RLC Briefing Paper No. 1

REFUGEE LAW CLINIC | UNIVERSITY OF LONDON

The Eritrean practice of the issuance of identity-proving documents with particular focus on the case of returnees from Ethiopia*

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March 2022

Abstract

Difficulties in proving Eritrean nationality are commonly experienced by asylum applicants who have a background of expulsion from Ethiopia. Most of them were expelled from Ethiopia during or after the 1998-2000 border conflict between Eritrea and Ethiopia and may also have left Eritrea without relevant documentary evidence that proves their identity and nationality. By examining the relevant nationality laws of both countries and the prevailing practice in this regard, this briefing paper explores the likelihood for certain asylum applicants to be recognised as Eritrean nationals, and, if so, whether they would be subject to the fulfilment of the National Military Service Programme (NMSP). The paper also offers a comparative discussion of the nationality laws of Eritrea and Ethiopia, with a view to ascertaining whether there is a group of people who may be entitled to one or both nationalities but in practice can obtain neither.

Keywords *asylum, citizenship, Eritrea, Ethiopia, Eritrean National Military Service Programme*

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* This Briefing Paper was prepared by the authors in their capacity as independent expert consultants pursuant to a formal request received from the Refuge Law Clinic, University of London, related to a set of questions which are included in Section 1.

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1. Introduction

Eritrean asylum applicants and refugees in Europe often experience difficulties in proving their identity in both refugee status determination and family reunification procedures which have increasingly resulted in negative decisions. The underlying reason for this scenario relates to the limited and often inexistent access to official documents from Eritrea or via diplomatic missions abroad, and the failure of some national decision-makers to properly grapple the issue. This paper focuses on the possibility to obtain Eritrean identity documents for Eritrean nationals in two situations: those who have spent a considerable period of time in neighbouring country Ethiopia; and those who have been returned from Ethiopia to Eritrea on various grounds and have subsequently departed or fled Eritrea within a short period of time after their arrival in Eritrea from Ethiopia.

The paper is divided into four more sections. Section 2 discusses the general Eritrean practice related to the issuance of official documents, with a focus on documents proving Eritrean identity. In doing so, it asks: what is the ability of individuals who have spent only brief/childhood periods in Eritrea to (re)document? Section 3 considers the issue of recruitment into the National Military Service Programme (NMSP) for Eritreans who have spent long periods in Ethiopia, and asks: what is the likelihood of recruitment of individuals falling under this group into the NMSP? In Section 4, a comparative analysis of the Eritrean and Ethiopian citizenship laws and procedures is provided. Section 4 also addresses the question of whether there exists any group(s) who may be (legally) entitled to one/both citizenship/s but in practice can obtain neither. Lastly, Section 5 concludes by summarising the main findings.

The paper draws on secondary sources, some of which, in turn, rely on primary data gathered by the authors from a wide range of actors, including Eritrean legal professionals, NGO representatives, asylum lawyers, and Eritrean asylum seekers and refugees in various geographical locations.

2. The issuance of identity-proving documents in Eritrea

It has become apparent recently that some asylum authorities in Europe only consider Eritrean national ID cards and passports of probatory value of one's identity in the context of refugee status determination and family reunification procedures. This, however, disregards the Eritrean context and contemporary practice. In Eritrea, there are at least four types of official documents that can serve as proof of identity in the local context. Based on our recent Expert Report on this subject, these documents include not only (1) the Eritrean national ID card, also known as ታሴራ or ናይ መንነት መረጫት (መንነት) in Tigrinya, and (2) the passport, but also (3) the residence card or ናይ ነባርነት in Tigrinya and (4) the ration coupon.[1] Although issued for other purposes, the two latter mentioned documents have a probatory value of establishing the identity of the bearers in Eritrea. It bears recalling that the residence card is a document that provides the official domicile or residence of the holder; while the ration coupon is meant to administer access to government subsided basic commodities that are sold in state owned shops or in private shops under highly regulated circumstances. Yet, both documents include the name and some basic details of the holder.

In the following sub-sections, we discuss the law and practice pertaining to the official issuance of Eritrean passports and national ID cards. As will be illustrated, while obtaining an Eritrean passport is extremely difficult, in relative terms, access to a national ID card is easier, however, provided that the most essential requirements stipulated by the relevant Eritrean laws are fulfilled.

Before turning to the discussion below, it is important to note that this section should be read in conjunction with an Expert Report recently co-authored by the authors and commissioned by Equal Rights Beyond Borders and the International Refugee Assistance Project (IRAP).[2] The Expert Report discusses at length the (non)possibilities for Eritrean refugees to access official documents from the country or via Eritrean diplomatic missions. The main findings of the Expert Report have been presented by both authors in various international and national forums;[3] and various excerpts of it have been cited by some asylum authorities in policy documents[4], and by asylum courts in recent jurisprudence.[5] A shorter and academically crisp version of the Expert Report was also presented at an international conference "(Dis)connecting People: The Law and Practice of Family Reunification" held jointly by the University of Ghent and the University of Antwerp on 9 September 2021.[6] Moreover, on 31 October 2021, a shorter version of the Expert Report was submitted in the form of an "expert input" to a call made by the UN Office of the High Commissioner for Human Rights (OHCHR), with a view to having the expert input transmitted to the next annual full-day meeting of the UN Human Rights Council (2022), themed: "The rights of the child and family reunification." The expert input is expected to contribute to the Council's forthcoming new resolution on the same theme.[7]

2.1 The practice relating to the Eritrean national ID card

The Eritrean national ID card was formally introduced in 1992 in preparation for the National Referendum

1 See Daniel Mekonnen and Sara Palacios Arapiles, "Access to Official Documents by Eritrean Refugees in the Context of Family Reunification Procedures: Legal Framework, Practical Realities and Obstacles" April 2021, https://equal-rights.org/site/assets/files/1287/report_access_to_official_documents_eritrea_equalrights_irap_may-2021.pdf (hereinafter "Mekonnen and Palacios-Arapiles Expert Report 2021").

