*, a document dated 1215. The *Magna Carta* provided that “it shall be lawful in the future for anyone ... to leave our Kingdom and to return, safe and secure by land and water.”³ A general right to free movement is also reflected in the writings of 16th century publicists of international law. According to the Spaniard Francisco de Vitoria, “it was permissible from the beginning of the world for anyone to set forth and travel wheresoever he would.”⁴ During the 17th century Hugo Grotius postulated the principle that “every nation is free to travel to every other nation.”⁵

Some writers have indeed found justification for the contemporary rights to leave and to return to one’s country in ancient human history and have thus concluded the rights are innate to human beings.⁶ Nevertheless, as Hannum⁷ has rightly observed, whatever theory one adopts to explain the original source, the right to movement has now acquired the status of positive law through the widespread acceptance of the international covenants and numerous other international agreements.⁸

In its modern sense, freedom of movement contains internal and external aspects: freedom of movement within a country and between states respectively.⁹ The latter aspect is usually referred to as the rights to leave and to return to one’s country. It is the external aspect which is the focus of this article. While the rights to leave and to return are closely connected, in that the existence of one allows for the effective

2. J. Barist et al, *Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of “State Secrets” in Comparison with Standards of International Law and the Policies of Other States*, 15 HOFSTRA L. REV. 381 (1987), at 384.

3. *Magna Carta*, Ch 42, *quoted in* S.E. THORNE ET AL, *THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* 133 (1965).

4. *Quoted in* J.D. INGLÉS, *STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY* 2 (1963).

5. *Id.*

6. G. Liu, *The Right to Leave and Return and Chinese Migration Law* (PhD Thesis, University of Technology, 2005), at 15-22. *See also*, G. LIU, *THE RIGHT TO LEAVE AND RETURN AND CHINESE MIGRATION LAW* (2007).

7. H. HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* 5 (1987).

8. For a discussion of the right to freedom of movement in general, see B. Frelick, *The Right of Return*, 2 INT’L J. REFUGEE L. 442 (1990), at 442-7; *THE RIGHT TO LEAVE AND TO RETURN: PAPERS AND RECOMMENDATIONS OF THE INTERNATIONAL COLLOQUIUM HELD IN UPPSALA, SWEDEN, 19-20 JUNE 1972* (K. Vasak & S. Liskofsky eds., 1976).

9. S.A. Jagerskiold, *The Freedom of Movement*, in *THE INTERNATIONAL BILL OF RIGHTS* (L. Henkin ed., 1981), at 167-70.

exercise of the other, they respectively respond to different needs of the individuals exercising them. The person leaving his or her country may be doing so out of a desire to travel, to emigrate, or to seek refuge; while the person seeking to return to his or her country is usually motivated by a desire to return home, to the place where he or she belongs, to his or her roots.¹⁰ This “natural desire for a base or homeland” has been said to demonstrate “the logical connection” of freedom of movement with the right to a nationality and the right to property.¹¹ These and other factors could therefore lead to different standards applicable to the right to leave and the right to return.

The right to leave one’s country does not, for example, grant an automatic right to enter other alien countries.¹² This fact coupled with the growing proportion of economic migrants to the west which the west has not been welcoming, and that illegal migrants face deportation and numerous violations of their rights, could tempt a third world state to, for example, make exit visa dependent upon securing entry. Regardless of this scenario, Harvey and Barnidge however argue that “the right to leave one’s own country remains significant in international human rights law.”¹³

II. THE RIGHTS TO LEAVE AND TO RETURN UNDER INTERNATIONAL LAW

A. *The Rights under Treaty Law*

Out of the many treaties¹⁴ and soft laws which provide for the rights to leave and to return, this article focuses on two treaties Eritrea has ratified.¹⁵ These are the African Charter on Human and Peoples’ Rights (ACHPR),¹⁶ the International Covenant on Civil

10. D.N. Nseroko, *The Right to Return Home*, 21 INDIAN J. INT’L L. 335 (1981), at 336.

11. S. Agterhuis, *The Right to Return and its Practical Application* (LL.M Thesis, Aristotle University of Thessaloniki, 2004), at 4.

12. C. Harvey & R.P. Barnidge, *The Right to Leave One’s Own Country under International Law* (paper prepared for the Policy Analysis and Research Program of the Global Commission on International Migration, 2005), at 1.

13. *Id.*, at 16.

14. A few examples are Article VIII of the American Declaration of the Rights and Duties of Man, Article 22 of the American Convention on Human Rights and Article 2 of the Fourth Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See also*, INGLÉS, *supra* note 4, at 94-112 (listing provisions from various agreements).

15. On 31 July 2001 and 3 August 1994 respectively. Eritrea has also acceded to the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. Both instruments provide for the rights to leave and return. *See*, arts 5(d) (ii) & 10 respectively.

16. Eritrea acceded to the ACHPR on 14 January 1999.

and Political Rights (ICCPR)¹⁷ and the Universal Declaration of Human Rights (Universal Declaration). The latter, even though a mere declaration, is binding on Eritrea because it has arguably attained the status of customary international law.¹⁸

Article 12(2) of the ACHPR provides that “every individual shall have the right to leave any country including his own and to return to his country.” Article 13 of the Universal Declaration provides that “everyone has the right to leave any country, including his own and to return to his country.” Article 12(2) of the ICCPR provides, in relevant part that “everyone shall be free to leave any country, including his own”; and article 12(4) provides that “no one shall be arbitrarily deprived of the right to enter his own country.”

B. The Boundaries of the Rights

In this world which often experiences worst dictatorial governments taking terms such as democracy and justice as their names, and in the context of such governments often claiming to be respectful of the rights to leave and to return, it is indeed important to discuss the permissible limitations of these rights.

Generally, three approaches of limiting rights can be identified. In some constitutions, there are no expressed limitation clauses on rights. Nevertheless, as all rights are not absolute, courts have read-in certain limitation in rights.¹⁹ With other constitutions and human rights instruments, a qualifier clause by which limitation of non-absolute rights is regulated is attached and there is no general limitation clause. Such qualifiers are often referred to as internal limitations or clawback clauses. Or rights are stated in seemingly absolute terms and then there is a general limitation clause applicable to the non-absolute rights.²⁰ A third category of constitutions and human rights instruments not only attach an internal limitation but also provide for a general limitation clause—thus seemingly subjecting rights to double limitation.²¹ Derogation²² from rights during state of emergency situations is treated differently by

17. Eritrea acceded to the ICCPR on 22 January 2002.

18. See generally, H. Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1995/96).

19. The United States of America's constitutional jurisprudence is the best example.

20. German Basic Law is one example.

21. Best examples are article 36 of the 1996 South African Constitution and article 26 of the 1997 Eritrean Constitution.

22. For more discussion of the notion of derogation, see generally D. McGoldrick, *The Interface between Public Emergency Powers and International Law*, 2 INT'L J. CONST. L. 380 (2004).

different constitutions.²³ Although there could be certain procedural implications,²⁴ it seems however that the distinctions are more theoretical and all approaches tend to meet at the end result.

Under the Universal Declaration, the twin rights to leave and to return are subject to general limitation provided in article 29:

- (i) Everyone has duties to the community in which alone the free and full development of his personality is possible.
- (ii) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
- (iii) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Although the ACHPR is known for its trademark of not allowing derogation from its rights even during state of emergency, Heyns has convincingly argued that article 27(2) of the ACHPR which states the “rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest” will increasingly be used by states as a general limitation in addition to the internal limitations.²⁵ Article 12(2) of the ACHPR contains internal limitation by subjecting the rights to leave and to return to “restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

The only limitation to the right to return contained in the ICCPR is that the right is not absolute but subject to derogation.²⁶ Article 4 of the ICCPR allows state parties to, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, take measures derogating from their

23. See, e.g., art. 27 of the Eritrean Constitution (1997).

24. As a result the so called “two stage analysis” of a limitation of a right has been developed in recent South African constitutional jurisprudence. See generally, I. CURRIE & J. WAAL, *THE BILL OF RIGHTS HANDBOOK* (2005); R.J. Goldston, *The South African Bill of Rights*, 32 *TEX. INT’L L. J.* 451 (1997).

25. C. Heyns, *Civil and Political Rights in the African Charter*, in *THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE SYSTEM IN PRACTICE, 1986-2000* (M. Evans & R. Murray eds, 2002), at 139.

