

RŌPŪ TAKE MANENE, TAKE WHAKAMARU  
AOTEAROA

<b>Appellants:</b>	<b>AC (Eritrea)</b>
<b>Before:</b>	S A Aitchison (Member)
<b>Counsel for the Appellants:</b>	P Sundar
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	18 and 19 September 2023
<b>Date of Decision:</b>	3 November 2023

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**DECISION**

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**INTRODUCTION**

[1] These are appeals against decisions of a refugee and protection officer, declining to grant refugee status or protected person status to the appellants, citizens of Eritrea. The appellants are husband and wife. By order of the Chair, according to section 223(3)(b) of the Immigration Act 2009, their appeals have been heard together.

**The Principal Issue on Appeal**

[2] The appellants fear indiscriminate violence, and human rights abuses, owing to the proximity of their village to conflict on the Eritrean border and the Tigray region in Ethiopia. They also fear displacement, dire socio-economic conditions (including an inability to access food, housing and medical care), and forcible conscription of the husband by the Eritrean military contrary to his conscientious beliefs.

[3] The principal issue to be determined is whether the appellants' fear is well-founded.

[4] Given that the same claim is relied upon in respect of all limbs of the appeals, it is appropriate to record it first.

## **THE APPELLANTS' CASE**

[5] The account which follows is a summary of that given by the appellants at the appeal hearing. It is assessed later.

### **The Evidence of the Husband**

[6] The husband, of Tigrinya ethnicity and the Tewahedo Orthodox Christian faith, was born in X village, Debub region in Eritrea in the early 1940s. His village is approximately 1.5 hours drive from the Eritrean border with the Tigray region of Ethiopia.

[7] The husband's parents are deceased. He has three siblings who live with their families in the Y village not far from X village.

[8] The husband worked as a farmer and a builder in Eritrea between the mid-1960s and 1970s. In 1977, he fled to Sudan as he feared being recruited by the Derg military junta who controlled Eritrea at the time. He has one son from a former relationship who moved to the United States of America some 15 years ago, and whom he has not seen or heard from since.

[9] The husband and wife met in Sudan. They married and lived together in the refugee camp. In 1988, they returned to Eritrea, after Eritrea achieved independence from Ethiopia. They lived near the border with Sudan and in 1991, returned to X village.

[10] The husband performed military service between 1988 and 1991. Everyone was forced to take arms and he could not avoid this. The government believes that, once you turn 18, you are "government property" and they will do with you what they will. They will even take children out of school to serve.

[11] Over time, there were continuous drives to conscript persons into the military and the husband regularly went into hiding to avoid being conscripted. There was always war, and he ran from it. He was a committed Christian and became an elder in his church. He worked closely with the priest and managed to avoid further conscription through this association. He became a *shim agile*, an elderly chief of their small village.

[12] The husband, wife resided in X village, near the border with Tigray region of Ethiopia. The husband had a portion of land that he farmed. They were aware of incidents such as kidnappings and shooting from conflict on the border between Eritrea and Tigray but were not personally affected.

[13] The daughter stayed in Eritrea with them for several months before leaving. She grew up in Sudan and, in 2007, she travelled to New Zealand.

[14] In 2016, the appellants left X village due to conflict between Eritrea and Ethiopia. They stayed in Z village and did not return to X village.

[15] The appellants were approved visitor visas by Immigration New Zealand in June 2018. They obtained exit visas to depart Eritrea and travelled from X village to Asmara city by bus, then passed through necessary checkpoints and departed the country by air on 5 September 2018.

[16] The appellants arrived in New Zealand in September 2018. They returned to Eritrea in June 2019. They returned to X village and were supported by remittances from their daughter. They also visited Z village after their return.

[17] The appellants returned to New Zealand on 17 September 2019.

[18] After their return, the appellants received a telephone call from a friend from X village. He informed them that everyone had left the village owing to the conflict in the Tigray region in Ethiopia that has spread to border areas including X village.

[19] On 6 June 2021, the husband lodged a claim for refugee and protected person status with the Refugee Status Unit.

[20] The husband fears returning to X village which is close to the conflict area in the Tigray region of Ethiopia. He fears that their village would be bombed. While there has been a peace agreement, he has heard that there is still shooting at the border. He has heard from persons now living in Asmara city (the capital of Eritrea) and V town in Debub region that all the village is now deserted as people have fled for their lives. Buses no longer go to the area.

[21] The appellants lived a subsistence lifestyle in Eritrea where they grew their own food. They chiefly subsisted on lentils and beans and a brewed beverage. If they had money, they would also buy meat. The government provided coupons to buy sugar and they received these coupons if they were "lucky".

[22] The husband no longer has access to land there, which is managed by the government. If he were to return, he would have to pay taxes to the government officials to farm a portion of land which he cannot afford. He is also too old now to farm the land. Because he has been living overseas, he would also be expected to pay an additional two per cent tax to the government.

[23] The husband fears that his wife will not be able to access necessary medication for her diabetes condition in Eritrea. Even if the medicine is available, there is no guarantee that the wife will be able to access the medicine. Access to medicine in Eritrea is *ad hoc* and not guaranteed. His wife has been fainting regularly owing to her health and the stress she is under. The husband also has recently lost his teeth through poor health.

[24] The appellants would have no home or anywhere to live upon return to Eritrea. The husband has not had any contact with his siblings since coming to New Zealand and the wife had received no help from her siblings. The husband may also be forcibly conscripted to serve in the military to which he is opposed. He does not want to shoot people. Although the military knock on doors to recruit children, if his children are not around, they will not seek to recruit them.

[25] While living in New Zealand, the husband has renewed his Eritrean passport.

### **The Evidence of the Wife**

[26] The wife's evidence was broadly consistent with her husband, and it is not necessary to reproduce all her evidence here.

[27] The wife, of Tigrinya ethnicity and the Tewahedo Orthodox Christian faith, was born in Z village, Debub region in Eritrea in the late 1940s. Her parents are deceased. She has three siblings who live in the rural area with their families in Z village. She does not maintain contact with them and cannot rely upon them for support.

[28] The wife's ex-husband was killed in an accident. In 1979, she left Eritrea with her daughter, AA, then three years of age. They travelled to Sudan where they lived in a refugee camp.

[29] The wife met the husband while living in the refugee camp and they married. The husband had a son from a previous marriage, but he was killed during military service. After growing up in Sudan, her daughter did not return to live in Eritrea. She later came to live in New Zealand.

[30] The wife fears return to X village, which is very close to the border with the Tigray region in Ethiopia. The area is very dangerous. There are nowhere the appellants could live safely in Eritrea. The wife's siblings were unable to provide her with any support when she left for Sudan with her daughter and would still be unable to support her now.

[31] Access to medicines in Eritrea is poor and the medicines the wife needs may not be available there. The wife did not get diagnosed as diabetic until she came to New Zealand.

[32] The appellants are committed Christians and give themselves to God every day. They thank God for the peace they have found in New Zealand with their daughter. They fear for their daughter's health as she requires repeat surgeries and they pray for her.

[33] The wife lodged her claim for refugee and protected person status with the Refugee Status Unit on 9 June 2022.

[34] Since her arrival in New Zealand, the wife has renewed her Eritrean passport which is valid until 12 July 2026.

### **The Evidence of the Daughter**

[35] The wife's daughter, AA, was born in the late 1970s ("the daughter"). She was three years of age when she left Eritrea with her mother (the wife) and travelled to Sudan where she grew up in a refugee camp. She grew up knowing the husband as her biological father and it was not until the family returned to Eritrea when she was approximately 19 years of age that she learned of her biological father's identity. She did not stay in Eritrea and left for South Africa where she found employment. She married and in 2007, she travelled to New Zealand. She is now a New Zealand citizen.

[36] The daughter has undergone extensive surgery and treatment for breast cancer and is waiting for further surgery. She is currently receiving a benefit, as is her husband, who is in his 70s and who also has health problems. The couple

have two sons, aged 12 and 16 years. Her parents (the appellants) have helped support her and her family during the period they have lived with her.

[37] The daughter fears for her parents returning to Eritrea. They are elderly and not in good health. Their living conditions in X village are primitive. They dig water from the ground and her mother would not receive adequate medical support. The village of X consists of some 300 people and there is no electricity. It is also on the border area where there is conflict. The daughter has sent them remittances and provided all that she is capable of to help support them. However, she is in poor health herself and has limited resources.

### **Material and Submissions Received**

[38] On 11 September 2023, counsel provided a joint statement (undated) from the appellants and a letter (24 August 2023) from the daughter's general practitioner, stating that the daughter had been diagnosed with breast cancer in May 2015 and had undergone intensive operations and reconstructions. Her prognosis is uncertain. She has received counselling for this. She is physically unable to perform certain duties owing to chronic pain from the operation. It would be desirable for her mother to be able to remain longer in New Zealand to support her.