2 Mekonnen and Palacios-Arapiles Expert Report 2021, pp. 33-38.

3 These include: an expert meeting of UNHCR's Global Refugee Family Reunification Network (FRUN) held on 2 June 2021; an expert meeting on family reunification of the National European Red Cross and Red Crescent Societies held on 5 May 2021; a working group session with French NGOs hosted by UNHCR France on 6 July 2021; and a juridical seminar for asylum lawyers in Germany organised by the Catholic Academy of Franz Hitze Haus held on 30 September 2021.

4 See, for instance, the UK Home Office, "Country Policy and Information Note Eritrea: National service and illegal exit," September 2021, p. 20, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1020555/ERI_CPIN_National_service_and_illegal_exit.pdf; and the Country of Information Report (2021) of the Swedish Migration Agency, https://lifos.migrationsverket.se/dokument?documentAttachmentId=48539, pp. 7-8.

5 Higher Administrative Court of Hamburg, Case 4 Bf 106/20.A, 27 October 2021 and Case 4 Bf 546/19.A, 2 September 2021. It has also been included in the official evidence list ("Knowledge Resources" / *Erkenntnismittel*) for Eritrea of the Administrative Court of Berlin, as updated on 21 September 2021, https://www.berlin.de/gerichte/verwaltungsgericht/service/erkenntnismittellisten/eritrea/.

6 The title of the paper is "Between Utopia and Reality: The Right to Family Reunification of 'Paperless' Refugees."

7 The full title of the expert input is "High Evidentiary Thresholds in Family Reunification Procedures Threatening the Rights of Refugee Children."

on the formal independence of Eritrea that was conducted in April 1993.[8] At the formal level, the issuance of the national ID card is governed by Proclamation No. 21/1992, which was promulgated on 6 April 1992. Like many other Eritrean laws, this Proclamation is promulgated only in Tigrinya and Arabic versions.[9] Its official title reads as follows: *The Eritrean Citizenship Proclamation* (ኣዋጅ ዜግነት ኤርትራ in Tigrinya).[10] This section now turns to discuss the most important features of this law.

At first glance, from the language of the first substantive provision (Article 2) of Proclamation No. 21/1992, it appears that Eritrea has a citizenship law modelled based on the so-called principle of *jus sanguinis*,[11] by which citizenship is acquired based on ancestral background. For this to happen, one or both parents of an individual must be Eritreans by birth. However, in subsequent provisions, namely Articles 3, 4, 5 and 6, Proclamation No. 21/1992 also recognises the right to citizenship based on "permission" or by naturalisation, including by adoption and by marriage. This latter example falls "clearly" neither in the category of *jus sanguinis* or its well-known comparative example of *jus soli*, which literally means "law or right of the soil," according to which a person may obtain nationality if they are born in a particular country.[12]

Nonetheless, for purposes of ascending to the highest level of political office in the country, which is that of the State President, there seems to be strong propensity towards to the principle of *jus sanguinis*. This is specifically indicated in Article 40 of the non-implemented Constitution of Eritrea (of 1997). The Constitution provides that anyone who seeks to be a candidate to the Office of the President of Eritrea shall be a citizen of Eritrea by birth.[13] However, due to its unimplemented status, any discussion about the provisions of the 1997 Eritrean Constitution does not go beyond a mere academic discourse. The Constitution does not have any practical relevance for everyday life in Eritrea.[14]

In practice, individuals who apply for an Eritrean national ID card must do so by bringing three witnesses who can testify about the accuracy of the alleged Eritrean identity of the applicant. It is not clear where this requirement emanates from, because there is no such perquisite in the most important Eritrean law on citizenship, namely Proclamation No. 21/1992. Most likely, the requirement of "three witnesses" may have been inspired by what is stipulated in Article 4(2) of Legal Notice No. 4 of 1992, the full title of which is: *Regulations for Travel Documents and Immigration*.[15] This regulation governs the way travel documents (i.e., passports and entry and exit visas) are issued as follows: "a person who wants to apply for a new travel document must prove his Eritrean citizenship by documentary evidence or by bringing three witnesses."

8 The conduct of the National Referendum was promulgated by Proclamation No. 22/1992, which was issued on 7 April 1992. A full version of this Proclamation is available at: https://tile.loc.gov/storage-services/service/ll/lleritrea/eritrean-proc-22-1992/eritrean-proc-22-1992.pdf. In Article 24, the Proclamation stipulates that to register for the National Referendum, an individual must first establish her/his Eritrean citizenship pursuant to the other newly proclaimed law, Proclamation No. 21/1992 (*Eritrean Nationality Law*), issued on 6 April 1992.

9 The English translation of the relevant Eritrean laws cited in this paper (except those which are also promulgated in their English version) is based on an unofficial translation of those laws done by Mekonnen.