26. Not all rights are subject to derogation. Article 4(2) of the ICCPR states that no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made.

obligations to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. However, any state party to the ICCPR which desires to avail itself of the right of derogation is required to immediately inform the other parties to the ICCPR, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

On top of the possibility of derogation in accordance to article 4, article 12(3) indicates that the right to leave is subjected to additional restrictions insofar as such restrictions are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the ICCPR. Thus, under the ACHPR, the two rights to leave and to return; and under the ICCPR, the right to leave are subjected to limitations at two stages.²⁷

The Eritrean Constitution that was ratified on 23 May 1997 also provides under article 19(9) that “every citizen shall have the right to leave and return to Eritrea and to be provided with passport or any other travel document.” Article 26 of the Constitution provides for almost an identical limitation clause to those in the three instruments discussed above. According to article 26 which applies to article 19(9), the fundamental rights and freedoms guaranteed under the Constitution may be limited only in so far as limitation is in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others. However, any law providing for the limitation of the fundamental rights and freedoms guaranteed in the Constitution must (a) be consistent with the principles of democracy and justice; (b) be of general application and not negate the essential content of the right or freedom in question and (c) specify the ascertainable extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

In addition, under article 27 of the Constitution, at a time when public safety or the security or stability of the state is threatened by war, external invasion, civil disorder or natural disaster, by a resolution passed by a two-thirds majority vote of all its members, the National Assembly of Eritrea can sanction declaration of state of emergency for six months (renewable only for additional three months) which could have the effect of suspending many rights including the rights to leave and to return.

27. For more on the “two stage analysis” to violation (limitation) of a right, see CURRIE & WAAL, *supra* note 24.

Generally, two requirements a permissible limitation has to meet can thus be identified with the ACHPR, the ICCPR, the Universal Declaration and the Eritrean Constitution: (1) the procedural (provided for by law) and (2) the substantive requirement (the purposes for which limitation is permitted). The discussion below looks at the meaning of both the procedural and substantive requirements and explores the preparatory works of the above instruments, other interpretative guides and interpretation of the rights by relevant bodies in the form of General Comments and cases.

1. *Procedural Requirements.*—There is no much documentation on the development of the provision of the ACHPR that can help in the interpretation of the rights to leave and to return. If “provided for by law” is to mean any domestic law, many writers however decried that it would mean what has been provided under international treaties can be withered away by laws states can pass at the end making rights contained in international treaties illusory.²⁸ Fortunately, the African Commission on Human and Peoples’ Rights (monitoring body of the ACHPR) has not followed this literal interpretation and it is now settled that the phrase “provided for by law” is taken as referring to international human rights standards.²⁹

When the Universal Declaration was debated in the General Assembly, the Union of Soviet Socialist Republics (USSR) proposed an amendment to Article 13(2) that would have added after the phrase “to leave any country, including his own” the words “in accordance with the procedure laid down in the laws of that country.”³⁰ The USSR and Eastern bloc delegates defended the amendment as an accurate statement of “existing realities,” as “movement within a given country or across its frontiers” was a matter of domestic law.³¹ The USSR’s proposal for amendment, however, was strongly opposed by many nations and was defeated, and the USSR was subsequently the only nation to vote against the final wording of Article 13.³²

The drafting history of Article 12 of the ICCPR also establishes the intent of the member states to recognize and protect the right to emigrate. As submitted to the General Assembly by the Commission on Human Rights, the right to emigrate, set out in Article 12, was preceded by a limiting paragraph:

28. Heyns, *supra* note 25, at 142; U. Essien, *The African Commission on Human and Peoples’ Rights: Eleven Years After*, 6 BUFF. HUM. RTS. L. REV. 93 (2000), at 95.

29. Communication 105/93, 128/94, 130/94 and 152/96, *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, (12th Activity Report of the ACHPR 1998-1999, Annex V) ¶ 66.

30. Barist et al, *supra* note 2, at 386.

31. *Id.*

32. *Id.*, at 387.

Subject to any general law of the State concerned which provides for such reasonable restrictions as may be necessary to protect national security, public safety, health or morals or the rights and freedoms of others, consistent with the other rights recognized in this Covenant...³³

Although the delegates generally agreed with the substance of the proposed Article 12, they also felt that the drafting needed revision to make the principles of freedom to emigrate clear and paramount.³⁴ Thus, the initial order of the provisions of Article 12 was amended so as to stress the principle rather than the exceptions and article 12 took its current shape. The amendment was immediately supported by many delegations, and was especially praised for its revised form which stressed the rights of the individual.³⁵ The drafting history of the ICCPR also shows that the requirement that a limitation must be provided by law is necessary to curb executive discretion.³⁶

There are also numerous guidelines showing the boundaries of permissible limitations and the procedures states should follow in limiting the rights to leave and to return. These include General Comment No. 27, the Siracusa Principles,³⁷ the Uppsala Colloquium's Declaration,³⁸ Draft Principles on Freedom and Non-Discrimination in respect of the Right of Everyone to Leave Any Country, including His Own³⁹ and the Strasbourg Declaration.⁴⁰

In order to give content to the drafters' intent to prohibit arbitrary restrictions on the two rights, the above principles and declarations further provide that laws shall guarantee procedural safeguards. In his seminal 1963 study on the implementation of

33. INGLÉS, *supra* note 4, at 89 (citing U.N. Doc. E/2573, annex I B (1959)).

34. In this regard the Italian representative was quoted to have said: "there was one fundamental objection to the text of Article 12 as it stood: instead of first proclaiming the right concerned, it began by giving a long list of restrictions. That was, to say the least, an inauspicious opening." *Quoted in Barist et al, supra* note 2, at 388.

35. According to the Yugoslavian delegate, the amendment's primary merit was that it listed restrictions only after stating the right. *Quoted in Barist et al, id.*

36. *Id.*, at 398.

37. Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984), available online at <<http://hei.unige.ch/~clapham/hrdoc/docs/siracusa.html>> (accessed on 12 December 2007).

38. Declaration on the Right to Leave and the Right to Return, adopted by the Uppsala Colloquium, Sweden, June 1972, *reprinted in* HANNUM, *supra* note 7, at 150 (hereinafter Uppsala Colloquium).

39. Draft Principles on Freedom and Non-discrimination in respect of the Right of Everyone to Leave any Country, Including His Own, and to Return to His Country, U.N. Doc. E/CN.4/1846 (1963), *reprinted in* HANNUM, *supra* note 7, at 142.

40. Strasbourg Declaration on the Right to Leave and Return, *reprinted in* 81 AM. J. INT'L L. 434 (1987).

the ICCPR's statement on the rights to leave and to return, Judge Ingles, whose position is also supported by the Uppsala Colloquium's Declaration,⁴¹ the Draft Principles on Freedom and Non-Discrimination⁴² and the Strasbourg Declaration,⁴³ required the following procedural safeguards to protect the rights to leave and to return:

(a) Everyone denied a travel document or permission to leave the country or to return to his country is entitled to a fair hearing. In particular, he shall have the possibility of presenting evidence on his own behalf, of disputing evidence against him and of having witnesses examined. The hearing shall be public except when compelling reasons of national security or the personal interests of the applicant require otherwise. (b) The decision of the competent authorities to grant, deny, withdraw or cancel the required permission or travel document shall be made and communicated to the individual concerned within a reasonable and specified period of time. (c) If the required travel document or permission is denied, withdrawn or cancelled, the reasons for the decision shall be clearly stated to the individual concerned. (d) In case of denial, withdrawal or cancellation of the required permission or travel document, the aggrieved individual shall have the right of appeal to an independent and impartial tribunal.⁴⁴

2. *Substantive Requirements.*—It is convenient to analyze the substantive requirements by dividing them into three components: (1) are necessary (2) for the protection of national security, law and order, public health or morality, securing due recognition and respect for the rights and freedoms of others and the general welfare in a democratic society, and (3) are consistent with the other rights recognized in international standards.⁴⁵

(a) Drafting history (*travaux préparatoires*)

There is no much information on the drafting history of the ACHPR on the particular rights to leave and to return. There is, however, substantial information on article 12

41. Uppsala Colloquium, *supra* note 38, art. 6.

42. *See supra* note 39.

43. Strasbourg Declaration, *supra* note 40, arts. 2, 4(a)(1), 4(b), 10 & 11.

44. INGLÉS, *supra* note 4, at 67.

45. These are the grounds mentioned in the three instruments.

of the ICCPR. After agreeing on an acceptable form, the General Assembly focused on the specific terms of Article 12(3) of the ICCPR, especially on those terms that in some way limited the rights established. As originally drafted by the UN Commission on Human Rights, Article 12 contained a long list of limitations on the right to emigrate than it has now; but the formula was eventually rejected, in part, because the restrictions were “too broad and required further qualification while providing no real protection against the enactment of arbitrary legislation.⁴⁶ Concern was voiced that far-reaching restrictions could be justified under such a vague expression.⁴⁷ The drafting history and the wording used in Article 12 make it clear that restrictions on freedom of movement were intended to be entirely exceptional. This position has been reinforced by the various declarations and principles mentioned above, General Comment No. 27 and case law of the Human Rights Committee and the African Commission.

(b) General Comment No. 27

In the course of its life, the monitoring body of the ICCPR, the United Nations Human Rights Committee (the Committee), has issued commentaries (commonly referred as General Comments) on the interpretation of the rights contained in the ICCPR.⁴⁸ General Comment No. 27 adopted in 1999 specifically provides detailed principles to guide states in securing the freedom of movement generally. Paragraphs 1 and 2 affirm that “liberty of movement is an indispensable condition for the free development of a person” and the “permissible limitations which may be imposed ... must not nullify the principle of liberty of movement, and are governed by the requirement of necessity ... and by the need for consistency with the other rights recognized in the Covenant.”