[39] On 13 September 2023, counsel provided written submissions and accompanying country resources.

### **ASSESSMENT**

[40] Under section 198 of the Immigration Act 2009 ("the Act"), on an appeal under section 194(1)(c), the Tribunal must determine (in this order) whether to recognise each of the appellants as:

- (a) a refugee under the 1951 *Convention Relating to the Status of Refugees* ("the Refugee Convention" or "the Convention") (section 129); and
- (b) a protected person under the 1984 *Convention Against Torture* (section 130); and
- (c) a protected person under the 1966 *International Covenant on Civil and Political Rights* ("the ICCPR") (section 131).

[41] In relation to a claim to be recognised as a protected person, section 198(1)(c) of the Act requires that the Tribunal must also determine matters analogous to the Article 1F exclusion clause in the Refugee Convention. In this appeal, no exclusion issues arise.

[42] In determining whether the appellants are refugees or protected persons, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellants' account.

### **Credibility**

[43] The Tribunal finds the appellants' evidence of the core of their account to be credible.

[44] There was one evidential discrepancy regarding the appellants' children. The husband claimed that his adult son had left Eritrea soon after qualifying as a school teacher and was living in the United States of America, whereas the wife claimed that the husband had told her when she met him in Sudan that the son had been killed in military action in Eritrea. Asked to explain this discrepancy in their evidence, the husband explained that he had kept the son's circumstances a secret from the wife since they first met so as to avoid having to explain their lack of any close relationship and the Tribunal accepts this explanation.

[45] The Tribunal also disclosed to the appellants a letter from a general practitioner in New Zealand provided to Immigration New Zealand by the husband in relation to a medical examination, which recorded that he had seven children — one who lived in Norway, one who lived in New Zealand, another who lived in the United States and four who lived in Eritrea. In response, the appellants maintained to the Tribunal that they only had the two children as previously disclosed, and the husband stated that the doctor may have confused the fact of the husband having siblings with his children. The wife and daughter also maintained that there were no other children in the family.

[46] The Tribunal has not been able to resolve this inconsistency. However, for reasons that become clear in this decision, irrespective of whether or not the appellants have two or seven children, they are protected persons.

[47] In relation to this discrepancy, the Tribunal affords the appellants the benefit of the doubt and accepts their evidence, finding that they have two children as claimed.

*Summary of relevant facts as found*

[48] Having regard to the credibility assessment, the Tribunal summarises the facts as found from the appellants' case relevant to its evaluation of the risk to the appellants in Eritrea, and other relevant issues as set out below, as follows.

[49] The husband and wife, in their 80s, are of Tigrinya ethnicity and the Tewahedo Orthodox Christian faith. They originate from the Debub region of Eritrea, the husband from X village and the wife from Z village. The husband's parents are deceased. He has three siblings who live with their families in the Y village not far from X village. The wife's parents are deceased. She has three siblings who live in the rural area with their families in Z village. Her daughter relocated to New Zealand in 2007 where she lives with her husband and two sons.

[50] The appellants have lived through extended periods of conflict and displacement. They first left Eritrea in the late 1970s (the husband alone and the wife with her daughter from a prior marriage). They met in Sudan at a refugee camp and returned to live in X village, located close the Eritrean border with the Tigray region of Ethiopia.

[51] The appellants returned to Eritrea in 1988. The husband performed military service in Eritrea between 1988 and 1991. He has evaded service (to which he is opposed owing to his Christian beliefs not to bear arms) since this time. The appellants left X village in 2016 owing to conflict and sought refuge in Z village.

[52] The appellants departed Eritrea lawfully and travelled to New Zealand in September 2018. They returned to Eritrea in June 2019. They again lived in X village and were supported by remittances from their daughter. They also visited Z village. In September 2019, the appellants returned to New Zealand.

**The Refugee Convention**

[53] Section 129(1) of the Act provides that:

A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention.

[54] Article 1A(2) of the Refugee Convention provides that a refugee is a 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, is unable or, owing to such fear, is unwilling to return to it.

[55] This requires the Tribunal to evaluate the reason why the appellants are outside Eritrea and do not depend on their returnability there; see *GD (China)* [2021] NZIPT 801793–794.

[56] In terms of *Refugee Appeal No 70074* (17 September 1996), affirmed by the Tribunal in *DS (Iran)* [2016] NZIPT 800788, at [213], as “the essential distillation of the issues arising in the context of an inquiry into refugee status”, the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellants being persecuted in the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

[57] For the purposes of refugee determination, “being persecuted” requires serious harm arising from the sustained or systemic violation of internationally recognised human rights, demonstrative of a failure of state protection — see *DS (Iran)* [2016] NZIPT 800788, at [114]–[130] and [177]–[183].

[58] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379, where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective — see *Refugee Appeal No 76044* (11 September 2008), at [57].

### **Objectively, on the Facts as Found, is there a Real Chance of the Appellants Being Persecuted in Eritrea?**

#### *The international human rights engaged*

[59] These appeals engage civil and political rights that include the right to life, right to be free from cruel, inhuman or degrading treatment or punishment, and the right to freedom of thought, conscience and religion, as contained in Articles 6, 7 and 18 of the ICCPR; see also Articles 4, 5 and 8 of the 1986 *African Charter of Human and Peoples’ Rights* (“ACHR”); and Article 4 of the 2003 *Protocol to the*

*African Charter on Human and People's Rights on the Rights of Women in Africa* ("Maputo Protocol").

[60] There are also socio-economic rights that include the right to work, to social security, to an adequate standard of living (including adequate food and housing), and to the highest attainable standard of physical and mental health, as contained in Articles 6, 9, 11 and 12 of the 1966 *International Covenant on Social, Economic and Cultural Rights* ("ICESCR"), Articles 14–16 of the ACHR, and Articles 13, 16 and, in the African context, Article 18 of the Maputo Protocol. There are further protections in the Maputo Protocol that include special protection for elderly women (Article 22) and protection of women in armed conflict (Article 11). See also the commentary on these rights in United Nations Committee on Economic, Social and Cultural Rights ("CESCR") *General Comment No 4: The Right to Adequate Housing (Art 11(2) of the Covenant)* E/1992/33 (13 December 1991); CESCR *General Comment No 12: The Right to Adequate Food (Art 11)* E/C12/1999/5 (12 May 1999); and CESCR *General Comment No 6: The Economic, Social and Cultural Rights of Older Persons* E/1996/22 (8 December 1995).

[61] In terms of the rights of older persons in the context of climate change and disaster risk mitigation, the Tribunal also acknowledges the United Nations Committee on the Elimination of Discrimination Against Women ("CEDAW") *General Recommendation No 27 on Older Women and Protection of Their Human Rights* CEDAW/C/GC/27 (16 December 2010), as it concerns climate change, disaster risk reduction and older women. There is also the CEDAW *General Recommendation No 37 on Gender-Related Dimensions of Disaster Risk Reduction in the Context of Climate Change* CEDAW/C/GC/37 (7 February 2018), where the CEDAW emphasises the importance of prioritising older women as a marginalised group in the context of climate change and promoting and protecting the rights of older women in disaster-related health care; see paras 26 and 68(f). The CESCR *General Comment No 6* affirms that older persons are entitled to the enjoyment of the full range of rights enacted in the ICESCR and states must take special measures to promote, protect and respect the rights of older persons wherever necessary and to the maximum of their available resources; see paras 10 and 13. There are also non-binding policy documents, for instance, Resolution 44/7 adopted by the Human Rights Council, where the Human Rights Council calls on states to adopt age-inclusive approaches to climate change adaptation and mitigation policies; see Human Rights Council *Resolution 44/7 Human Rights and Climate Change* A/HRC/RES/44/7 (23 July 2020) at para 4.

[62] The United Nations Office for Disaster Risk Reduction (“UNDRR”) also specifies minimum standards for older persons in its *Charter 14 for Older People in Disaster Risk Reduction* (2014), which should be considered by states when developing laws and policies for disaster risk reduction; see also UNDRR *Sendai Framework for Disaster Risk Reduction (2015-2030)* A/CONF224/CRP1 (18 March 2015), para 19(d); Inter-Agency Standing Committee *Operational Guidelines on the Protection of Persons in Situations of Natural Disasters* (January 2011); Article 14 of the 2016 *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Older Persons in Africa*; Article 29 of the African Union *Convention for Protecting the Human Rights of Older Persons*; and Article 9 of the 2009 *Convention for the Protection and Assistance of Internally Displaced Persons in Africa* (also known as the Kampala Convention).

[63] Also relevant to this appeal, the Eritrean Defence Forces (“EDF”) have been engaged in armed conflict in the Tigray region of Ethiopia, bordering with Eritrea. Eritrea is not yet a state party to Additional Protocol II of 1977 to the Geneva Conventions of 1949, therefore, Common Article 3 of the Geneva Conventions and customary international humanitarian law apply to its forces; see Amnesty International *Ethiopia: ‘Today or Tomorrow, They Should be Brought Before Justice’: Rape, Sexual Slavery, Extrajudicial Executions, and Pillage by Eritrean Forces in Tigray* AFR 25/7152/2023 (4 September 2023) (“Amnesty International report”) at p32.