10 A full version of the Proclamation is available at: https://tile.loc.gov/storage-services/service/ll/lleritrea/eritrean-proc-21-1992/eritrean-proc-21-1992.pdf. As of 4 September 2020, all Eritrean laws are freely accessible from the Digital Collection of the Gazette of Eritrean Laws of the United States Library of Congress.

11 Literally this means "law or right of blood." According to this principle, nationality is based on descent from parents who themselves are or were citizens. See in general Brownen Manby, *Citizenship Law in Africa: A Comparative Study* (New York: Open Society Foundations, 2016), https://www.opensocietyfoundations.org/uploads/f124bc3c-70e5-4680-a534-8a2f7e3e194c/citizenship-law-in-africa-a-comparative-study-20160101.pdf, p. 43; Ayelet Shachar, *The Birthright Lottery Citizenship and Global Inequality* (Cambridge: Harvard University Press, 2009), p. 120; Rey Koslowski, *Migrants and Citizens: Demographic Change in the European State System* (Ithaca: Cornell Universiry Press, 2000), p. 77; Andrew Vincent, *Nationalism and Particularity* (Cambridge: Cambridge University Press, 2002); Marteen Peter Vink and Gerard-René de Groot, "Birthright Citizenship: Trends and Regulations in Europe," EUDO Citizenship Observatory, November 2010 https://cadmus.eui.eu/bitstream/handle/1814/19578/Vink%26DeGroot.pdf?sequence=1&isAllowed=y, p. 35.

12 Manby 2016, pp. x, 43. The principle of *jus soli* is the most favoured approach by the 1961 *Convention on the Reduction of Statelessness*, and it is deemed a very effective remedy to counter statelessness. See also Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (Oxford: Oxford University Press, 2015), p. 223; Ivan Shearer and Brian Opeskin, "Nationality and Statelessness," in Brian Opeskin Richard Perruchoud and Jillyanne Redpath-Cross (eds.), Foundations of International Migration Law (Cambridge: Cambridge University Press, 2012), p. 99; Brownen Manby, *Citizenship in Africa: The Law of Belonging* (New York: Bloomsbury, 2021).

13 See also Daniel Mekonnen, "The Right to Cross-Border Identity of Individuals with Eritrean and Ethiopian Ancestry: International and Comparative Law Perspectives," *Ethiopian Yearbook of International Law* (2019), pp. 49-79.

14 For more on this, see also Daniel Mekonnen, "The State of Eritrea: Introductory Note," in Rüdiger Wolfrum, Rainer Grote and Charles Fombad (eds.) *Constitutions of the Countries of the World* (Oxford: Oxford University Press, 2016), pp. 1-32: Simon M. Weldehaimanot, "The Status and Fate of the 1997 Eritrean Constitution," *African Human Rights Law Journal* (2008) 8(1), pp.108-137; Joseph Magnet, "Constitution Making in Eritrea: Why It's Necessary to Go Back to the Future," *African Journal of Legal Studies* (2015) 8, pp. 237-272; Tesfatsion Medhanie, "Constitution-Making, Legitimacy and Regional Integration: An Approach to Eritrea's Predicament and Relations with Ethiopia," Institut for Historie, Internationale Studier og Samfundsforhold, Aalborg Universitet, 2008, https://vbn.aau.dk/ws/portalfiles/portal/16138517/DIIPER_wp_9.pdf; Mekonnen and Palacios-Arapiles Expert Report 2021, p. 4.

15 The Tigrinya version reads: ሕጋጋት ሰነድ መገሺን ኢምግረሽንን። A full version of the legal notice is available at: https://tile.loc.gov/storage-services/service/ll/lleritrea/eritrean-notice-4-1992/eritrean-notice-4-1992.pdf.

The requirement of the "three witnesses" for the issuance of national ID cards started to be a very common practice during the few years after the promulgation of Legal Notice No. 4 of 1992, despite not being stipulated in the latter instrument.[16] Such requirement is also applicable to Eritreans who have lived in the country only for a brief period, for instance, those who have returned from a third country, including Ethiopia, and have later or soon after left the country (most probably through the so-called "option" of "illegal exit").

In recent years, some Eritrean diplomatic missions have introduced a more stringent procedure for the issuance ID cards (and passports), which is neither required by the relevant laws of Eritrea nor established by prior practice in this regard (as discussed above). This was explained to us in one of the interviews we conducted for the Expert Report (of April 2019). In the interview, an Eritrean resident in Germany tells that he was specifically instructed by the Eritrean Embassy in Germany to prove that "four generations of his or her ancestors are Eritreans."[17] In our view, "[t]his requirement, which is very difficult by its nature, is not stipulated in the relevant nationality law, which is Proclamation No. 21/1992."[18] This specific account also serves to show the inconsistency between the law and the practice pertaining to the issuance of official documents, in particular with regard to the practice of Eritrean diplomatic missions.