Paragraph 8 explains that freedom to leave the territory of a state may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country or the state of destination. Since international travel usually requires appropriate documents, in particular a passport, paragraph 9 requires that the right to leave a country must include the right to obtain the necessary travel documents from the state of nationality of the individual; and the refusal by a state to issue a passport or prolong its validity for a national residing abroad may deprive a person his or her right to leave and to travel elsewhere.

46. INGLÉS, *supra* note 4, at 89.

47. Barist et al, *supra* note 2, at 389.

48. UNITED NATIONS, COMPILATION OF GENERAL COMMENTS AND GENERAL RECOMMENDATIONS ADOPTED BY HUMAN RIGHTS TREATY BODIES, UN Doc., HRI/GEN/1/Rev.7, 12 May 2004, at 173–7.

Paragraph 13 clearly requires states to always be guided by the principle that the restrictions must not impair the essence of the right; the relation between right and restriction, between norm and exception, must not be reversed and the laws authorizing the application of restrictions should use precise criteria and may not confer unfettered discretion on those charged with their execution.

Paragraph 14 and 15 further stress that it is not sufficient that the restrictions serve the permissible purposes—they must also be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected. The principle of proportionality has to be respected not only in the law that frames the restrictions, but also by the administrative and judicial authorities in applying the law.

Paragraph 18 clearly requires that, to be permissible, restrictions need to be consistent with the fundamental principles of equality and non-discrimination. Thus, it would be a clear violation of the ICCPR if the rights to leave and to return are restricted by making distinctions such as on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(c) Other Interpretative Guides

A limitation is “necessary” when it, assessed objectively, responds to a pressing public or social need, pursues a legitimate aim and is proportionate to that aim.⁴⁹ “National security, public order, public health or morals or the rights and freedoms of others” are the most fluid justifications states often rely on to shield their actions.⁵⁰ Responding to this concern, the Siracusa Conference stresses that national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force and cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order or as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.⁵¹ Judge Ingles observed that a “general policy of not permitting anyone to leave the country is never justifiable except in time of war or

49. Strasbourg Declaration, *supra* note 40, art. 4(c).

50. INGLÉS, *supra* note 4, at 39-40; Barist et al, *supra* note 2, at 402.

51. Siracusa Principles, *supra* note 37.

national emergency.”⁵²

Article 6 of the Uppsala Colloquium’s Declaration further provides that a “person’s right to leave a country shall be subject only to such reasonable limitations as are necessary to prevent a clear and present danger to the national security or public order, or to comply with international health regulations; and only if such limitations are provided for by law, are clear and specific, are not subject to arbitrary application and do not destroy the substance of the rights.”⁵³ The kinds of limitations considered permissible under this view of national security would include those necessary to prevent espionage, to protect military secrets, and to regulate the movement of members of the military.⁵⁴

3. *Cases Before the ICCPR’s Human Rights Committee.*—General Comments and the other guidelines, although detailed, contain yet abstract principles that provide guidance in understanding a right. Cases (communications) demonstrate how a right has been interpreted when states have allegedly breached their legal obligations. There are many cases in which the right to leave and to return featured. *Lauri Peltonen v. Finland*⁵⁵ in particular squarely applies to the situation in Eritrea and thus merits detailed consideration.

In *Lauri Peltonen*, Finland notes that Section 7, paragraph 1, of the Constitution Act (94/1919) provides for the right of a Finnish citizen to leave his/her own country which is further spelt out in the Passport Act (642/1986) and Passport Decree (643/86), which regulate the right to travel abroad. Furthermore, Section 75 paragraph 1 of the Constitution Act regulates the obligation of Finnish citizens to participate in the defence of the country; this is spelt out in the Military Service Act (452/50) and the Non-Military Service Act (1723/91).

Section 3, paragraph 1, of the Passport Act provides that a Finnish citizen shall obtain a passport, unless otherwise stipulated in the Act. In addition, a passport “may be denied to persons aged 17 to 30 if the requesting citizen cannot show its issuance (by implication leaving Finland) would not be used to evade military service.”⁵⁶ In such cases, a request for a passport should be accompanied by various documents that show

52. INGLÉS, *supra* note 4, at 40 & 59.

53. Uppsala Colloquium, *supra* note 38, at 127.

54. Jagerskiold, *supra* note 9, at 172; Strasbourg Declaration, *supra* note 40.

55. Communication No. 492/1992, *Peltonen v. Finland*, U.N. Doc.CCPR/C/51/D/492/1992 (1994) ¶ 1-2, <<http://www1.umn.edu/humanrts/undocs/html/vws492.htm>>, (accessed 13 December 2007).

56. Citing § 9(1)(6), ¶ 6.2 of the Committee’s decision which reads: “passport may be denied to persons aged 17 to 30 if they are unable to demonstrate that the performance of military service is not an obstacle to the issuance of a passport.” However, the quoted provision can only be construed as meaning the same as the italicized text above.

either the requesting individual is exempted or has completed or can be trusted to honour his/her duty to complete the service.⁵⁷ A Finnish citizen living abroad, and falling into the category of Section 9(1)(6) must obtain a statement from the police of his last place of residence in Finland, showing that he is not liable for military service.

As to the authorities' discretion to give or deny a person a passport, Finland points out that, when considering a passport application from a person falling within the category of Section 9(1), consideration must be given to "the significance of travel related to the applicant's family relations, state of health, subsistence, profession and other circumstances," in accordance with Section 10 of the Act. In this context, Finland refers to the *ratio legis* of the Passport Act as explained in Parliament, where it was noted that the decision to grant a passport is taken by legal discretion, based on acceptable objective grounds. Furthermore, according to a circular of the Legal Office of the Ministry for Foreign Affairs of 22 June 1992,⁵⁸ an Embassy must consider its decisions in Section 9(1) cases on the basis of the statement obtained from the police of the applicant's last residence in Finland, and must take into account the circumstances of the case and the grounds referred to in Section 10. Thus, Finland contended, the Embassy's discretion to grant a passport is not unlimited, since the Passport Act contains clearly specified grounds for rejecting a request for a passport.

As regards to the time dimension, it is submitted by Finland that the denial of a passport cannot be limited solely to the period of a person's actual military service, but it necessarily covers a more extensive period before and after such service, in order to secure that a conscript really performs his military service.⁵⁹ Finland explained that, for a person who has participated in his call-up for military or alternative service, or who has been granted a deferral (for up to three years, for example) of performance of such service, a passport is generally granted up to 28 years of age.⁶⁰ Once the person liable for military service has reached the age of 28, the passport is generally granted for a shorter period of time, so that by the age of 30, he must perform his military service. Generally, citizens are not called for military service after the age of 30.

The complainant, Mr Lauri Peltonen, is a Finnish citizen born in 1968, residing in Stockholm, Sweden, since 1986. In June 1990, the complainant applied for a passport at the Finnish Embassy in Stockholm and he was denied on the ground that he had failed to report for his military service in Finland on a specified date. The

57. Section 4 of the Passport Decree.

58. No. 0IK-4, 1988/1594/68.40.

59. Application of § 9(1)(6) of the Passport Act.

60. The length of the service is 8 to 11 months. Thus 28 years is arguably selected because it provides two years (until a person reaches 30) within which a reluctant citizen can be forced and thus denial of passport can be applied.

complainant appealed against the Embassy's decision but the appellate court upheld the Embassy's decision. The complainant then appealed to a higher court which confirmed the previous decisions. Subsequently the complainant filed a communication with the Human Rights Committee. The complainant noted that the administrative and judicial instances seized of his case did not justify the denial of a passport.

In its decision, the complainant contended the last appellate court merely observed that the Embassy had the right not to issue a passport to the complainant because he was subject to conscription and had failed to prove that by getting a passport he was not planning to evade.⁶¹ The complainant also contended that the interpretation by the court means that Finnish Embassies around the world have full discretion to deny passports to Finnish citizens until they reach the age of 30. The duration of the denial of a passport is likely to exceed by far the period of "eight to eleven months," as it did in this case.⁶²

The complainant acknowledged that failure to report for military service is an offence under the Finnish Military Service Act. The complainant did not challenge Finland's position that a state must have some means at its disposal to secure that conscripts actually perform their military service. He observed, however, that the Finnish authorities could have instituted criminal or disciplinary proceedings against him; failure to do so is said to further underline that the denial of a passport was and continues to be used as a *de facto* punishment. Thus the complainant submitted that the denial of a passport is a disproportionate punishment in relation to the offence of failure to report for military service and thus amounts to a violation of his right under article 12 of the ICCPR. The complainant argued that Finland cannot use denial of passport as legal means of forcing citizens to carry out the military service which is 8 to 11 months. The contention of the complainant is that the ramification of denial of a passport is too disproportional to the interest that is intended to be served.