#### *Relevant country information*

[64] It is helpful to set out a backdrop of country information to inform the predicament of the appellants who are elderly persons of Tigrinya ethnicity who have lived in an Eritrean border town with the Tigray region of Ethiopia, where there has been armed conflict.

[65] Eritrea and Ethiopia have a controversial history and it is not necessary to reproduce that lengthy history here. Following the overthrow of the Derg regime, Eritrea seceded from Ethiopia in 1993, and the two countries were involved in a conflict over disputed territories along their borders from 1998. Although a June 2000 peace deal ended a major phase to the conflict, the Ethiopian government did not agree on its implementation and border clashes continued; see T Araia “Remembering Eritrea-Ethiopia Border War: Africa’s Unfinished Conflict” *BBC News* (6 May 2018); and “Ethiopian and Eritrea Blame Each Other for Border Clash” *BBC News* (13 June 2016). In 2018, diplomatic relations

resumed between the two countries after newly elected Ethiopian Prime Minister Abiy Ahmed announced Ethiopia would accept the terms of the peace deal; see E Meseret “Eritrea’s Leader Visits Ethiopia as Dramatic Thaw Continues” *AP News* (14 July 2018).

[66] At the turn of the decade, Eritrea became involved in the civil war in the Tigray region of Ethiopia, which took place between November 2020 and November 2022. The Ethiopian government, assisted by the EDF, fought with the regional government of Tigray, which was controlled by the political party, Tigray People’s Liberation Front (“TPLF”). In November 2022, the parties agreed to “a permanent cessation of hostilities”; see “Two Years of Ethiopia’s Tigray Conflict: A Timeline” *Al Jazeera* (10 November 2022).

[67] While the peace agreement led to a reduction in conflict in Tigray, the situation has been described as a “fragile and uncertain peace”, with Eritrean and Amharic troops remaining in Tigray and accused of ongoing attacks on civilians; see “Ethiopia’s War in Tigray Has Ended, But Deep Faultlines Remain” *Economist* (12 January 2013); German Institute for International and Security Affairs (SWP) *Sustaining Peace in Ethiopia* (14 March 2023) (“the SWP report”); and S Z Hagos “Eritrea’s Government Should Not be Allowed to Harm Peace in Ethiopia” *Al Jazeera* (7 April 2023).

[68] The war in Tigray is estimated to have claimed the lives of up to 500,000 civilians; see E Ogao and E Kaufman “Ethnic Cleansing Continues in Tigray, Despite Truce Agreement: Report” *ABC News* (7 June 2023). Human Rights Watch (HRW) has reported that, during the conflict, Amhara security forces and interim authorities have conducted a campaign of ethnic cleansing against the Tigrayan population in Western Tigray, committing war crimes and crimes against humanity; see “Ethiopia: Ethnic Cleansing Persists Under Tigray Truce” *HRW* (1 June 2023); Report of the Ethiopian Human Rights Commission and Office of the High Commissioner for Human Rights (“OHCHR”) *Joint Investigation into Alleged Violations of International Human Rights, Humanitarian and Refugee Law Committed by all Parties to the Conflict in the Tigray Region of the Federal Democratic Republic of Ethiopia* (3 November 2021); United Nations Human Rights Council *Report of the Special Rapporteur on the Situation of Human Rights in Eritrea A/HRC/50/20* (6 May 2022) (“SR May 2022 report”); and also the Amnesty International report.

[69] Eritrea was not mentioned in the peace agreement between the parties to the conflict, and it has not yet fully withdrawn from the Tigray region. Since late 2020, EDF have been positioned along the border of Eritrea with Ethiopia's Tigray region, occupying positions on both sides of the border; see "Flareup on Ethiopia-Eritrea Border After Clashes in Rama and Badme" *Ethiopian Observer* (9 May 2022).

[70] Ongoing clashes have been reported between TPLF and Eritrean forces in bordering territories; see T Tekle "Eritrea Accuses TPLF of Planning Fresh Attacks Against Asmara" *The East African* (18 May 2022). *The East African* reported that:

Asmara's accusations on Tuesday [17 May 2022] came a few days after rebel TPLF forces and Eritrean forces clashed in two fronts in Badme and Rama towns which lie along their bordering territories.

[71] According to G Mezzofiore et al, "Eritrean Forces Stop UN Mission in Tigray, Ethiopia, Aid Workers Tell CNN" *CNN* (26 May 2023), Eritrean forces who have remained in the region despite the ceasefire have been committing continued violations including looting, destruction of property and sexual violence in villages and denying human aid access to the Tigray region. HRW reports that the Eritrean forces have engaged in large-scale massacres, pillaging and sexual violence; see "Eritrea: Crackdown on Draft Evaders' Families" *HRW* (9 February 2023) ("HRW Eritrea article"). C Byaruhanga similarly reports in "Ethiopia War in Tigray: Eritrean Soldiers Accused of Rape Despite Peace Deal" *BBC News* (15 February 2023) that attacks on civilians, in particular sexual assaults on women, have continued; see also the Amnesty International report and C Wilmot "Ethiopian Minorities Remain Fearful Despite Peace Deal" *The New Humanitarian* (16 February 2023).

[72] The Ethiopia Peace Observatory (EPO) *EPO Weekly: 2-8 September 2023* at <http://epo.acleddata.com> reports on a study by the Physicians for Human Rights and the Organisation for Justice and Accountability in the Horn of Africa that at least 128 sexual assaults have taken place since the peace agreement committed by men alleged to be combatants; see C Anna "Scores of Women and Girls Were Sexually Assaulted After Peace Deal in Ethiopia, Study Shows" *Associated Press* (24 August 2023).

[73] Reports of these actions have continued throughout 2023 and into the latter half of the year; see "Eritrea: Dire Rights Record Should be Publicly Condemned" *HRW* (10 July 2023). The *Guardian* has reported that, nine months after the peace deal, Eritrean troops continue to occupy several areas along the border,

including four of Irob's seven subdistricts; see "People Are Under Siege': Why Ethiopia's War in Tigray Isn't Over" *The Guardian* (7 August 2023). According to the Special Rapporteur, this occupation places the stability of the region and the consolidation of peace in jeopardy; see United Nations Human Rights Council *Report of the Special Rapporteur on the Situation of Human Rights in Eritrea A/HRC/53/20* (9 May 2023) ("SR May 2023 report").

[74] F Maberera for the Wilson Centre reports in *Africa Up Close – Ethiopia's Tigray Conflict Peace Deal Show Cased the African Union's Peace Diplomacy, but Several Sticking Points Remain* (15 February 2023) at [www.wilsoncentre.org](http://www.wilsoncentre.org) that "thorny issues" and "obstacles" continue to threaten lasting peace in Tigray, explaining that:

[C]hief among these is contestation over Amhara-occupied territory in western Tigray, which is claimed by both Amharan and Tigrayan authorities. A second issue is the presence of Eritrean forces who fought alongside the federal government and whether or not the deal would have sufficient political backing necessary to ensure their withdrawal in subsequent moments ...

[75] The Council on Foreign Relations reports in *Global Conflict Tracker: Conflict in Ethiopia* (28 August 2023) at [www.cfr.org](http://www.cfr.org) that tensions between regions, armed groups and the federal government exacerbated by the civil war persist. It states that:

In May 2022, Ethiopia arrested over four thousand people in Amhara to weaken a nationalist militia that helped the government repel the TPLF, fearing its growing power could challenge the state. The next month, government forces did little to prevent the killing of hundreds of Amhara people by an armed group in Oromia. Meanwhile security forces in Afar detained and relocated around 9,500 residents from a town on its border with Tigray.

[76] Such conditions have caused the government to declare a state of emergency; see A Ross "Ethiopia Just Ended One War. Is Another One Beginning?" *Reuters* (9 August 2023).

[77] The Tigray conflict has caused mass displacement from Tigray and border areas; see Council on Foreign Relations *Global Conflict Tracker: Conflict in Ethiopia* (28 August 2023) at [www.cfr.org](http://www.cfr.org). Despite the peace agreement, and a relative improvement in the condition and security of Eritreans, many displaced persons told HRW that they feared returning home as they did not feel safe while officials and security forces remained in the area; see "Ethiopia: Ethnic Cleansing Persists Under Tigray Truce" *HRW* (1 June 2023); SR May 2022 report; and D Salazar *Unwanted and Unprotected: Displaced Eritreans Caught by Conflict*,

*Crisis and Cruelty* United States Committee for Refugees and Immigrants (USCRI) (“USCRI report”) (3 August 2023).