The procedure for the issuance of ID cards via Eritrean diplomatic missions also entails the payment of the so-called "2% diaspora income tax" and the signature of a so-called "regret form" wherein Eritreans are compelled to a sing a self-incriminating statement admitting that by leaving Eritrea illegally (mainly in order to seek asylum and potentially also by avoiding the country's NMSP), they have committed a crime for which they will be held accountable whenever they return to Eritrea.[19] Having lived in the country only for a brief period does not exempt the concerned applicant from fulfilling the aforementioned two requirements, that is, to pay the "2% diaspora income tax" and to sign the "regret form". While the first requirement applies to all without exceptions, the latter requirement applies in particular to all individuals who fled the country after the 1998-2000 border conflict with Ethiopia.[20]

2.2 The practice relating to the Eritrean passport

Under Eritrean law, a passport is interchangeably known as "a travel document," or rather it is defined as one type of travel document. This is according to the formal definition of the document provided by Article 3(5) of Proclamation No. 24/1992, issued on 15 July 1992, the full title of which is: *Proclamation to Govern the Issuance of Travel Documents, and the Entry, Exit and Residence of Foreigners in Eritrea*.[21] According to the provision in Article 3(5):

> A travel document is a passport or another document, with a photo and a description of the nationality of its bearer, as may be issued by the Provisional Government of Eritrea, or by other governments, or by international organisations.

Under paragraphs 10 and 11 of Article 3, the Proclamation recognises three types of travel documents, namely: (1) regular travel documents; (2) diplomatic travel documents; and (3) special travel documents. The first and second types of travel documents are self-explanatory: a regular travel document is a passport issued to ordinary Eritrean citizens; while a diplomatic travel document is one that is issued to government officials (such as ministers, diplomats, and other senior government officials) when traveling abroad on official capacity, i.e., representing the Eritrean Government. The third type, that is, "special travel documents," is not defined by Proclamation No. 24/1992. Instead, its meaning is elaborated upon in Articles 6 and 7 of Legal Notice No. 4 of 1992 (which was issued as a supplement to Proclamation No. 24/1992).

16 In Eritrea, a Proclamation is the equivalent of what may be known in other jurisdictions as an act of parliament or legislation; and a Legal Notice is the equivalent of what may be known in other jurisdictions as a regulation or ordinance. On the Eritrean experience of law-making process, see in general Simon Weldehaimanot and Daniel Mekonnen, "The Nebulous Making Process in Eritrea" *Journal of African Law* (2009) 53(2), pp. 171-193.

17 Mekonnen and Palacios-Arapiles Expert Report 2021, p. 26.

18 Ibid, p. 27.

19 On a full discussion on this, see generally Section 4 of Mekonnen and Palacios-Arapiles Expert Report 2021.

20 See Ibid. As stated in Section 3, most Eritreans who were expelled or returned from Ethiopia, arrived in the Eritrea during or shortly after the 1998-2000 border conflict with Ethiopia.

21 The Tigrinya version reads as follows: ንኣመሃህባ ሰናዓት መገሺን፡ ምእታው ናብ ወደ ምውዳእ ካብ ኤርትራን፡ ምንባር ወጻእተኛታት ኣብ ኤርትራን ንምቁጽጻር ዝወጸ ኣዋጅ። A full version of the Proclamation is available at: https://tile.loc.gov/storage-services/service/ll/lleritrea/eritrean-proc-24-1992/eritrean-proc-24-1992.pdf.

Article 6 of Legal Notice No. 4 of 1992 regulates two different types of "special travel documents". It first defines one of the types of "special travel documents" as a "travel document for foreigners" and envisages three categories of people (including their family members) as beneficiaries of this document. These include: (a) stateless individuals residing in Eritrea; (b) individuals who have official recognition as refugees in Eritrea; and (c) those who are unable to obtain travel documents from their country of origin on various grounds. The second type of a "special travel document" is a "laissez-passer," as defined by Article 7 of Legal Notice No. 4 of 1992. It can be issued to the following category of individuals: (a) Eritreans who want to return home from abroad (presumably, those who never had an Eritrean passport or ID at the time of their return from another country); (b) Eritreans who may have lost their travel document while aboard; (c) those who want to leave Eritrea for a short period of time and under special circumstances. Legal Notice No. 4 of 1992, however, does not clarify what "special circumstances" mean. It appears that the third category of people in Article 7 may be those who are already identified as stateless individuals and/or individuals who have official recognition as refugees in Eritrea under Article 6.

The discussion now centres on the way travel documents (or passports) is issued. Under Article 5 of Proclamation No. 24/1992, the issuance of diplomatic travel documents and special travel documents is the exclusive mandate of the Minister of Foreign Affairs, whereas the issuance of regular travel documents (or regular passports) is the exclusive mandate of the Minister of Internal Affairs. In our view, it is the issuance of the second type of document (i.e., regular passport), which is often discussed in the context of asylum and family reunification applications by Eritreans, thus we pay particular attention to that aspect in the following paragraphs.

At the outset, it needs to be recalled that the Ministry of Internal Affairs no longer exists in Eritrea. It ceased to exist in the mid-1990s, after which all responsibilities related to the issuance of regular travel documents (including exit visas, which we will explain shortly), and other immigration services, are being handled by the Department of Immigration and Nationality (which was a sub-division of the former Ministry of Internal Affairs). The Department also handles the process of issuance of national ID cards. According to Article 5(3) of Proclamation No. 24/1992, a regular passport may be issued to any Eritrean who wants to travel abroad for work, visit, study or any other *valid* reason. In Eritrea, access to a regular passport is a privilege rather than a right. As shown in our recent Expert Report on this subject, in Eritrea, access to passport is:

> … directly linked with a person's presumed ability to travel outside the country. In Eritrea, citizens within the so-called age limit of the NMSP are not allowed to leave the country legally (or to travel at all). Only a certain category of people, listed by the UKUT in their latest Country Guidance on Eritrea (*MST and Others*), benefit from the rare opportunity of lawful exit from Eritrea.[22] We describe these people as forming part of the category of individuals entitled to the "privilege of lawful exit" from Eritrea.
>
> According to *MST and Others*, the list of individuals who would normally benefit from the rare "privilege of lawful exit" from Eritrea includes: (i) men aged over 54; (ii) women aged over 47; (iii) children aged under five (with some scope for adolescents in family reunification cases); (iv) people exempt from national service on medical grounds; (v) people travelling abroad for medical treatment; (vi) people travelling abroad for studies or for a conference; (vii) business and sportsmen; (viii) former freedom fighters (*tegadelti*) and their family members; and (ix) authority representatives in leading positions and their family members.[23] Only people within this list may have access to a passport in Eritrea.[24]

This means that it is impossible for anyone outside of the age range indicated in the excerpt above to obtain a regular passport (the same is true about exit visa). In the same Report referenced above, we cite several other sources, including primary data from immigration lawyers and experts in different jurisdictions, in support of this claim. The sources note that it is very uncommon to find Eritrean asylum applicants in possession of an Eritrean passport. A refugee service provider in Egypt, for instance, noted that: "99% of the Eritrean refugees who receive services in [their] centre, don't bring identification documents (such as IDs, birth certificates, or passports)," and that an Eritrean passport is the least common document they would

22 *MST and Others (national service – risk categories) Eritrea CG* [2016] UKUT 00443 (IAC), para. 4.

23 *Ibid*.

24 Mekonnen and Palacios-Arapiles Expert Report 2021, p. 29 [footnotes omitted].

see in their dealings with Eritreans.[25]

For international travel, Article 11 of Proclamation No. 24/1992 stipulates three main requirements, namely: a passport, an exit visa, and an international health certificate. The law makes it clear that no person can exit the country without these three requirements. The requirement of an "exit visa" for international travel is further buttressed by Article 17(1) of Legal Notice No. 4 of 1992, which explicitly stipulates that any person, be it Eritrean or a foreigner, needs to have an "exit visa" to leave the country. To our knowledge, as we have noted elsewhere, Eritrea is one of the very few countries in the world that requires their citizens to obtain an exit visa before they travel abroad.[26]

Access to a passport and an exit visa is far more difficult, as shown above, for those who fall within the age range of the NMSP. However, neither the Proclamation No. 24/1992 nor the Legal Notice No. 4 of 1992 stipulates the fulfilment of the NMSP as a requirement or precondition for the issuance of a passport or an exit visa. The practice of aligning the entitlement to a passport and an exit visa to the fulfilment of the NMSP, like many other government practices in Eritrea, is not based on officially promulgated law or policy. Rather, it is based (most likely) on written or unwritten administrative directives (locally known as "circulars") that may have been issued either by the Office of the State President or the Ministry of Defence. The origins of these, however, are not easily traceable. This is part and parcel of the markedly inconsistent nature of the official conduct of business in Eritrea, which is explained by Schröder as follows:

> In its governmental practice the Eritrean Government habitually ignores the official Proclamations and Legal Notices when it suits its interest. Its governmental practice overwhelmingly is based on internal directives, which were never made public, or on oral instructions usually emanating directly from the autocratic president. This reflects the "governance practice" of the EPLF during the liberation struggle, which the political leadership of Eritrea has not outgrown after independence.[27]

The requirements explained in this section with regard to the issuance of a regular passport equally apply to Eritrean citizens who have spent only short periods in Eritrea. Moreover, the procedure via Eritrean diplomatic missions for the request of a regular passport also encompasses the payment of the "2% diaspora income tax" and the signature of the "regret form" as discussed in the earlier sub-section.

25 Telephonic interview with Refugee Service Provider in Egypt (21 October 2020), as cited in Mekonnen and Arapiles Expert Report 2021, p. 29.

26 Ibid, p. 29.

27 Günter Schröder, "Marriage, Vital Events Registration and Issuance of Civil Status Documents in Eritrea," May 2017, https://migrationlawclinic.files.wordpress.com/2017/05/paper-gc3bcnther-schrc3b6der-eritrea-marriage.pdf, p. 3.

3. Recruitment of returnees into the NMSP

This section focuses on the (re)recruitment of returnees to the NMSP, and to that end, it is important to start with a brief overview of Eritrea's NMSP, it being the most common reason for the exodus of Eritrean refugees from the country over the past twenty or more. The NMSP "stands out as the most devastating government policy of the post-independence era."[28] It started in the early 1990s in the form of a national development and reconstruction programme, but which also included an initial 6-month compulsory and intensive military training programme.

At present, the most important law pertaining to the NMSP is Proclamation No. 82/1995.[29] Under this law, all adult Eritreans (men and women) between the age of 18 and 40 are obliged to complete a compulsory NMSP of 18 months. The service involves a military training of six months and a 12-month of "active military service and development tasks in military forces" (Article 8 of Proclamation No. 82/1995). In the aftermath of the 1998-2000 border conflict with Ethiopia, but mainly after Eritrea's major political crisis of September 2001, the NMSP ended up becoming an indefinite scheme of coerced conscription through which systemic and widespread human rights violations have taken place in the country, giving rise to thousands of victims of such violations. This has been sufficiently established, among other things, by the two major reports of the UN Commission of Inquiry on Human Rights in Eritrea (COIE), published in June 2015 and June 2016.[30]

Over and above the various human rights violations that are perpetrated in the context of the NMSP, the programme has now become indefinite by nature. This became more embedded with the promulgation of the so-called Warsai-Yikealo Development Campaign (WYDC) in May 2002, wherein the maximum age limit for NMSP was extended up to 57 years of age for men and 47 years of age for women.[31] The People's Army (also called militia) was created in March 2012, and it functions as an extension to the NMSP. The government also recruits underage children, as is widely reported by various sources.[32] This happens mainly in the context of compelling high school students to finish their final year of schooling (Grade 12) at the main military training centre in Eritrea, the Sawa Military Training Centre, where formal education and the requirement of a 6-month military training programme are conducted in tandem.