Finland further noted that when requesting for a passport, the complainant did not show he was not trying to evade his liability for military service. Finland noted the complainant did not react to his military call-up in 1987,⁶³ and that he has disregarded

61. Citing one document (CCPR/C/SR.1016, ¶ 21), the Committee quotes what Finland submitted to contextualize the complainant's contention: "there might have been some misunderstanding concerning the question of obligation of military service. A passport could be issued to a person under duty of performing his military service and conscription, but its validity must temporarily expire during the period of military service. There is no *de facto* possibility for a conscript to leave the country during his military service ... which is only ... 8 to 11 months." See, *Peltonen v. Finland*, *supra* note 55, ¶ 2.3.

62. Indeed in the case at hand it is 11 years. A 19 year old can be denied passport for 11 years in so far as the individual did not report to the military service.

63. Born in 1968, Mr Peltonen, the complainant, was only 19 years old in 1987 and he has 11 years within which he can respond to the service. See, *Peltonen v. Finland*, *supra* note 55, ¶ 1.

all subsequent call-ups. Finland further referred to the conduct of the complainant which it seems to show that the complainant was reluctant to start his service. Furthermore, Finland contended, no mention was made in his request for a passport of any significance of the intended travel of the complainant which the complainant seems not to rebut. Finland contended that the restriction is a permissible restriction under article 12(3) of the ICCPR.

In paragraph 8.3, the Committee concluded that pursuant to the requirements of article 12(3), states could “impose reasonable restrictions on the rights of individuals who have not yet performed such [mandatory national] service to leave the country until service is completed.” Thus, national service obligation laws that “reasonably restrict” the right to leave will not be held to violate article 12. At the same time, national service obligation laws that undermine the essence of the right to leave, or exceptions that violate the rule, will be contrary to article 12.

There are scholars who agree and differ from the Committee’s conclusion. Jagerskiold noted that “if there is a mandatory national service requirement, individuals who have not yet served may be prohibited from leaving until service is completed.”⁶⁴ On the other hand Nowak asserted that “[o]nly in special cases may persons who have not fulfilled their military service be prohibited from leaving the country.”⁶⁵ Comparing with certain concluding observations⁶⁶ in which the Committee stated that it “is further regretted that all individuals who have not yet performed their national service are excluded in principle from enjoying their right to leave the country,” Harvey and Barnidge noted contradictions with the Committee’s conclusion.⁶⁷

Uncontested contention of Finland shows that if the significance of the desired travel is explained and found to be convincing, it seems that a passport can be granted even to a citizen subject to conscription. It also appears that if the desired travel is for visiting family members or health, subsistence, profession and other circumstances of the traveller, passport (permission to leave) can be granted. Assuming that the complainant failed to mention any of such significance of his travel, it is sound to conclude that the Committee was right to find the proportionality equation in favour of limiting the right of the complainant.

64. Jagerskiold, *supra* note 9, at 178.

65. M. NOWAK, UN COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 212 (1993).

66. Concluding Observations, Russian Federation, ICCPR, A/50/40 vol. I (1995) 65, ¶ 381, <http://www.bayefsky.com/themes/leave_concluding-observations.php>, (accessed on 19 December 2007).

67. C. Harvey & R.P. Barnidge, *Human Rights, Free Movement, and the Right to Leave in International Law*, 19 INT’L J. REFUGEE L. 1 (2007), at 10, fn 58.

III. CURTAILMENT OF THE RIGHTS TO LEAVE AND TO RETURN IN ERITREA

Eritrea got independence on 24 May 1991 from Ethiopian domination that lasted almost for four decades. The *de facto* independence achieved in 1991 was consummated to *de jure* status in 1993 after a referendum in which the Eritrean people overwhelmingly supported Eritrea to be an autonomous state. The Eritrean struggle for independence was led to final victory by the Eritrean People's Liberation Front (EPLF). Since 24 May 1991, the EPLF took charge of the administration of the whole country and on 22 May 1992 ultimately established by law⁶⁸ a transitional government called Provisional Government of Eritrea (PGE). On 19 May 1993 the PGE slightly restructured itself by law⁶⁹ and was renamed "Government of Eritrea" (GoE). The EPLF, renamed as Peoples' Front for Democracy and Justice (PFDJ) has since 1994 remained the only political party in Eritrea.

As of May 1991, the PGE and later the GoE started to take important decisions and actions that gave rise to hopes for a better future of the country. Imminent of these were that the GoE took the initiative to promulgate a democratic constitution and during the transitional time prepare the country to constitutional governance. After a three year-long process of constitution-making, the Constitution of Eritrea (the Constitution) was adopted on 23 May 1997. The lifespan of the GoE was for a maximum of four years (1993-97); after which a constitutional government should have been established.⁷⁰ As such, transformation from the transitional setting to the constitutional setting was envisaged to take place immediately after the ratification of the Constitution.⁷¹

The Eritrean youth were the main driving forces of the Eritrean independence struggle (1950s to 1991).⁷² The hope the Independence Day brought also aroused great enthusiasm in the Eritrean youth to serve their country. After independence, thousands

68. See, Proclamation 23/1992: A Proclamation to Provide for the Structures, Powers and Responsibilities of the Provisional Government of Eritrea. In Eritrea, a legislation that in other jurisdictions is commonly referred to as an "Act" is called a Proclamation. What other jurisdictions refer to as a "Regulation" is called a "Legal Notice." For more on the lawmaking process in Eritrea, see S.M. Weldehaimanot & D.R. Mekonnen, *The Nebulous Lawmaking Process in Eritrea*, 53 J. AFR. L. 171 (2009).

69. See, Proclamation 37/1993: A Proclamation to Provide for the Structures, Powers and Responsibilities of the Provisional Government of Eritrea. Proclamation 23/1992 was repealed by Proclamation 37/1993 and certain provisions of the latter are amended by Proclamation 52/1994. The three proclamations make the interim constitution of Eritrea.

70. Proclamation 37/1993, art. 3.

71. *Id.*, art. 3(2).

72. For the role of the youth, see D. CONNELL, *AGAINST ALL ODDS: A CHRONICLE OF THE ERITREAN REVOLUTION* (1997).

of Eritrean youth who did not take part in the independence struggle mainly because of their age expressed their readiness to the PGE to contribute to the rehabilitation of the war-shattered country. In the context of the enormous support the Eritrean youth demonstrated to help rebuild their country, in 1991, the PGE devised a National Service Program through which the youth give mandatory service to the country.⁷³ The National Service Program includes two components: six months of military training and 12 months of service devoted to rehabilitation of the country.⁷⁴ The National Service Program was designed to take place in rounds, tens of thousands of youth participating in each round. Hitherto 22 rounds have participated and around 350,000 to 400,000 youth are believed to have been enrolled in the past 20 years.

Although the implementation strategies of the National Service Program were not the result of a democratic process, after the Program was declared, it was however highly supported. Many youth volunteered to enroll in the first rounds. At first, the youth who were unemployed or who planned to discharge their duty earlier were the only participants. Students and employed youngsters were not compelled to enroll in the National Service until they finished their studies or made arrangements to enroll at a particular time.⁷⁵

During the early rounds, there were incidents of young children of less than 14 years and Diaspora Eritrean youth, with high enthusiasm, enrolling to the National Service.⁷⁶ In the first rounds, although the participants who experienced and witnessed the unconstructive implementation of the Program soon rightly started to question the real but hidden motives of the GoE in launching the National Service,⁷⁷ the Program

73. Proclamation 11/1991, National Service Proclamation.

74. This was clarified by Proclamation 82/1995.

75. Proclamation 11/1991, art. 5(1). *See also*, Proclamation 82/1995, art. 14(2).

76. *See*, Eritrea: Conscientious Objection and Desertion (a documentation by Connection of Germany War Resisters' International and the Eritrean Anti-Militarism Initiative), at 10.

77. The declared objectives of the National Service include (1) the establishment of a strong defence force based on the people to ensure a free and sovereign Eritrea; (2) to preserve and entrust future generations the courage, resoluteness heroic episode shown by Eritrean people in the past thirty years; (3) to create a new generation characterized by love of work, discipline, ready to participate and serve in the reconstruction of the nation; (4) to develop and enforce the economy of the nation by investing in development work of the Eritrean people as a potential wealth; (5) to develop professional capacity and physical fitness by giving regular military training and continuous practice to participants in training centres, and (6) to foster national unity among the Eritrean people by eliminating sub-national feelings. In the course of implementation, however, the National Service was indeed turned into a means of repression. *See* the findings of the Asylum and Immigration Tribunal in *MA (Draft Evaders – Illegal Departures – Risk) Eritrea CG [2007] UKAIT 00059*, ¶ 185 (hereinafter the *MA Case*). The United Kingdom's Asylum and Immigration Tribunal is the successor to the Immigration Appellate Authority and the Immigration Appeals Tribunal. The Tribunal was set up under the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and came into being on 4 April 2005. The purpose of the Tribunal

was not entirely unpopular until 1998 when Eritrea and Ethiopia went to war due to a border conflict.⁷⁸ In spite of their reservation on the manner of the implementation of the National Service, thousands of Eritrean youth again presented themselves to the GoE in defence of their country. The war with Ethiopia lasted from May 1998 to June 2000 in destructive rounds. All the time, the Eritrean youth remained committed to the defence of their country until both countries agreed to submit the contentious issue to international arbitration.⁷⁹ Figures of the UNHCR and refugee hosting countries clearly show that the number of Eritreans seeking asylum started to grow after the war was over.