[78] The USCRI report states that:

Eritrean refugees and asylum seekers have been repeatedly ‘cornered by conflict,’ from the war in Tigray to the current crisis in Sudan. Forcibly displaced Eritreans represent one of the most vulnerable populations in the Horn of Africa, caught between their home country’s repression and aggressive actions to repatriate them and the outbreak of conflicts around them by competing armed actors in Tigray and Sudan.

### *Conscription*

[79] Military training and national service are compulsory for all Eritreans, male and female, between the ages of 18 and 50 years; see Article 6 of the *Eritrea: Proclamation on National Service No 82/1995 of 1995*. Despite provisions in Eritrean law limiting national service to 18 months, it is often indefinite; see HRW Eritrea article.

[80] According to Eritrean law, citizens over 50 years of age and/or those who have previously performed national service prior to the *Proclamation on National Service No 82/1995 of 1995* are exempt from any further service. However, sources indicate that exemptions are not applied consistently in practice. HRW reports that when the border war with Ethiopia broke out in 1998, former fighters and reservists who had been demobilised were forcibly conscripted and all national service recruits were retained under emergency directives. Since this time, conscription for many has continued to be extended indefinitely, forcing many Eritreans, some under 18 and others above 40, into military service for years, and some for decades; see HRW Eritrea article. Enforced indefinite conscription commences for many during their final year of high school; see HRW Eritrea article.

[81] Sources also convey that Eritrea has ramped up military conscription in response to the Tigray conflict. There are reported instances of older men and individuals who should be otherwise exempt from being conscripted; see United Kingdom Home Office *Country Policy and Information Note: Eritrea: National Service and Illegal Exit* (September 2021). According to the Special Rapporteur, the round-up of individuals for military conscription (*giffa* in Tigrinya) has dramatically intensified in recent years; see the SR May 2022 report at para 24. Witnesses have reported that the authorities have failed to release individuals with documentation conveying that they were ineligible or have been

discharged from national service. Men as old as 70 years have also reportedly been conscripted and forced to undertake policing and security duties while youth are sent to the frontline; see the SR May 2022 report at para 30. *BBC News* has reported in similar terms that “elderly men have also been forced to be on a war footing in many areas and in most cases, the operation of the conscription is being carried out arbitrarily”; see “Eritreans Hunted Down as Military Call-up Intensifies Over Ethiopia’s Tigray War” *BBC News* (12 October 2022). The United States Department of State *2022 Country Report on Human Rights Practices: Eritrea* (20 March 2023) (“2022 USDOS report”) also states at p24 that:

The government required those not already in the military to attend civilian militia training and carry firearms, including many who were demobilized, the elderly, and persons otherwise exempted from military service. Failure to participate in the militia or national service could result in detention.

[82] HRW reports in the HRW Eritrea article that:

Eritrean authorities have conducted waves of roundups in Eritrea to identify people it considers draft evaders or deserters. Since September 2022, when Ethiopian and Eritrean forces carried out joint offensives in the Tigray region, the Eritrean government has inflicted further repression, punishing family members of those seeking to avoid conscription or recall, to enforce widespread forced mobilization, including of older men. Such punishment has included arbitrary detentions and home expulsions.

‘Struggling to fill its dwindling fighting ranks, Eritrea’s government has detained and expelled older people and women with young children from their homes in order to find people it considers draft evaders or deserters’ said Laetitia Bader, deputy Africa director at Human Rights Watch.

...

Older parents as well as women with young children have been temporarily detained for days, some reportedly longer, and have been expelled from their homes during the government’s searches. A 71-year-old woman was evicted from her home in Asmara, the capital, because she was unable to confirm the whereabouts of one of her sons being sought by the authorities.

[83] This recent enforced conscription drive focussed initially in rural areas in the country’s southern region, before intensifying in major towns including Asmara in mid-September 2022 through to early 2023; see HRW Eritrea article.

[84] Even conscripts who are not part of active military operations are often subjected to a government-sponsored system of forced labour, working for little pay under threat of severe punishment to themselves and their families; see the SR May 2022 report at paras 31–32.

[85] Of further concern, from mid-2022 through to early 2023, during the conscription drive, the government collectively punished relatives of alleged draft evaders and deserters. Older people, women and young children were evicted from their homes and arbitrarily detained; see “Eritrea: Dire Rights Record Should be Publicly Condemned” *HRW* (10 July 2023). HRW reported a number of instances of the elderly being mistreated, including that a 78-year-old man who had been detained for three days in a village school because the authorities were looking for one of his sons, and an 80-year-old man with diabetes who was detained for failing to bring forward the youngest of six sons; see HRW Eritrea article.

[86] In a similar vein, HRW emphasises that the authorities have targeted individuals’ means of livelihood and income, by confiscating livestock in rural communities and preventing people from harvesting their crops, in order to force them to hand themselves in, particularly in southern Eritrea in the first weeks of the campaign. Local administrators also withheld ration coupons from families whose members have not responded. Authorities are able to keep track of people through a family coupon system, which specifies how many people are a part of the household and requires all family members to be present to renew a family’s coupon; see HRW Eritrea article .

[87] The Special Rapporteur reported how children, pregnant women and elderly had been evicted from their homes. Families were left destitute and forced to erect makeshift shelters. Relatives of draft evaders were tortured, and their farming equipment, livestock, grain and vegetables were confiscated. The Special Rapporteur reported that this forced conscription and coercive practices to mobilise the population had generated an environment of fear; see the SR May 2023 report paras 30 and 40.

[88] The United Nations Commission of Inquiry on Human Rights in Eritrea has found that ‘slavery-like’ practices are routine within the national service system; see HRW Eritrea article. HRW has also documented that during their prolonged conscription, Eritreans, particularly those in the military, risk systematic abuse, including torture, harsh working conditions, and pay insufficient to support a family, which constitutes illegal forced labour; see HRW Eritrea article; and HRW *Service for Life – State Repression and Indefinite Conscription in Eritrea* (16 April 2009).

[89] According to the USDOS, the Eritrean government often denied passports and exit visas to citizens who had not completed their military service, or paid income taxes, for arbitrary or unstated reasons, and the requirements for obtaining

such documents were inconsistent and non-transparent; see the 2022 USDOS report at p13.

### *General conditions*

[90] Eritrea, with a population size estimated at 3.29 million and around 70 per cent of the population under 35 years, is one of the poorest countries in the world; see International Fund for Agriculture Development (“IFAD”) *State of Eritrea: Country Strategic Opportunities Programme 2020–2025* (16 March 2020) (“IFAD report”). Eighty per cent of the population rely on subsistence agriculture and the economy is dependent on foreign aid (over 50 per cent of the population receive food aid) and remittances (accounting for 32 per cent of gross domestic product); see Trading Economics *Eritrea GDP Annual Growth Rate* (December 2022) at <https://tradingeconomics.com>.

[91] Poverty statistics are not available. However, the country’s ranking on the United Nations Development Programme (“UNDP”) Human Development Index remains low at 0.492, placing Eritrea at 176th out of 191 countries (as of 2021); see UNDP *Human Development Report 2021/2022: Uncertain Times, Unsettled Lives: Shaping Our Future in a Transforming World* (2022) at p274. The IFAD report that Eritrea faces “severe food and nutrition security challenges”. Malnutrition for children under five years of age has led to some 50.3 per cent being stunted. Eritrea rated poorly at 33.8 on the Global Hunger Index in 2014 (now almost a decade past), being heavily dependent on food imports; see IFAD report at p2. This poor position is reinforced in more recent years, with the Special Rapporteur, stating that Eritreans are “trapped in cycles of poverty and vulnerability” and depend on food coupons, foreign aid and remittances from relatives in the diaspora; see the SR May 2022 report at para 32.

[92] Eritrea has one of Africa’s highest levels of food insecurity with a low adaptive capacity and fragile environment; see IFAD report at p14. It suffers periodic droughts and chronic food shortages hampering development efforts. IFAD reports that “[e]ven in times of good rainfall, domestic food production is estimated to meet 60–70% of the population’s needs”; see IFAD report at p14. According to IFAD report, about two thirds of households are impacted by food insecurity, with the biggest threat to rural areas, particularly isolated regions; at p24.

[93] The Global Network Against Food Crises and Food Security Information Network in *Global Report on Food Crises 2023 (2023)* records Eritrea as one of the countries who have either requested external assistance for food and/or faced economic shocks in 2022 or at least once in past 3 years or for 3 years in the past 10 years; at p11. It emphasises, however, that it has not been able to analyse the country situation in Eritrea owing to data gaps, limited availability and access to data, and constraints on humanitarian actors to conduct assessments, see at pp12 and 60.