For all practical purposes, the NMSP has now become a very potent tool of the Eritrean Government in effectively controlling the Eritrean population, thereby pre-empting any potential danger of popular uprising or other sorts of political opposition to the government's grip to power. The exercise of control over conscripts is also used, among other things, in order to exact forced labour from them for the benefit of the government.[33] With this in mind, Palacios-Arapiles argues that the NMPS can be said to reach the threshold of slavery as defined by the relevant corpus of international law.[34]

As stipulated by law and as a matter of general practice, recruitment to the NMSP is applicable to any adult member of the society above the age of 18 (sometimes earlier, as stated above), including returnees from Ethiopia. The law does not exempt the latter group from the NMSP.[35] It bears recalling that most Eritrean re-

28 Mekonnen 2019, p. 83; see also Daniel Mekonnen, "Transitional Justice Implications on the Use of Child Soldiers in Eritrea," in Ilse Derluyn et al (eds.), *Re-Member: Rehabilitation, Reintegration and Reconciliation of War-Affected Children* (Antwerp: Intersentia, 2021), pp. 263-281; See also Sara Palacios-Arapiles, "The Eritrean Military/National Service Programme: Slavery and the Notion of Persecution in Refugee Status Determination," *Laws*, 10(2), 28 pp. 1-39; Sara Palacios-Arapiles, "The True Human Rights Situation in Eritrea: The New UK Home Office Guidance as a Political Instrument for the Prevention of Migration," RLI Working Paper No. 14, July 2015, https://sas-space.sas.ac.uk/6097/1/RLI%20Working%20Paper%20No.14.pdf; Sara Palacios-Arapiles, "The Exercise of Control over Eritrean Conscripts within the National Service" in Mirjam van Reisen et al (eds.), *Human Trafficking in Libya* (Bamenda, Cameroon: Langaa Research & Publishing CIG, forthcoming 2022); Gaim Kibreab, "Forced Labour in Eritrea," *Journal of Modern African Studies* (2009) 47(1), pp. 41-72.

29 The full title of the law is ሓዋጅ ሃገራዊ ኣገልግሎት (National Service Proclamation), available at https://tile.loc.gov/storage-services/service/ll/lleritrea/eritrean-proc-82-1995/eritrean-proc-82-1995.pdf.

30 *Report of the UN Commission of Inquiry on Human Rights in Eritrea*, A/HRC/29/42, 4 June 2015 (First Report); *Report of the UN Commission of Inquiry on Human Rights in Eritrea*, A/HRC/32/47, 8 June 2016 (Second Report).

31 Palacios-Arapiles 2022 (forthcoming); Palacios-Arapiles 2021; Mekonnen 2009; Mekonnen 2012.

32 Mekonnen 2012.

33 Palacios-Arapiles 2022 (forthcoming).

34 Palacios-Arapiles 2022 (forthcoming). See also Palacios-Arapiles 2021.

35 Proclamation No. 82/1995 does not permit exemptions except for former freedom fighters (Article 12) and citizens who suffer from disabilities, such as invalidity or blindness (Article 14(5)). However, the former group, as well as those who have been already discharged or have completed NMSP, are subject to compulsory service in the national "reserve army," formally until they reach the age of 50 (Article 23(2)), but in reality this can extend a decade more. Palacios-Arapiles 2022 (forthcoming). Afterwards, they are recruited into the People's Army (also called militia).

turnees (or expellees) from Ethiopia arrived in the country during the 1998-2000 border conflict with Ethiopia or shortly after that. This was the time when Eritreans were also expelled from Ethiopia in large numbers and under extremely difficult circumstances. In recent years, returnees from Ethiopia have only arrived in Eritrea in very sporadic instances and in less numbers, although the exact estimate cannot be established.

During the initial rounds of expulsions from Ethiopia, returnees were given a so-called "grace period" of one year during which they could find employment opportunities or pursue educational programmes without having to report to the Sawa Military Training Centre for NMSP. However, in 2003, the education system was integrated into the WYDC, and in 2006, the Government closed the only accredited university in the country, the University of Asmara, and therefore, no one can longer undertake university studies in Eritrea. Presently, there exists centers for vocational training or higher education colleges, however higher education also includes military training.[36] The authors are unaware whether the one year "grace period" practice remains; lack of current information on that may be because Eritreans are no longer returned to the country on the basis of the border conflict (1998-2000), and thus, the practice might have consequently ceased.