A. *Legal Limitations on the Rights to Leave and to Return of Eritrean Youth*

The seeds of the violation of the right to movement of the Eritrean youth, particularly to and from Eritrea were, however, planted within the implementation strategies of the National Service. In 1991, when the National Service was first proclaimed, it was provided that *unless authorised by the Secretary of Defence (now Ministry of Defence), or provided certificate of completion or exemption from the National Service, no person between the age of 18 to 40 can travel outside of Eritrea.*⁸⁰ A proclamation enacted in 1995 further reinforced the above restriction. It provided that any person who has the obligation to do the National Service (18 to 50 years old) can only travel outside Eritrea upon (1) producing certificate of exemption or completion of the National Service or (2) showing registration card for the National Service that shows that the card bearer is registered to enroll to the National Service at a certain round and the bearer deposits

is to hear and decide appeals against decisions made by the Home Office in matters of asylum, immigration and nationality. Reported determinations receive a neutral citation number of the form [2003] UKIAT 00001. They are anonymized and are to be cited by the neutral citation number. Starred determinations (indicated as such with STARRED being the first word in the title of the determination) have a special status. They are to be treated as binding by all Adjudicators and the Tribunal unless inconsistent with authority binding on the Appellate Authorities.

78. ELF-RC, *The Public Has Doubts and Reservations on the Aims of the National Service*, 13 DEMOKRASIAWIT ERITREA 2-4 (1995); ELF-RC, *Interview with an Eritrean Youth*, 13 DEMOKRASIAWIT ERITREA 6-7(1995). Both sources are in Tigrinya, one of Eritrea's dialects. See also, G. Kibreab, *The Eritrean National Service: A Missed Opportunity* (paper presented at the founding conference of Citizens for Democratic Rights in Eritrea (CDRiE) held in London, on 11 January 2009), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1664873> (accessed on 7 September 2009).

79. The border conflict is settled by law. See the Eritrea/Ethiopia Boundary Commission's Decision Regarding Delimitation of the Border between the State of Eritrea and the Federal Democratic Republic of Ethiopia (13 April 2002).

80. Proclamation 11/1991 art. 12. Emphasis added.

60,000 Birr⁸¹ to guarantee his or her enrolment.⁸²

The restrictions are supported by the immigration laws of Eritrea. No person is allowed to leave Eritrea except through the exit gates⁸³ that the Secretary (now Department) of Immigration from time to time specifies and proclaims by Legal Notices.⁸⁴ *No person is permitted to exit from Eritrea without holding a valid immigration document (mainly a passport) and a valid exit visa.*⁸⁵ Citizens who ask for exit visa shall provide (1) those who seek to exit for any kind of education, a supporting letter from the concerned body; (2) those for different governmental activities or activities of a private body, a supporting letter from such body; (3) those for employment on contract basis, a supporting letter from the labour office (Ministry of Labour and Human Welfare) and (4) those for medical reasons, a supporting letter from the department of health (Ministry of Health).

Article 25 of the Eritrean Constitution that was ratified on 23 May 1997 provides that citizens shall have the duty to (1) owe allegiance to Eritrea, strive for its development and promote its prosperity; (2) be ready to defend the country; (3) complete one's duty in national service; (4) advance national unity; (5) respect and defend the Constitution; (6) respect the rights of others; and (7) comply with the requirements of the law. On the other hand, article 19(9) provides that "every citizen shall have the right to leave and return to Eritrea and to be provided with a passport or any other travel document."

Article 26 of the Constitution provides for almost an identical limitation clause to those in the three treaties discussed in part one of this article. According to article 26 which applies to article 19(9), the fundamental rights and freedoms guaranteed under the Constitution may be limited only in so far as limitation is in the interests of national security, public safety or the economic well-being of the country, health or morals, for the prevention of public disorder or crime or for the protection of the rights and freedoms of others. However, any law providing for the limitation of the fundamental rights and freedoms guaranteed in the Constitution must (a) be consistent with the principles of democracy and justice; (b) be of general application and not negate the essential content of the right or freedom in question and (c) specify the ascertainable

81. Birr is the legal tender of Ethiopia which Eritrea was using until 1997. In 1995, the exchange rate of the Birr against the US Dollar was about 7 to 1.

82. Proclamation 82/1995, art. 17.

83. Legal Notice 4/1992: Travel and Immigration Regulations, provide for the list of entry/exit gates. *See*, art. 3.

84. Proclamation 24/1992: Proclamation to Regulate the Issuance of Immigration Documents, Entry to and/or Exit from Eritrea and Residence of Aliens in Eritrea, art. 10(1). *See also*, art. 17(11) of Legal Notice 4/1992.

85. Proclamation 24/1992 art. 11. Emphasis added.

extent of such limitation and identify the article or articles hereof on which authority to enact such limitation is claimed to rest.

In addition, under article 27 of the Constitution, at a time when public safety or the security or stability of the state is threatened by war, external invasion, civil disorder or natural disaster, by a resolution passed by a two-thirds majority vote of all its members, the National Assembly of Eritrea can sanction declaration of state of emergency for six months (renewable only for additional three months) which could have the effect of suspending many rights including the rights to leave and to return.

However, the Constitution has never been respected in whatever form or shape and thus the GoE has not applied its relevant parts even to justify in its favour the massive human rights violations it has been perpetrating.⁸⁶ Thus, the statutes that were promulgated before the Constitution were ratified (1997) and Eritrea acceded to the ACHPR and the ICCPR (1999 and 2002 respectively) have not been revised to be brought in line with the Constitution and the two human rights instruments. The GoE's non-compliance with the requirements of the rule of law is so flagrant that in Eritrea, there is no even a remote resemblance to the constitutional order. As noted clearly by one Eritrean legal scholar, even during the height of the border war with Ethiopia (1998-2000), Eritrea never cared to declare public emergency to shield the restrictions under the derogation clause of the ICCPR.⁸⁷ Objectively, there has never been emergency situation that could have justified the restrictions on the right to leave except during the war. As a matter of fact, the restrictions were promulgated as early as in 1991 when the future of the country looked bright.

B. Practical Limitations

Whereas the statutes are severely restrictive, their implementation has been by far prohibitive.⁸⁸ The authorities that are empowered to give letters of support that allow getting exit visa for the permitted limited grounds are tied by the policy of the GoE that has not been largely in support of many youth to leave Eritrea for whatever reason. In a country where fear of higher authorities as opposed to fear of the law governs, lower officers tend to err on the side of denying than permitting. As a matter of fact, the

86. For more on the fate of the Constitution, see generally S.M. Weldehaimanot, *The Status and Fate of the Eritrean Constitution*, 8 AFR. HUM. RTS. L. J. 108 (2008).

87. D.R. Mekonnen, A Rejoinder to Sophia Tesfamariam's Crude Allegations (September 2007), available online at <<http://zete9.asmarino.com/ftHiynges.php?itemid=1019>>, (accessed 8 January 2008).

88. See the testimonies of Dr Pool in the *MA Case*, *supra* note 77, at ¶¶ 83-9.

entire process of getting a passport and exit visa was complicated by the fluctuation of directives from the Office of the President; from time to time making the requirements more restrictive. As a result many youth could not get exit visas in spite of fulfilling the requirements provided by the relevant statutes.⁸⁹ The low respect for the rule of law coupled with the GoE's conception of rights as state privileges makes the provisions of the laws that were unduly restrictive in the first place, very illusory. The yearly reports of the State Department of United States have reflected the situation accurately:⁹⁰

Men under the age of 50, regardless of whether they had completed national service; women of ages 18 to 27; members of Jehovah's Witnesses ... and others who were out of favour with or seen as critical of the government were routinely denied exit visas. In addition, the government often refused to issue exit visas to adolescents and children as young as 5 years of age, either on the grounds that they were approaching the age of eligibility for national service or because their diasporal parents had not paid the 2 percent income tax required of all citizens residing abroad. Some citizens were given exit visas only after posting bonds of approximately \$7,300 (100 thousand nakfa).

C. Lack of Procedural Safeguards

Contrary to the international and domestic legal standards mentioned in part one of this article, the statutes related to immigration provide no judicial means of reviewing a decision refusing to grant a passport or a visa by immigration authorities. Although the ordinary courts can, in theory, review immigration abuses, so far the courts have played no role.⁹¹ The judiciary is not only weak and un-independent, but also the case of travel restriction is politically very sensitive as it is linked to the repressive governance that no citizen dares to take it to court. In this regard in his written testimony to the African Commission, Mekonnen laments:

89. Email written by the author on 27 August 2005 to Margaret Arach Orech, the organizer of the Regional Training Programme. The email is attached as evidence 2.1 to the Communication filed, *supra* note 1.