[94] Political insecurity and conflict have long undermined food production, including pastoral and agricultural, systems; see Dutch Ministry Report at p9. Decades of conflict, including the imposition of prolonged national service, has contributed to this bleak socio-economic picture, hampering subsistence farming and pastoral activities; see Bertelsmann Stiftung Transformation Index (“BTI”) *BTI 2022 Country Report Eritrea (23 February 2022)* (“BTI report”). The BTI also reports that there has been “extreme restrictions on movement” related to the COVID-19 pandemic and a lack of public transport interrupting supply chains; at p10.

[95] The Dutch Ministry of Foreign Affairs reports in *Climate Change Profile – Greater Horn of Africa (April 2018)* (“Dutch Ministry report”) at p3 that countries in the Greater Horn of Africa (“GHA”) region that include Eritrea are “[p]oor with the majority of its population illiterate”. It describes this “food insecure region” as:

[h]ighly vulnerable to climate change, not only due to rising temperatures, erratic rainfall, and rising sea level, but also because of political instability and fragility, conflict, poor governance and corruption.

[96] The GHA countries are very vulnerable to climate change. As with other countries in Africa, “the burden of climate change will be borne by countries that produce very little of the greenhouse gases that are contributing to climate change”; see Dutch Ministry report at p3. With the exception of Djibouti, the GHA countries are among the most vulnerable to climate change. Four in particular, that include Eritrea, are among the most vulnerable; see Dutch Ministry report at p3.

[97] Drought is the salient environmental concern for the region. The GHA has become “measurably drier and hotter”; see Dutch Ministry report at p4; and C Funk et al “Assessing the Contributions of Local and East Pacific Warming to the 2015 Droughts in Ethiopia and Southern Africa” (2016) 97(12) *American Meteorological Society* S75. Countries bordering the western Indian ocean,

including Eritrea, report a 1.7 degrees Celsius increase in temperature since 1960, a rise of 0.37 degrees Celsius per decade; see State of Eritrea, Ministry of Land, Water and Environment, Department of Environment *Eritrea's Second National Communication* (February 2012) at p2. Occurrences of dry spells, seasonal droughts and multi-year droughts in the GHA have been more frequent than in the past, with a noticeable increase in episodes of torrential rainfall with heavy runoff and flooding; see Dutch Ministry report at p5. Research conveys that the GHA has “dried faster since the turn of the century than at any time during the last 2,000 years”; see Dutch Ministry report at p5.

[98] Four countries in the Horn of Africa, including Eritrea “are warming more quickly than the global average”; see R Muggah “Climate Threats are Multiplying in the Horn of Africa” *Foreign Policy* (8 December 2021).

[99] In the last 30–60 years, droughts and storms have been more common. In the past 20 years, four periods of drought have impacted millions of people in the region. Recent droughts (including the severe drought across the GHA from mid-2016 to mid-2017), and associated food insecurity have been linked to the long-term warming of the western Pacific Ocean, in addition to higher land temperatures in the region; see Dutch Ministry report at p5. The GHA region has also been experiencing catastrophic floods and flash floods which occur after intense and short-duration rainstorms; see Regional Initiative for the Assessment of Climate Change Impacts on Water Resources and Socio-Economic Vulnerability in the Arab Region *Arab Climate Change Assessment Report* (January 2017) at p37. Long-term predictions are that the GHA will become “hotter and drier with more frequent extreme events”; see Dutch Ministry report at pp5 and 7.

[100] According to the IFAD report at p8:

... 75% of the population who derives its livelihoods from rain-fed crop production and cattle rearing on traditional smallholder systems. Indeed, about 80% of the country receives less than 500mm of rainfall per year, and only 1.5% of the country receives more than 700 mm annually so water resources are limited. Rainfall is also erratic and droughts are becoming frequent. In recent years, the length of the main rainy season has been declining, and temperatures are increasing faster than the global average reflecting the emanating of the influence of climate change. In future temperatures are likely to increase further and though there is no clear prediction of trends in overall levels of rainfall, increased heat will increase. Smallholder farmers' livelihood resilience is still limited given that access to irrigated land is difficult; seeds are not yet adapted to rainfall variation, incentives for climate-smart practices and modern technologies adoption are not in place yet; etc. Farmers with access to wells continue to use fuel-led water pump system. The use of fossil fuel hinders the sustainability for the activity as fuel may not be available easily to farmers due to cost and availability while harming the environment ...

[101] This climate vulnerability is recognised in the State of Eritrea, Ministry of Land, Water and Environment, Department of Environment *First Biennial Update Report (BUR I) Under the United Nations Framework Convention on Climate Change (UNFCCC)* (December 2021) (“First Biennial Update report”). Over the past 50 years, there have been increasingly extreme precipitation changes over Eastern Africa, including Eritrea, with droughts and heavy rainfall events; see Minister of Land report at p6; and United Nations Environment Programme (“UNEP”) Global Resource Information Database (“GRID”)-Geneva and European Commission *Country in a Nutshell: Eritrea* at <https://dicf.unepgrid.ch>. According to World Weather Attribution *Human-Induced Climate Change Increased Drought in Horn of Africa* (27 April 2023) at [www.worldweatherattribution.org](http://www.worldweatherattribution.org), since late 2020, the Horn of Africa, including Eritrea, have suffered the worst drought in 40 years leading to the death of millions of heads of cattle and wiping out crops.

[102] Climate change has impacted the country’s water resources and agricultural sector and intensified the country’s current development and food security challenges; see UNEP GRID-Geneva and European Commission *Environmental Pillars: Eritrea* at <https://disf.unepgrid.ch> (“UNEP report”). This report conveys that:

Climate change impacts have already been observed on water resources, agriculture, coastal environments, forestry, livestock, and human health. For instance, Eritrea has an extensive river system with seasonal flow patterns. However, recurrent drought, warmer temperatures and high evaporation patterns are resulting in smaller stream flows, lower groundwater level, deterioration in water quality, and disappearance of base flows which are important sources of water supply for urban, rural, livestock and industry.

Over 70% of Eritrea’s population depends on agriculture (crop and livestock production) for their livelihoods. On the other hand, for most parts of the year, the population remains food insecure as the result of climate change and land degradation.

[103] According to the United Nations Food and Agriculture Organisation (“FAO”) *Country Programming Framework for the State of Eritrea (2017 to 2021)* (September 2016), climate change is severely affecting Eritrea. They state that increased climate variability has significantly impacted agricultural production and the livelihoods of the rural population, explaining at p2:

Eritrea is endowed with a variety of natural resources, but the quality has been declining due to drought, deforestation, land degradation, traditional agricultural practices, pollution and loss of biodiversity, ecosystem degradation and inadequate policies. Agriculture, which is the source of livelihood for more than 65% of the population, is the most affected sector. The environmental challenges are further exacerbated by climate change manifested in recurring drought, depletion of groundwater, and flash flooding. Coupled with the impacts of climate change, environmental and natural resources degradation in the country continues to have

deleterious economic and social repercussions for the population notably poor agricultural produce, food insecurity and negative wellbeing of the population.

[104] The Dutch Ministry report explains that a large percentage of the GHA's population rely on rain-fed agriculture as their primary source of livelihood. With rainfall and drought patterns varying, many areas will become increasingly unsuitable for agriculture. Predictably, the poor and marginalised will experience the impacts of climate change more acutely; see Dutch Ministry report at pp8–9.

[105] In recent years, Eritrea has also been affected by a locust infestation of unprecedented proportions, fuelled by climate change; see R Cleetus "East African Locust Crisis Shows How Climate Change Threatens Food Security" *The Equation* (30 January 2020).

[106] These circumstances combined have contributed to an "extremely critical situation" in Eritrea; see BTI report at p15.

[107] It is accepted that climate change serves "as a threat multiplier" amplifying pre-existing vulnerabilities such as food insecurity and political instability. The Dutch Ministry report emphasises, at p8, that:

The demographic, political instability, conflict, poverty, and climate change trends of the countries of the GHA are structural challenges that are interacting and driving one another.

[108] In the 1990s, Eritrea acceded to the United Nations *Convention on Biological Diversity* (CBD), the *Convention to Combat Desertification* ("CCD"), the *Framework Convention on Climate Change* ("UNFCCC") and the Kyoto Agreement. In 2016, it signed the Paris Agreement, an international treaty on climate change, although it has not yet ratified it.

[109] Although Eritrea has not developed a specific climate change policy, it has prepared a renewable energy sub-sector policy; see Dutch Ministry report at p10. In 2007, Eritrea adopted a National Adaptation Plan of Action ("NAPA") which builds on its efforts to address climate change in its development policy framework; see State of Eritrea, Ministry of Land, Water and Environment, Department of Environment *National Adaptation Plan of Action* (April 2007). The NAPA has five adaptation priority areas in agriculture, livestock, forestry, water, marine and coastal environment and public health; at p15.