In the current Eritrean context, where the practice of the NMSP is so pervasive (affecting all able-bodied members of the society) there is hardly a possibility for any individual to avoid (re)recruitment to the NMSP based on such temporary exception, or any other reason. The UK Upper Tribunal Immigration and Asylum Chamber, in the latest Country Guidance case on Eritrea *MST and Others*, only included with the group of persons "likely not to face a real risk of persecution or serious harm", i.e.(re)assignment to the NMSP, the following groups: "persons who are trusted family members of, or are themselves part of, the regime's military or political Leadership"; and, a "further *possible* exception, requiring a more case specific analysis", persons "who fled (what later became the territory of) Eritrea during the War of Independence" (which should not be confused with the border conflict of 1998-2000).[37] Returnees or expellees from Ethiopia, or Eritrean citizens who only spent brief periods in the country, are not included *per se* within any of said groups. Even those who may have left the country during the first year after expulsion from Ethiopia, would be presumed (nearly certainly) to have also avoided the obligation of conscription, and be perceived on (forcible) return as evaders or deserters.

36 Palacios-Arapiles 2022 (forthcoming).

37 *MST and Others (national service—risk categories) Eritrea CG* [2016] UKUT 00443 (IAC), 7 Oct 2016, p. 3 (emphasis added).

4. Comparing the Eritrean and the Ethiopian citizenship processes[38]

Citizenship issues in Africa are very much related to colonial legacies of African national borders. In that sense, like in all African countries, it is important to understand that the national boundaries of Eritrea and Ethiopia are the result of European colonialism, and thus their nationality laws also have some gaps, which are related to the way their boundaries were and are marked. As noted by Weldehaimanot and Mekonnen, the sad reality of African national borders, primarily designed and fixated by European colonisers, has had the consequence of unmindfully dividing sociologically similar groups, ascribing to them different legal identities or citizenships.[39] This problem is very much felt by people who live in the common border areas, such as the Afar, the Kunama and the Tigrinya ethnic groups.[40]

Under normal peaceful circumstances, Eritrea and Ethiopia were supposed to provide for the possibility of allowing dual nationality, particularly for people in the border areas. Nonetheless, the modern history of the two countries is far from that; it being fundamentally and perennially shaped by recurring problems of inter-state and intra-state armed conflicts (such as the one currently taking place in the northern part of Ethiopia, since November 2020, in which active involvement of Eritrean troops has been reported by various credible sources).[41] It is because of such problems of persisting armed conflicts and human rights violations that there still exists in both countries a pervasive problem of discrimination against individuals having ancestral roots in the other neighbouring country.[42] This is adequately corroborated by several partial awards delivered by the Eritrea-Ethiopia Claims Commission (EECC) – an international arbitral commission that was established in the context of the 1998-2000 border conflict between the two countries.[43]

The problem of pervasive discrimination on account of individuals' ancestral background in both countries takes various forms. A remarkable one is the "widespread usage of derogatory words in reference to"[44] the group of people under discussion, an entrenched "practice that seems to have implicit official blessing from government authorities,"[45] as also articulated in the following paragraph:

> The far-reaching implication of this practice is not limited to the mere usage of derogatory language, including in semi-official channels. Rather inappropriately, these expressions are oftentimes conflated with highly repugnant behaviours and actions, such as treason, a typical criminal act subject to the death penalty according to operational criminal laws in both countries. Such highly stigmatising societal and political attitudes have given way to a repugnant belief system and practice that equates the group of people under discussion with all that is against the national interest of the country in question, depending on the national context.[46]

In substantive terms, however, it is also important to have a closer look at the respective citizenship laws of Eritrea and Ethiopia, by way of providing an answer to one of the key questions posed by this paper: who are the group(s) who may be entitled to one/both citizenship/s but in practice can obtain neither? This is the question to which this paper now turns.

38 The entire Section 4 heavily relies on Mekonnen 2019, pp. 66-72.

39 See Simon Weldehaimanot and Daniel Mekonnen, "Favourable Awards to Trans-Boundary Indigenous Peoples," *Australian Indigenous Law Review* (2012) 16(1), pp. 60-76.

40 Mekonnen 2019, p. 53.

41 Mekonnen 2019; see also Daniel Mekonnen and Paulos Tesfagiorgis, "Rewinding the Clock of History: Eritrea and Ethiopia back to 1991?," in a special edition of *Afriche e Orienti* (2022, forthcoming).

42 Mekonnen 2019, p. 68.

43 Eritrea Ethiopia Claims Commission (EECC), Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27–32, 17 December 2004; EECC, Partial Award, Civilians Claims, Ethiopia's Claims 5 (17 December 2004).

44 Mekonnen 2019, p. 67.

45 Ibid.

46 Ibid. The observations made above are also based on the lived personal experience of Mekonnen, who has direct ancestral background in both countries. In the context of his work on the current situation of human rights violations in Eritrea, he has been repeatedly subjected to political vilifications and death threats based on his ancestral background.

4.1 The Ethiopian practice

There are two important laws related to the governance of citizenship rights in Ethiopia: the 1997 Constitution of the country (Article 6 being the most relevant provision) and Proclamation No. 378/2003, the official title of which is: *The Ethiopian Nationality Proclamation* (promulgated on 23 December 2003).[47] The latter is a successor to the original nationality law of Ethiopia dating back to 1930. Ethiopia has one of the oldest laws of citizenship in Africa. Despite that, it also has well-known and entrenched problems of judicial under-development, including with respect to the cardinal principle of the rule of law. For the purposes of the present discussion, the most important nationality laws are the 1994 Constitution and Proclamation No. 378/2003.