90. USA DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES, 2005: ERITREA (2005).

91. For the general lack of the practice of judicial review of administrative actions in Eritrea, see generally D.R. Mekonnen, *The Judicial Review of Administrative Action in Eritrea: The Prevailing Practice (Part I)*, (2007) (draft article on file with the author).

As a court clerk, assistant prosecutor, magistrate and provincial court judge who served in different parts of Eritrea between 1998 and 2001, I am well informed about the Eritrean legal system and judiciary. In terms of human rights protection, the Eritrean judiciary has played no role since the country's independence in 1991. Practically, the Eritrean judiciary adjudicates mainly on civil and criminal matters involving individual citizens. To my knowledge, no successful case has been brought before any Eritrean court where the government was challenged for violation of human rights.⁹²

D. Human Rights Violations, Travel Restrictions and the Desire to Emigrate

The aftermath of the border conflict between Eritrea and Ethiopia exposed the severe maladministration of the GoE more than any time before. The way the National Service was implemented was one point of focus. The Constitution prepared after popular participation and which remained unimplemented three years after its ratification in spite of popular expectation for speedy implementation was another point of focus. Equally, the little or no progress made by the transitional government to prepare Eritrea for constitutional governance became a subject of scrutiny. The overall undemocratic nature of the transitional government was also exposed to heavy criticism and comprehensive reform was called for.⁹³ Contrary to what the reformers demanded, the GoE declined to implement the Constitution and ignored the other reform proposals. Instead, unprecedented repression of fundamental rights and freedoms have prevailed in Eritrea since then.⁹⁴

Specifically, the GoE declared a new form of National Service called *Warsai-Ykaalo* Campaign. The campaign was declared by the President alone and it has no legal backing. To the contrary, the new campaign eroded the minimum compliance with the law the National Service had when it started. Particularly, the campaign condemned the Eritrean youth to indefinite duty under the government in the pretext

92. Written testimony to the African Commission, attached as evidence 3.2 to the Communication filed, *supra* note 1.

93. For these developments, see generally D. CONNELL, CONVERSATION WITH ERITREAN POLITICAL PRISONERS (2005). *See also*, Awate Team, The Chronology of the Reform Movement (2 December 2002), <<http://www.awate.com/portal/content/view/72/9/>> (accessed on 26 January 2011).

94. *See e.g.*, Annual Reports (2000 to 2006) of the USA Department of State, Bureau of Democracy, Human Rights and Labour, on Human Rights Practices of Eritrea. *See*, A. BARIAGABER, ERITREA: CHALLENGES AND CRISES OF A NEW STATE (a Writenet report commissioned by United Nations High Commissioner for Refugees, Status Determination and Protection Information Section – DIPS, 2006), at 11-2.

of national development and the alleged threat to national security in the context of unresolved border conflict. The severe restriction of the right to leave of Eritrean youth under the pretext of forcing the youth to first discharge their duty to National Service or defending the country, presupposes that the youth would flee the country in order to avoid the two obligations. This supposition is, however, unfounded and directly contradictory to the historical role of the Eritrean youth who, as explained above, have dedicated decades of their life for the liberation of their country at the cost of their lives.

As stated above, the youth were enrolling voluntarily when the program started. Rather, it is the nature of the National Service—a programme which was turned into a mechanism of repression—that caused the youth to flee.⁹⁵ Campbell, for example, explained that the *Warsai-Ykaalo* campaign, among others, is “apparently used to control dissent.”⁹⁶ Some experts of the GoE also clearly differed from the GoE’s policy of keeping the youth for fear of war because the border issue had been legally resolved.⁹⁷ Indeed, the more time the campaign took the more basic things got expensive and the more the youth get frustrated as they see themselves in a supposedly rehabilitation program with little or no contribution to the country.⁹⁸

With regard to the right to get a passport and exit visa, the indefinite *Warsai-Ykaalo* Campaign virtually means thousands of the youth cannot travel out of Eritrea. The relevant statutes mentioned above require completion of the National Service, which is supposed to be 18 months long, as a condition for getting exit visa.⁹⁹ The

95. In this regard, before the Asylum and Immigration Tribunal, Dr Kibreab has testified: “In Eritrea it is slavery not National Service and it is misnomer to quote National Service. For me it is a violation of the basic human rights principle.” See, *MA Case*, *supra* note 77, at ¶ 185. In its recent guidelines, the United Nations High Commissioner for Refugees (UNHCR) has noted that according to “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 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.” See, UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea, (April 2009), <<http://www.unhcr.org/refworld/docid/49de06122.html>> (accessed on 10 September 2009), at 9-10.

96. Quoted in, Findings of the Asylum and Immigration Tribunal in *IN (Draft Evaders—Evidence of Risk) Eritrea CG [2005]UKIAT OO106*, ¶ 26 (hereinafter the *IN Case*). See also, Kibreab, *supra* note 78.

97. Testimony of Dr Amanuel Gebremedhin, quoted in the *MA Case*, *supra* note 77, at ¶ 249.

98. Testimony of Dr Kibreab, quoted in *id.*, at ¶ 150. See also, Dr Gebremedhin’s affidavit as quoted in *id.*, at ¶ 185.

99. Exceptional circumstance can cause the extension of the 18 months period.

indefinite *Warsai-Ykaalo* campaign thus means curtailment of the right to travel to and from Eritrea and to get the necessary documents indefinitely.¹⁰⁰

The unhappy retreat of the country from its expected march to constitutional governance, followed by severe violation of rights and freedoms in every walk of life and the exploitation of the youth under the *Warsai-Ykaalo* Campaign has made the Eritrean youth to consider their own country as open air prison.¹⁰¹ The human rights record of the GoE has been getting worse from time to time. This inevitably forced the youth to flee their country at any cost.¹⁰² The GoE invariably responded by denying the youth their right to leave their country by denying them passports and exit visas. The worse the human rights situation of the country gets day by day, the more the number of youth fleeing the country,¹⁰³ the more the GoE tightens requirements for exit visa and deploys armed forces to guard the borders.¹⁰⁴ Eventually, issuing visa and passport became a presidential task that the Office of the President gives to few and denies to others arbitrarily.¹⁰⁵ The requirements for getting a passport and exit visa fluctuated from time to time without the slightest regard to the rule of law and the principle of legality.

100. HUMAN RIGHTS WATCH, SERVICE FOR LIFE: STATE REPRESSION AND INDEFINITE CONSCRIPTION IN ERITREA (2009), at 63 & 64.

101. A.M. Dias, War and State Formation: Outcomes of an Interstate War in the Post-cold War Era: Ethiopia and Eritrea 1998-2000 (AEGIS 2nd European Conference on African Studies, African Studies Centre, Leiden, The Netherlands, 11-14 July 2007), at 34. *See also*, BARIAGABER, *supra* note 94, at 11-2.

102. *Many Young Eritreans Seek Exile at All Costs*, SUDAN TRIBUNE, 31 August 2007, attached as evidence 11 to the Communication filed, *supra* note 1.

103. This is supported, for example, by the number of applications received from Eritrean asylum seekers in the UK (excluding dependants) from 1998 to 2007 which was 345, 565, 505, 620, 1,180, 950, 1,105, 1,760, 2,585 & 1,810 (the last figure is provisional). The nationalities accounting for the highest numbers of applicants were Afghan, Iranian, Chinese, Iraqi and Eritrean. The top ten applicant nationalities in 2007 were Afghan 2,500 (11%), Iranian 2,210 (9%), Chinese 2,100 (9%), Iraqi 1,825 (8%), Eritrean 1,810 (8%), Zimbabwean 1,800 (8%), Somali 1,615 (7%), Pakistani 1,030 (4%), Sri Lankan 990 (4%) and Nigerian 780 (3%). The main nationalities to be granted asylum in 2007 were Eritreans (31%), Somali (23%) and Zimbabwean (7%). *See*, Home Office, *Asylum Statistics: United Kingdom 2007*, 11 HOME OFFICE STATISTICAL BULLETIN 1 (2008), at 1, 3, 6 & 29.

104. HUMAN RIGHTS WATCH, WORLD REPORT 2006: ERITREA (2006).

105. Application form for Official Travel Abroad for Government Employees Only (on file with the author). Using this form, governmental institutions request the Office of the President to grant permission for their staff/s to get exit visa for exclusively governmental travel.

E. Leaving “Illegally:” The Only Option

As a result of these restrictions on the rights to leave and to return to Eritrea and acquire a passport, many youth have been severely affected. Many missed scholarship opportunities and other academic benefits that were offered to them because they could not undertake them as they were denied permission to leave Eritrea.¹⁰⁶ In totality, the youth are denied exposure to the outside world and the benefits they could get in this highly globalized world. Many youth, however, could not see such opportunities simply pass. Rather, they have taken a high risk of fleeing Eritrea by crossing to neighbouring countries through complicated trans-boundary human smuggling arrangements.