[110] All GHA countries have submitted an intended nationally determined contributions under the Paris Agreement, including adaptation actions. In 2018, Eritrea submitted its first nationally determined contribution to the UNFCCC

outlining strong mitigation actions, including its commitment to reduce CO2 emissions from fossil fuels by 12 per cent by 2030. With additional support, it has represented that emissions can be further reduced to 38.5 per cent by 2030. Steps for capacity building, financial support and partnership with regional and international agencies are also outlined. Later, in 2021, Eritrea submitted its First Biennial Update report to the UNFCCC.

[111] IFAD jointly prepared a country strategic opportunities programme (“COSOP”) with the Government of the State of Eritrea for 2020–2025; see IFAD report. This is aligned with Eritrea’s National Agriculture Development Policy and Strategy, the Five-year Strategic Agricultural Development Plan (2019–2023) and the Strategic Development Plan (2016–2020) prepared by the Ministry of Marine Resources. COSOP’s strategic objectives include:

SO1: Increased resilience and adaptation to climate change through sustainable management and utilization of natural resources (land and water);

SO2: Improved access to and use of appropriate technologies, infrastructure and services for enhanced productivity and sustainability of smallholder agriculture and fisheries systems; [and]

SO3: Build institutional, community and individual capacities to enhance food and nutrition security and sustainable livelihoods.

[112] The IFAD report emphasises that Eritrea was “diverted from its development path as a result of a 20-year war, followed by a ‘no-war, no-peace situation’ and 10 years of international sanctions.” However, the situation “normalized” with the signing of the peace agreement between Eritrea and Ethiopia in July 2018 and the lifting of sanctions, enabling Eritrea to gradually move towards development and resilience-building; see IFAD report at p1.

[113] The IFAD report states that “despite the Government’s strong commitment to Eritrea’s development agenda, institutional capacity gaps exist, which include:

(i) lack of suitable procedures and regulatory frameworks to guide project implementation; (ii) weak managerial and technical capacities; (iii) limited coordination across sectors; and (iv) inadequate financial management... and monitoring and evaluation... systems, all of which affect the ability to quantitatively demonstrate development impact.

[114] It is evident from these reports that, notwithstanding Eritrea’s commitment, significant challenges to implementing these frameworks remain. Eritrea’s First Biennial Update report conveys limited institutional and manpower resources and public and donor funding to manage and deliver climate change mitigation policies. There is also weak monitoring capacity for mitigation impacts and gaps; see UNEP report. The UNEP report states that there is inadequate research capacity on

clean energy technologies including capacities in solar, wind and geothermal. Public awareness regarding the risk of climate change is also low in general; see UNEP report. The report emphasises that in the past few years, “reducing vulnerability to climate change has become an urgent issue for Eritrea”, in particular, given the economies “dependence on climate-sensitive sectors, such as agriculture, water, and the coastal zone”. For an outline of the country’s planned adaptation goals for 2030, see State of Eritrea *Nationally Determined Contributions (NDCs) Report to UNFCCC* (March 2018) and United Nations Climate Change *NDC Registry: Eritrea* at <https://unfccc.int/NDCREG>.

### *The Tigrinya and the elderly*

[115] The Tigrinya are the largest ethnolinguistic group in Eritrea and account for approximately 50 per cent of the Eritrean population; see Central Intelligence Agency *The World Factbook: Eritrea* (16 October 2023). According to the BTI report, in principle, all social groups have equal access to the limited services offered by the state that include basic health care, education and food coupons in urban areas. The limited health care centres and schools are concentrated in the cities and towns dominated by the Tigrinya ethnic group. Other ethnic groups, particularly, pastoral and agropastoral social groups are excluded from many of these services; see BTI report at p22.

[116] While denied by the government, there are cleavages between the Tigrinya, as the dominant ethnic group and smaller ethnic groups who feel excluded from the limited services available. The administration, military and educational system is dominated by Tigrinya. Although the entire population is subject to political oppression and human rights abuses, structural discrimination against the other eight ethnic groups, predominantly Muslims, persists; see BTI report at p33.

[117] According to an Eritrean population and health survey in 2010, the older population, aged 65 years and above, account for some seven per cent of the total population of Eritrea. However, there are no specific programmes to cater for their needs. According to Dr Tesfatsion, Acting Director General of Public Health Services, the health system is not capable of responding to the needs of older people, there is inadequate nutrition for the elderly and social support is lacking; see “Eritrea Developed Healthy Ageing Action Operational Plan” *World Health Organisation* (2 April 2019).

[118] The African Commission on Human and People's Rights *Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea, 1999–2006* (1 May 2019) expressed notable concern about the lack of information on legislation, policy or programs for the protection of the rights of older persons, or a government institution to monitor this vulnerable group; see paras 109 and 111.

[119] The government also imposes taxes on those who have lived abroad. Returning citizens are expected to pay a two per cent tax on foreign earned income to the Ministry of Foreign Affairs to be eligible for some government services and documents, including birth or marriage certificates, passport renewals, real estate and vehicle transactions; see 2022 USDOS report at p14; and SR May 2022 report at p12. Churches are also obligated to pay 10 per cent of their income to the authorities; see SR May 2022 report at p13.

[120] With the exception of the Martyr's Trust Fund (which raises money from diaspora Eritreans for relatives of fighters and soldiers killed in action), the state has no social security system. The provision of social security support depends on traditional solidarity networks based on clan and extended family structures. However, these networks have weakened substantially due to the unlimited-term national service programme that has been operating for the past several decades; see BTI report at p34.

#### *Application to the facts*

[121] Counsel submits that the appellants' primary fears are two-fold. The husband fears forced conscription into the EDF contrary to his religious, pacifist beliefs, and the appellants both fear a life of abject poverty with no land, home, family support or access to necessary medical care.

#### *— Forcible conscription and mistreatment*

[122] The husband completed his military service between 1998 and 1991 and managed to avoid returning to service through going into hiding and his close involvement as an elder with the Tewahedo Orthodox Christian church. In recent years, he has departed Eritrea on two occasions, travelling to New Zealand in September 2018 and September 2019. On both occasions, he departed lawfully, with exit permission. Although government practices in granting exit permission are reportedly non-transparent and inconsistent, it would seem likely that the

government at that time had no issue with the husband failing to report for military service.

[123] Since the husband's most recent departure from Eritrea, country sources have conveyed an escalating conscription drive in Eritrea, in particular, in the context of the Tigray conflict. There is evidence of elderly persons having been forcibly conscripted. Such reports indicate that men as old as 70 years have been conscripted. However, as concerns the husband's age (over 80 years), sources convey that they are punished for their family member's evasion or desertion of service as distinct to being forcibly recruited themselves. HRW reported a number of instances of the elderly being mistreated, including a 78-year-old man who was detained for three days in a village school because the authorities were looking for one of his sons, and an 80-year-old man with diabetes who was detained for failing to bring forward the youngest of six sons.

[124] The husband does not fear pressure from the authorities in terms of his children's military service obligations (as he considers that they have long been absent from the country). He fears that, instead, he may be forcibly conscripted upon return to Eritrea. The Tribunal is cognisant that the husband has not been living in Eritrea these past five years, has had minimal contact with connections back home, and that he is illiterate and will not have read any of the country sources or news reports on current conditions. However, having regard to the country reports and the evidence of the husband, the Tribunal considers that the fact of the wife's daughter and the husband's son having been absent from Eritrea for decades is a salient point of distinction. The daughter left the country when she was three years of age and returned only for several months with her parents. When she visited her parents in more recent years in 2016, she experienced no difficulty in relation to her eligibility for military service. The son has also spent his adult life living in the United States of America and the appellants gave no evidence of ever being questioned by the authorities at any time concerning the whereabouts of their children or with respect to military service obligations. While there has been an elevated drive to forcibly conscript in recent years, against this background, the Tribunal does not consider there is any real chance of the husband being forcibly conscripted or of him or his wife being mistreated owing to their children's perceived military service obligations.

[125] The Tribunal does not, however, overlook the indirect impact of the authorities' systemic campaign to punish the relatives of persons eligible for military service, that includes forced evictions, the destruction of property, crops

and livelihoods. The Tribunal has no hesitation in finding that such actions would constitute cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR, in the context of a country in which sustainable living is so precarious. The state's actions towards such persons have also extended to denying access to rations by which those (particularly in the cities) can access affordable food and supplies.

[126] The Eritrean military's harsh conscription drive (where individuals have been evicted from their homes and their livelihoods have been destroyed) bears indicia demonstrative of a "treatment". The creation by a state of special rules which disentitle claimants to socio-economic benefits (including its policy/practice of denying rations) to which they would otherwise be entitled, could also constitute "treatment". As to the meaning of "treatment", see *BG (Fiji)* [2012] NZIPT 800091 at [153]; see also M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, Kiehl, 2005) at p160; and W Kalin and J Kunzli *The Law of International Human Rights Protection* (Oxford University Press, Oxford, 2010) at p324.

[127] As will be seen from the analysis below, the appellants are not immune to the indirect effects of this treatment, as vulnerable elderly persons who will likely depend on their communities for support to provide the basic necessities of life.

— *Armed conflict and insecurity*

[128] The appellants fear being killed through indiscriminate violence, including mortar fire, owing to the conflict in Tigray region that borders Eritrea close to their village. They have seen and heard mortar fire and have fled their village on a number of occasions throughout the years owing to conflict, staying variously in Z village and V town in Debub region and also in the capital city of Asmara. At this current time, a peace agreement is in effect between the Ethiopian federal government and the TPLF, and armed hostilities between those parties (which has been regarded as one of the world's deadliest conflicts in recent decades) have ceased. However, country sources convey that obstacles to lasting peace remain, and the EDF (which was not a party to the peace agreement) continues its presence in Tigray and bordering territories, and is reportedly engaged in the commission of ongoing human rights abuses, in addition to some ongoing heavy artillery clashes.

[129] As mentioned in the United Nations High Commissioner for Refugees *Guidelines on International Protection No 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence Under Article 1A(2) of the 1951 Convention and/ or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions* HCR/GIP/16/12 (2 December 2016) at para 25 and reinforced by M Foster et al in “‘Time’ in Refugee Status Determination in Australia and the United Kingdom: A Clear and Present Danger from Armed Conflict?” (2022) 34(2) *International Journal of Refugee Law* 163 at p183, peace agreements can lead “to new armed actors filling vacuums of power, or to the consolidation of groups composed of former members who have not disarmed and reintegrated into society”. This pattern may be discerned in the country sources through the ongoing actions of EDF actors and conflict dynamics in Ethiopia. The Tribunal proceeds on the basis that insecurity and violence remains in Tigray and the border region with Eritrea, with potential for hostilities to again escalate.

[130] Notwithstanding this insecurity, the Tribunal finds that the risk of the appellants being deprived of their rights to life or being subjected to cruel, inhuman or degrading treatment through armed conflict and violence falls below a real chance level. The Tribunal acknowledges that, notwithstanding a peace agreement being in force between the parties to the Tigray conflict, EDF forces remain in the border area and are continuing to commit atrocities there. The resumption of hostilities, given the fragile peace, is also a possibility. However, the appellants’ village of X is approximately 1.5 hours away from the border with Tigray, and the other areas where they have lived, including where they may choose to return, are Z village (some 49 minutes from X village and an hour from the border) and V town (some 46 minutes from X village and some 47 minutes from the border); see maps from Mapcarta at <https://mapcarta.com>; Mindat.org at [www.mindat.org](http://www.mindat.org) and Google Maps at <https://maps.google.com>. There is no evidence that such areas have been, or will be impacted from that distance through mortar, rocket or artillery fire. While reasonably proximate to the border, there is no evidence of EDF having been present in the villages inhabited by the appellants or of committing atrocities there, and from what is known of the current and foreseeable conflict dynamics, there is no real chance of such harm occurring there in the future.

[131] However, the Tribunal accepts the appellants’ evidence that others, like themselves, have fled from X village, and that the village may be deserted owing to collective fears associated with the conflict. The reality that the appellants may

be displaced from their village and home region is a real prospect and will be considered in more depth below in relation to their socio-economic circumstances.

— *Socio-economic conditions*

[132] The appellants claim that, on return to Eritrea, they will be unable to live in their village, as their home will have been destroyed through conflict, and they have heard that all of the villagers have fled owing to the border conflict. They state that they will not be able to maintain an adequate standard of living without housing or the means to support themselves. They would need to pay taxes to the government in order to secure land to farm and earn an income (which they cannot afford), and their age also presents as a barrier to them sustaining employment. While their daughter could send them remittances from New Zealand, she earns little on her benefit and is in poor health with an uncertain future. The closest city where they could access remittances would be V town. The appellants also fear that the wife would have difficulty obtaining a consistent supply of medicine, if at all, for her diabetic condition. Counsel submits that the appellants will be forced to live a life of poverty, isolation and destitution.

[133] As mentioned above, these concerns engage a host of socio-economic rights that include the right to work, right to social security, right to an adequate standard of living (including adequate food and housing), and right to the highest attainable standard of physical and mental health, as contained in Articles 6, 9, 11 and 12 of the ICESCR; Articles 14–16 of the ACHR; and Articles 13, 16 and 18 of the Maputo Protocol.

[134] Also relevant is the United Nations General Assembly *United Nations Principles for Older Persons Adopted by General Assembly Resolution 46/91* (16 December 1991), principle 1 which provides that “older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help”. The ICESCR attaches great importance to this principle, that older persons realise their rights contained in Article 11 of the ICESCR; see OHCHR *ICESCR General Comment No 6: The Economic, Social and Cultural Rights of Older Persons E/1996/22* (8 December 1995).

[135] There is also the appellants’ right to be free from cruel, inhuman or degrading treatment or punishment as contained in Article 7 of the ICCPR. Notably, the European Court of Human Rights has found that dire humanitarian conditions and severe destitution may give rise to inhuman or degrading

treatment; see *MSS v Belgium and Greece* Application No 30696/09 (21 January 2011) at paras 249–264; and *Sufi and Elmi v United Kingdom* Application Nos 8319/07 and 11449/07 (28 June 2011).

[136] The appellants’ right to life with dignity is contained in Article 6 of the ICCPR; Article 4 of the ACHR; and Article 4 of the Maputo Protocol; see United Nations Human Rights Committee (“HRC”) *General Comment No 36: Article 6 (Right to Life)* CCPR/G/GC/35 (3 September 2019) at paras 2 and 7. According to the *General Comment No. 36* at para 7, the obligation to ensure the right to life “extends reasonably foreseeable threats and life-threatening situations that can result in loss of life”. The HRC further explains at para 26 that:

The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.

[137] The HRC elaborates that these general conditions include hunger, malnutrition and extreme poverty and homelessness.

[138] The HRC has found that the right to life includes “the right of individuals to enjoy a life with dignity”, which includes social and economic protections to maintain an adequate standard of living; see Human Rights Committee *Teitiota v. New Zealand* CCPR/C/127/D/2728/2016 (7 January 2020) (“*Teitiota*”) at para 9.4. This finding is consistent with that of regional courts which have found the right to life encompasses the duty “of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impeded it”; see *Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations, and Costs*, Judgment, Inter-American Court of Human Rights (Ser C) No 125 (17 June 2005) at para 162, referring to case of the *Juvenile Reeducation Institute v Paraguay*, Judgment, Inter-American Court of Human Rights (Ser C) No 112 (2 September 2004) at para 159.

[139] In *Refugee Appeal No 74665* (7 July 2004) at [89], as cited in *AF (Kiribati)* [2013] NZIPT 800413 at [68], the Refugee Status Appeals Authority, as the Tribunal’s predecessor, has affirmed that the right to life (Article 6 of the ICCPR) in conjunction with the right to adequate food (Article 11 of the ICESCR) could permit a finding of ‘being persecuted’ where an individual faces a real risk of starvation. As emphasised by the Tribunal in *AF (Kiribati)*, this would encompass the discriminatory denial of food in the wake of a drought, which could support a finding of being persecuted.

[140] States have a duty to respect, protect and fulfil economic, social and cultural rights. Their specific obligations include to progressively achieve full realisation of rights. Irrespective of resource availability, states have an immediate obligation to take appropriate steps to ensure continuous and sustained improvement of the enjoyment of these rights over time. They are also required, with immediate effect, to ensure the enjoyment of minimum essential levels of each right. The duty to progressively fulfil these rights implies a prohibition of measures that would diminish the current enjoyment of rights. States must ensure that their policies and measures do not undermine access to such rights. States have a duty to use their maximum available resources for the progressive realisation of economic, social and cultural rights. Even if a state has inadequate resources at its disposal, it should introduce low-cost and targeted programmes to assist those most in need so that limited resources can be used efficiently and effectively; see OHCHR *Economic, Social and Cultural Rights* at [www.ohchr.org](http://www.ohchr.org); see also *Refugee Appeal Nos 75221 and 75225* (23 September 2004); and CESCR *General Comment No 20: Non-discrimination in Economic, Social and Cultural Rights (Art 2, Para 2 of the International Covenant on Economic, Social and Cultural Rights)* E/C12/GC/20 (2 July 2009).

[141] Breaches of socio-economic rights are capable of founding valid claims for refugee status where claimants would be denied the core minimum content of the relevant social-economic rights engaged by their claim on a discriminatory basis; see *BG (Fiji)* [2012] NZIPT 800091 at [89].