The National Service requires the youth to be always around the areas where they “serve.” Nevertheless, the rate of “deserters” at any given time is very high. As a result, the GoE has severely curtailed the right to movement of the youth within Eritrea too. One needs a permit to move from one place to another. Main roads are intercepted by roadblock check points where security forces board buses and any other public transport and make sure every person has a permit. Periodic round-ups and house-to-house searches for deserters add-up to further restrict the right to movement. The youth who flee Eritrea, therefore, have to pass many hurdles inside Eritrea to get close to Eritrea’s border with Sudan or Ethiopia. Many of those who manage to reach closer to the borderline often hire guides to help them cross the most critical check points where the border guards patrol.¹⁰⁷ The guides, some of them corrupt government officials, are people involved in the human trafficking business at exorbitant charges.

In a similar way, some Eritrean youth also cross to Djibouti, Yemen and Saudi Arabia. The figures of fleeing youth, when compared to the total Eritrean population, are alarmingly high. According to the UNHCR, in 2009 only, there were 43,400 asylum seekers from Eritrea, majority of whom were youth.¹⁰⁸ The highest concentration of Eritrean asylum-seekers was in Ethiopia (17,300) and Sudan

106. Out of the 31 students of the Faculty of Law of the University of Asmara (a 98 batch graduated in 2005), for example, 11 are already out of Eritrea for further studies and 5 had to leave Eritrea “illegally” to Sudan while the rest could not be considered to have obtained their visas in accordance with the due process of law.

107. Interview with recently fled Eritrean youth in Khartoum, Sudan, conducted by the author via yahoo messenger chat (on file with the author). *See also*, Findings of the Asylum and Immigration Tribunal, in *AH (Failed Asylum Seekers – Involuntary Returns) Eritrea* CG [2006] UKAIT 00078 ¶ 5 (hereinafter the *AH Case*).

108. UNHCR, *STAT. Y.B. 2009* (2010), at 8.

(10,200).¹⁰⁹ In 2009 the UNHCR had 209,200 Eritreans refugees.¹¹⁰

F. Ramifications of Leaving “Illegally”

1. *Risk to Life.*—The implications of the denial of the right of Eritrean youth to leave their country and the consequential adventures such youth are taking are indeed many. The way such youth manage to get themselves in neighbouring countries is agonizingly risky.¹¹¹ Many have successfully fled while some have fallen into the hands of the border security guards and have been incarcerated.¹¹² While crossing the check points, the youth and the guides pass through agonising moments. The risk of getting caught by the patrolling guards who are free to shoot at any one is high. Hence, the suffering of the youth is indeed unbearable.¹¹³ In this regard, the United Kingdom’s Asylum and Immigration Tribunal has noted that “it is therefore apparent from the evidence, that the Eritrean Government has indeed taken ‘draconian steps to prevent its citizens leaving illegally.’”¹¹⁴

The number of people so far killed while trying to flee Eritrea or after being apprehended while trying to escape is not precisely known. However, the GoE does not even care to hide the fact that it shoots to kill anyone found at the borderline. In some instances, the GoE brought some apprehended youth nearby towns and shot them in front of the public eye or left them dead to deter others. Diaspora Eritrean websites are full of reports of Eritreans dying at the borderline or in the Mediterranean Sea.¹¹⁵ Human Rights Watch gives a glimpse of the situation.¹¹⁶

2. *Harsh Punishment.*—The GoE has never followed the due process of the law with regard to prosecuting those caught trying to flee Eritrea. Articles 20 and 37 of Proclamation No 11/1991 and 82/1995 (two immigration related statutes) provide that, without prejudice to graver penalties provided by the Penal Code, whosoever violates the provisions of both proclamations is punishable with 2 years imprisonment

109. *Id.*, at 47.

110. *Id.*, at 23.

111. HUMAN RIGHTS WATCH, *supra* note 104, at 65 (noting that “leaving Eritrea is not an easy undertaking ... heavily patrolled borders, mine-fields, and a shoot-to-kill policy make escape from Eritrea difficult”).

112. *See, e.g.*, Dr Kibreab’s testimony in the *MA Case*, *supra* note 77, at ¶ 138. *See also*, SUDAN TRIBUNE, *supra* note 102.

113. *See, supra* note 76, at 10-1 & *supra* note 102.

114. *MA Case*, *supra* note 77, ¶ 353. Emphasis in the original.

115. *See, e.g.*, *Eritrea’s Killing Fields*, EVENTS MONITOR, 22 September 2007, available online at <<http://www.awate.com/portal/content/view/4623/5/>> (accessed on 8 September 2009).

116. HUMAN RIGHTS WATCH, *supra* note 104, at 39-40.

or 3,000 Birr fine or both. However, both statutes have never been respected nor were the entire criminal justice system used. The status of rule of law in Eritrea is aptly described as “annihilated” by one Eritrean lawyer and human rights activist.¹¹⁷ Alleged offenders are thus punished administratively by local commanders without any form of trial, legal recourse or opportunity for appeal or redress. The forms of punishment consist of torture and arbitrary detention for an indefinite period.¹¹⁸ Several hundreds of these fleeing youth who managed to get into other countries were deported back to Eritrea in the face of incessant appeals by international human rights organizations.¹¹⁹

In 2002, several hundred Eritreans leaving Libya (via Sudan) landed on the island of Malta, mainly as a result of shipwreck or sea rescue, and were detained. In September and October 2002, Malta forcibly deported some 220 Eritreans back to Eritrea, where they were all immediately detained on arrival in Asmara and sent to the nearby *Adi Abeto* military detention centre. Since then, they have been languishing in prison for years without facing trial and several opposition websites have been indicating that 160 of them were summarily executed by presidential order.¹²⁰ Between 12 and 19 June 2008, up to 1,200 Eritrean asylum-seekers were forcibly returned from Egypt to Eritrea, majority of whom were transferred to the remote Wia prison and other military facilities, where they are still being held, while some (mainly pregnant women and women with children) were released after weeks in detention.¹²¹ Again Human Rights Watch describes treatment in detention camps as inhumane.¹²²

3. *Harassment as Undocumented Aliens.*—Calculating the risk of being caught, many of the youth who attempt to flee Eritrea leave behind or mail their identity documents to Sudan. A passport has been turned into the most precious document for

117. D.R. Mekonnen, *Annihilation of the Rule of Law: Cause for all Pitfalls in Eritrea* (articles series in Tigrinya, part 1 to part 6, 2007) <www.awate.com> (accessed on 22 November 2007).

118. See, AMNESTY INTERNATIONAL, “YOU HAVE NO RIGHT TO ASK” – GOVERNMENT RESISTS SCRUTINY ON HUMAN RIGHTS (19 May 2004), AI Index: AFR 64/003/2004.

119. Human Rights Watch, *Eritrean Refugees in Danger of Deportation from Libya: Letter to Mu’ammar al-Gaddafi*, 22 July 2004. See also, AMNESTY INTERNATIONAL, *MALTA: THE GOVERNMENT SHOULD SUSPEND DEPORTATIONS OF ERITREANS* (10 October 2002), AI Index: EUR 33/001/2002 (Public) News Service No. 180.

120. AMNESTY INTERNATIONAL, *THE STATE OF THE WORLD’S HUMAN RIGHTS: ERITREA* (2007). See also, AMNESTY INTERNATIONAL, *supra* note 118.

121. Amnesty International, *Eritrean Asylum-seekers Face Deportation from Egypt* (19 December 2008, <<http://www.amnesty.org/en/news-and-updates/news/eritrean-asylum-seekers-face-deportation-egypt-20081219>> (accessed on 7 September 2009).

122. HUMAN RIGHTS WATCH, *supra* note 104, at 40.

Eritrean youth that they often, if they have it,¹²³ mail it in advance to where they feel is a safe place. Thus when they successfully reach neighbouring countries, such youth are undocumented aliens and they are exposed to corrupt security officers who obtain money by arbitrarily arresting and releasing asylum seekers. The appalling predicament of such youth in Egypt, for example, is well documented:

Eritreans and Ethiopians complain of being hassled, laughed at, and mocked by Egyptians on a day-to-day basis. People are aggressively asked where they are from, why they do not leave Egypt, and told that they are not wanted here. Overt racism is common, such as pejorative calls of “donkey,” “animal,” or “slave.” Common also is sexual harassment against Eritrean and Ethiopian women, who are called “prostitute” and “chocolata.” These women also face physical sexual harassment.¹²⁴

4. *Unable to Return.*—The GoE is highly offended by those youth who flee their country in the above mentioned manner.¹²⁵ To put it in perspective, these fleeing youth are undeniable testimonies of the nature of governance inside Eritrea and their unabated escape, in spite of the enormous risk they encounter, is one of the tangible and expressive dissents the youth managed to show against the GoE.¹²⁶ These many categories of dissenters are the least tolerated by the GoE. Indeed, when the latter could reach the dissenters it shows no mercy.¹²⁷ Thus, the GoE has dubbed the fleeing of youth as traitors. In fact, when such youth approach the Eritrean Embassy in the Sudan for a passport or other documents, they are asked to make self-incriminating statements in writing.¹²⁸ This is a notorious fact that even the Immigration Appeal Tribunal in the United Kingdom has observed that the “issue of military service has become politicized

123. In the past five years, requirements for getting a passport have been restrictive. The Eritrean passport serves for five years (renewable). This implies that even those youth who secured passports when the restrictions were not severe could only have expired passports.