[142] The evidence establishes that the appellants would be returning to conditions of abject poverty, underdevelopment and likely displacement. The Tribunal acknowledges that the appellants would face a life of significant hardship upon return to Eritrea. They are particularly vulnerable, given their elderly status and lack of family support. It is accepted that, through ongoing conflict and post-conflict conditions, the appellants may be forced to live other than in their home village, either in the wife's family village in Z village, where her elderly siblings live, or V town, where they have previously received support. They may even be displaced further north away from the border with Tigray. There will be limited, if any, opportunities for them at their age to secure employment (they would likely struggle to afford to pay the necessary tax for the land and they lack, through age, the physical capability to farm it). In living a subsistence life, they would, no doubt, be reliant on traditional social support mechanisms in terms of accessing shelter and support for their basic necessities, and on what small remittances their daughter and her family can provide from New Zealand.

[143] There are visible breaches to the appellants' socio-economic rights to adequate food, water, shelter in Eritrea. The Tribunal finds that the Eritrean government has failed to progressively realise these socio-economic rights, consistent with the ICESCR, so as to ensure at least a basic level of enjoyment of the constituent elements comprising an adequate standard of living. Decades of conflict (including the state's heavy devotion of resources to militarisation, hampering subsistence farming and pastoral activities), the impact of longstanding sanctions in force until recently, poor governance and corruption, in addition to a lack of resources and general poverty, all comprise of the matrix of factors underpinning the appellants' predicament.

[144] The risk of the appellants returning to abject poverty, even starvation, is further heightened by climate change. Country sources establish that climate change is contributing, through droughts and heavy rainfall events, to severe food security challenges in Eritrea. It is broadly acknowledged that extreme weather events and disasters brought about by climate change have impacted the Horn of Africa and are increasing in frequency and intensity. Such phenomena disproportionately affect the most vulnerable persons and systems; see Intergovernmental Panel on Climate Change ("IPCC"), *IPCC Sixth Assessment Report. Summary for Policymakers* (2022) at para B.1. Climate change impacts are compounded by factors that include age; see United Nations General Assembly *Promotion and Protection of Human Rights in the Context of Climate Change A/77/226* (26 July 2022) at p8. The elderly also possess other intersecting vulnerabilities that may stem, as in the case of these appellants, from their gender, displacement and socioeconomic status, amongst other conditions; see United Nations General Assembly *Human Rights of Older Persons in the Context of Climate Change-Induced Disasters A/78/226* (25 July 2023) prepared by an independent expert, Claudia Mahler ("Mahler report") at pp4–5.

[145] Older persons are at heightened risk of dying from climate-related disasters; see United Nations General Assembly *Summary of the Panel Discussion on the Human Rights of Older Persons in the Context of Climate Change A/HRC/49/61* (29 November 2021) at para 23. The elderly face "disproportionate negative impacts on their health, housing, livelihoods, well-being, and access to food, land, water and sanitation"; see Mahler report at p4. Physical, political, social and economic factors that include poverty, a lack of transport and the disruption of care and support services, further compound vulnerabilities. Older persons can also be isolated, excluded and left behind in the context of natural disasters and related emergencies; see Mahler report at pp4–5.

[146] The appellants are particularly vulnerable as elderly persons living without any of their children to support them in Eritrea, and rely chiefly on community support, where available. They face severe food security challenges, exacerbated through the impacts of ongoing climate change and disaster. The indirect effects of the military's conscription campaign and its implementation, that bears the hallmarks of cruel, inhuman and degrading treatment, reducing the capacity of local communities to support the appellants, further intensifies the risk to them. Although the appellants' daughter has been able to provide modest remittances to assist them in the past, she is particularly vulnerable given her health condition and the fact that she only receives a modest government benefit. Her elderly husband is also unwell, and they have two sons to support in New Zealand.

[147] The Tribunal finds that, given the particular characteristics of these appellants, there is a real chance that their rights to be free from cruel, inhuman or degrading treatment in Article 7 of the ICCPR will be impinged giving rise to serious harm within the meaning of being persecuted. The direct and indirect actions of the government of Eritrea (that include the state's military prioritisation, poor governance, corruption and abuses significantly impacting the subsistence lifestyle of the appellants), have contributed materially to their predicament and constitute "treatment" within the meaning of cruel, inhuman or degrading treatment or punishment. The government has taken actions through its conscription campaign which deny villagers their socio-economic necessities, whom the appellants rely upon for support; see *BG (Fiji)* at [153]. It has also failed to discharge positive obligations owed to vulnerable elderly persons who are dependent on the state for their socio-economic wellbeing; see *BG (Fiji)* at [155].

[148] Although the government has recently started to take steps towards sustainable development and risk-reducing adaptation measures in terms of the accelerating effects of climate change, such risk mitigation factors are inadequate to reduce the risk of the appellants facing starvation here and now below the real chance level.

[149] The Tribunal further finds that the Eritrean state has contributed materially to the predicament of the appellants giving rise to them being at risk of cruel, inhuman or degrading treatment or punishment in violation of Article 7 of the ICCPR. Owing to this finding, it is not necessary for the Tribunal to go on further to consider any prospective breach to their right to life with dignity in terms of Article 6 of the ICCPR.

### *Conclusion*

[150] For these reasons the appellants hold a well-founded fear of being persecuted in Eritrea.

### **Is there a Convention Reason for the Persecution?**

[151] The Tribunal finds that the harm faced by the appellants is not due to any Convention reason.

### **Exclusion**

[152] There is nothing in the evidence before the Tribunal which raises any issue under Article 1F of the Refugee Convention.

### **Conclusion on Claim to Refugee Status**

[153] While the appellants each hold a well-founded fear of being persecuted it is not for a Convention reason. The harm they fear is not for any discriminatory reason.

### **The Convention Against Torture**

[154] Section 130(1) of the Act provides that:

A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand.

### **Assessment of the Claim under Convention Against Torture**

[155] Section 130(5) of the Act provides that torture has the same meaning as in the *Convention Against Torture*, Article 1(1) of which states that torture is:

... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

[156] The appellants rely upon the same evidence for this part of their appeal as they do for their claim to refugee status. The same findings of credibility and fact apply. For the reasons given above, they are not at risk of being subjected to severe mental or physical pain or suffering for any of the prescribed purposes with any of the prescribed involvement of a public official. Accordingly, the appellants are not recognised as a protected person in New Zealand under the *Convention Against Torture*.

### **Conclusion on Claim under Convention Against Torture**

[157] For the above reasons, the appellants are not protected persons under section 130 of the Act.

### **The ICCPR**

[158] Section 131 of the Act provides that:

- (1) A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand.
- ...
- (6) In this section, cruel treatment means cruel, inhuman, or degrading treatment or punishment.

[159] By virtue of section 131(5) of the Act:

- (a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment.

### **Assessment of the Claim under the ICCPR**

[160] The appellants rely upon the same evidence for this part of the appeal as for their claim to refugee status. The same findings of credibility and fact apply.

[161] The Tribunal has found that the appellants hold a well-founded fear of being persecuted in Eritrea, as there is a real chance that they will suffer cruel, inhuman or degrading treatment by way of starvation and destitution, as a result of decades of financial and agricultural mismanagement by the state. However, because they

were not at risk of such harm for any discriminatory reason, they could not be recognised as refugees.

[162] The assessment for protected person status under the ICCPR does not require that the appellants demonstrate any discriminatory ground for the harm they face. The Tribunal finds that there are substantial grounds for believing that the appellants are in danger of being subjected to cruel, inhuman or degrading treatment or punishment in Eritrea in violation of Article 7 of the ICCPR and section 130 of the Act.

[163] Given this finding, it is not necessary to go on to consider whether there are substantial grounds for believing that the appellants are in danger of arbitrary deprivation of life in terms of Article 6 of the ICCPR. It suffices to record in terms of the applicable law as follows.

#### *Conclusion on Claim under ICCPR*

[164] For the reasons given above, the appellants are in danger of being subjected to cruel, inhuman or degrading treatment or punishment. Accordingly, the appellants are recognised as protected persons in New Zealand under the ICCPR.

## **CONCLUSION**

[165] For the foregoing reasons, the Tribunal finds that the appellants:

- (a) are not refugees within the meaning of the Refugee Convention and therefore are not refugees under section 129 of the Act;
- (b) are not protected persons within the meaning of Article 1(1) of the *Convention Against Torture* and, therefore, are not protected persons under section 130 of the Act;
- (c) are protected persons within the meaning of the relevant elements of Article 7 of the *International Covenant on Civil and Political Rights* and, therefore, are protected persons under section 131 of the Act.

[166] The appeals are allowed.

**Order as to Depersonalised Research Copy**

[167] The Tribunal is satisfied that publication of this decision beyond the parties (and those to whom disclosure is permitted by section 151(2)(a), (b) or (c)) would tend to identify the appellants and/or be likely to endanger the safety of the appellants or others.

[168] Pursuant to clause 19 of Schedule 2 of the Act, the Tribunal orders that, until further order, the research copy of this decision is to be depersonalised by removal of the appellants' names and any particulars likely to lead to the identification of the appellants.

"S A Aitchison"  
S A Aitchison  
Member

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