124. N.R. Brown, S. Riordan & M. Sharpe, *The Insecurity of Eritreans and Ethiopians in Cairo*, 16 INT’L J. REFUGEE L. 661 (2004), at 680.

125. In *NM (Eritrea) [2005] UKIAT 00073*, it has been rightly stated that “the situation is not normal in Eritrea so far as the Government’s attitude towards military service is concerned. Being perceived as a draft evader does carry political connotations in the eyes of the authorities to the extent that the appellant would be at risk of serious harm for a convention reason: her perceived opposition to the government.”

126. Submissions of Mr M. Jackson, Counsel for the applicant in *AH Case*, *supra* note 107, at ¶ 20.

127. Brown, Riordan & Sharpe, *supra* note 124, at 677.

128. Interview with some youth in Sudan (on file with the author).

and actual or perceived evasion of military service is regarded by the Eritrean authorities as an expression of political opinion.”¹²⁹ The same tribunal eventually concluded:

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.¹³⁰

In *Said v. The Netherlands*,¹³¹ the European Court of Human Rights considered that substantial grounds had been shown for believing that, if expelled at the present time, the applicant, who is a typical representative of the fleeing youth, would be exposed to a real risk of being subjected to torture or to inhuman or degrading treatment or punishment. Accordingly, the Court found that the expulsion of the applicant to Eritrea would be in violation of Article 3 of the European Convention on Human Rights. The risk at stake when such youth get deported is also clearly indicated by the public outcry recently echoed in opposition to perceived act of deportation of around 1,200 Eritreans from Egypt.¹³²

Since 2007, thousands of Eritreans and others have signed a petition opposing deportation of the said youth from Libya.¹³³ In 2002, Amnesty International concluded

129. *MA Case*, *supra* note 77, ¶ 227 & *IN Case*, *supra* note 96, ¶ 44(v).

130. *MA Case*, *supra* note 77, ¶ 1. The UNHCR also agreed: “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) and its 1967 Protocol, and/or the 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Convention), 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.” *See*, UNHCR *supra* note 95, at 10.

131. ECHR Application No. 2345/02, Chamber Judgment, ¶ 46.

132. UN News Centre, UN Human Rights Chief Urges Egypt to Stop Deporting Eritrean Asylum-seekers (19 June 2008).

133. Petition against forced deportation of Eritreans from Libya. The petition to the United Nations High Commissioner for Refugees was created and written by BH Selassie and had a feature that enabled many Eritreans to sign it. The petition is available at <www.PetitionOnline.com> as a public

that “Eritrea cannot be regarded as a ‘safe’ country with regard to national service deserters who would be at risk of serious human rights violations including arbitrary detention, torture or ill-treatment, extrajudicial execution or the death penalty, if returned to Eritrea.”¹³⁴ The risk of deporting or repatriating such youth is rightly highlighted by other institutions and researchers.¹³⁵

For these reasons, those who successfully escaped from Eritrea, despite the deplorable life they live in neighbouring countries and despite their willingness to return to their country, they do not feel safe to do so.¹³⁶ Many students who have finished their studies and who would like to return to their country and serve their communities do not feel safe to do so.¹³⁷ For the same reasons (severe repression of human rights) it has been noted that the older generation of Eritrean refugees in Sudan and Ethiopia in particular are not keen to return to Eritrea.¹³⁸

5. *Punishing Parents.*—The families of such fleeing youth are frequently punished too—again without any legal or judicial reference.¹³⁹ Fathers or mothers or other relatives have been unlawfully detained in secret for short or long periods without charge or trial on account of their sons or daughters who fled the country. Sometimes they are being held as virtual hostages to try to force the wanted person(s) to surrender or asked to pay a sum of money extremely exorbitant to their income standards.¹⁴⁰ The intention of the GoE, as bluntly explained and admitted by many high level officials several times, is to stop the youth from fleeing the country for fear of harassment of their parents.

document. More than 2,000 people have signed it. *See also*, Letter of appeal by Dr B.H. Selassie, Distinguished Professor of African Studies, and Professor of Law at the University of North Carolina at Chapel Hill, to Mr Antonio Guterres, Commissioner, United Nations High Commission for Refugees, dated 16 July 2007.

134. Amnesty International, Malta: Open Letter to the Government of Malta, (27 September 2002) AI Index: EUR 33/002/2002.

135. Brown, Riordan & Sharpe, *supra* note 124, at 699; and UNHCR, Position on Return of Rejected Asylum Seekers to Eritrea (January 2004), <http://www.unhcr.se/Pdf/Position_countryinfo_papers_06/eritrea04.pdf> (accessed 7 September 2009).

136. Expert testimony of Dr June Rock in *AH Case*, *supra* note 107, ¶¶ 8-9 & 11-4.

137. D.R. Mekonnen & S.B. Abraha, The Plight of Eritrean Students in South Africa, <http://emdhr.civiblog.org/blog/_archives/2004/4/2/1020940.html> (accessed on 4 June 2007).

138. BARIAGABER, *supra* note 94, at 5. For more on the return and reintegration of the old generation refugees, see generally J. Bascom, *The Long, “Last Step” Reintegration of Repatriates in Eritrea*, 18 J. REFUGEE STUD. 165 (2005).

139. AMNESTY INTERNATIONAL, ERITREA: OVER 500 PARENTS OF CONSCRIPTS ARRESTED (2006), AI Index: AFR 64/015/2006 (Public). *See also*, AMNESTY INTERNATIONAL, *supra* note 118.

140. *MA Case*, *supra* note 77, ¶ 388.

In summary, the Asylum and Immigration Tribunal has aptly described the whole chain of the violation of the right to leave and to return in the following paragraph:

The evidence of a “shoot to kill” policy in respect of deserters, the imprisoning of parents and the process known as “*the giffa*,”¹⁴¹ 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.¹⁴²

IV. CONCLUSION

The rights to leave and to return of Eritrean youth to their country have been rampantly violated together with the overall repression of human rights in Eritrea. The rights have been treated as mere “state privileges” as was the case with the former USSR and its satellites¹⁴³ and China.¹⁴⁴ The curtailment of the two rights in the pretext of forcing Eritrean youth to perform their duty to the National Service is different from *Lauri Peltonen v. Finland* in terms of the restriction being unnecessary having regard to the history of the Eritrean youth; unlimited in terms of time; unlimited in terms of the aims which have been alleged to serve (often used as a means to control the Eritrean youth); and the destruction of the rule of law and the emasculation of the Eritrean judiciary that has offered no protection. The Eritrean case is also different in terms of the draconian steps the GoE took to close the country’s borders, harsh punishment imposed on apprehended “offenders” and collateral denial of the right to return for those who successfully escaped but wish to return. Punishing parents for the “sin” of their adult sons and daughters without establishing criminal complicity is unjustified in any sense.

However, besieged by the repression in Eritrea, tens of thousands of youth have managed to flee Eritrea. Ironic as it may seem, the restrictions on the right to emigrate have given rise to new generation of refugees. Those who managed to leak through the tight border control of the GoE cannot return to their country for well founded fear of persecution or ill treatment. As a result, there are thousands of Eritrean youth refugees

141. In Tigrinya (one of the dialects in Eritrea), this is the frequent periodic and indiscriminate searches for and round ups of “draft evaders.”

142. *MA Case*, *supra* note 77, ¶ 445.

143. Barist et al, *supra* note 2, at 429-41. See also, N. Rubins, *The Demise and Resurrection of the Propiska: Freedom of Movement in the Russian Federation*, 34 HARV INT’L L. J. 545 (1998).

144. LIU, *supra* note 6, at 159-225.

in Sudan and Ethiopia.

This article recommends that the GoE swiftly and unconditionally return its focus towards democratization and respecting human rights. Only drastic improvement in the human rights situation and democratization of Eritrea can solve the prevalent exodus of the Eritrean youth. Such improvement can solve the mass emigration in two ways. One, it can remove the main expelling element; thus remedy the problem from its roots. And second, such improvement can avoid the camouflage the Eritrean youth who migrate for economic reasons, albeit very few, have been getting. In the meantime this article recommends to the international community to lend assistance to such Eritrean youth. Documenting the severe violations the youth are facing is also an important engagement Eritreans and the international community should give attention.