One of the most important features of the Ethiopian law of citizenship is the prohibition of dual nationality, as stipulated by Articles 19 and 20 of Proclamation No. 378/2003. However, the case of Eritreans in Ethiopia was treated as a "special case," particularly before the 1998-2000 border conflict during which time Eritreans had the "privilege" of retaining Ethiopian citizenship even after acquiring Eritrean citizenship. This was the case even though Article 11 of the old Ethiopian law of nationality (of 22 July 1930), which was later replaced by Proclamation No. 378/2003, explicitly stipulated that Ethiopian nationality can be lost if a person acquires another nationality. This was a very clear and unmistakable case of "preferential" or "privileged" treatment of Eritreans by the previous government in Ethiopia. This is also acknowledged by the EECC in the following manner:

> [Ethiopia] allowed Ethiopians who had also acquired Eritrean nationality to continue to exercise their Ethiopian nationality, while agreeing with Eritrea that these people would have to choose one nationality or the other at some future time. The war came before these matters were resolved.[48]

According to Mekonnen, the "preferential" treatment of Eritreans was made possible "due to the very warm relationship enjoyed by the two major political forces of the day in both countries,"[49] namely the Eritrean People's Liberation Front (EPLF) in Eritrea and the Tigray People's Liberation Front (TPLF). Even as a passing remark, it may be important to note that this "preferential" treatment of Eritreans by the former government of Ethiopia was one of the main reasons that later become a cause of fragmentation within the TPLF itself. It was also one of the core issues that gave rise the devastating border war of 1998-2000, the far fetching ramifications of which are still deeply felt and experienced in both countries.

The following observation by Mekonnen, partially based on the findings of the Eritrea-Ethiopia Border Commission (EEBC) (the other international arbitral commission established in the context of the 1998-2000 border conflict), are also important for the purpose of this paper. The "preferential" treatment that was given to Eritreans (by the Ethiopian Government) was described by the EEBC as "quite commendable."[50] This was a tentative arrangement prompted by the peculiar circumstances surrounding the emergence of Eritrea as a *de facto* independent state in 1991, after winning a liberation war of thirty years against Ethiopia. According to the EEBC, this tentative approach was not to last forever, as both countries had an agreement to provide for an alternative and long-term solution. The border conflict erupted in May 1998 before such alternative could be put in place.[51]

Finally, there is a 2004 Directive issued by the Ethiopian Government (the full title of the which is: *Directive Issued to Determine the Residence Status of Eritrean Nationals Residing in Ethiopia*), that bears our attention.[52] Article 1 of the Directive defines its objective by providing the following context:

> When Eritrea became an independent country by the Referendum held in Eritrea in 1993, persons

47 As promulgated in *Federal Negarit Gazetta*, Volume 10, Number 13, also available at https://www.refworld.org/pdfid/409100414.pdf.

48 EECC, Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, para 59. The basis for this is an agreement reached between Eritrea and Ethiopia in August 1996 at the Fourth Ethio-Eritrean Joint High Commission Meeting, cited in para 52 of the same Partial Award. Accordingly, implementation of this agreement was subject to "granting the freedom to trade and to invest in either country for both nationals of Ethiopia and Eritrea." There were concerns that on the Eritrean side, the promise in this regard was not fulfilled to the satisfaction of Ethiopian traders/investors, giving rise on the part of the latter to a sense of resentment, exacerbated by the privileged treatment Eritreans received in Ethiopia before the outbreak of the war in 1998.

49 Mekonnen 2019, p. 70.

50 EECC, Partial Award, Civilians Claims, Eritrea's Claims 15, 16, 23 & 27-32, para 59; EECC, Partial Award, Civilians Claims, Ethiopia's Claim 5, 17 December 2004.

51 Mekonnen 2019, p. 70

52 A full version of the directive is available at: https://www.refworld.org/docid/48abd56c0.html.

> of Eritrean origin who were Ethiopian nationals became Eritrean nationals or their right to Eritrean nationality was established. Numerous persons of Eritrean origin have continued to reside in Ethiopia since long before the Eritrean independence. Since it has been found necessary to determine the residence status of those Eritrean nationals who have continued to live in Ethiopia, the Security, Immigration and Refugee Affairs Authority has issued this Directive.

Article 4.2 of the above Directive provides that a "person of Eritrean origin who has not opted for Eritrean nationality shall be deemed as having decided to maintain his or her Ethiopian nationality and his or her Ethiopian nationality shall be guaranteed." In Article 4.3, the 2004 Directive also provides that an Eritrean "who desires to regain his or her Ethiopian nationality may be readmitted to his or her Ethiopian nationality based on Article 22 of the new Nationality Proclamation" (meaning Proclamation No. 378/2003).

Unlike the practice in Eritrea, which will be discussed below, in Ethiopia there was a possibility (or rather a narrow window of opportunity) introduced by the 2004 Directive for Eritreans to obtain Ethiopian citizenship if they wanted to avail themselves of that possibility. However, the 2004 Directive was time-limited and is no longer operative, as also established by the UK Upper Tribunal Immigration and Asylum Chamber in *ST (Ethnic Eritrean – nationality – return)*.[53] Article 2 of the Directive clearly states that such possibility only applies to those who were resident in Ethiopia when Eritrea became independent and who had continued so to reside up until the date of the Directive.[54] The following additional observation from the same Tribunal, based on the expert opinion of Günter Schröder and John Campbell, is also illustrative on how the 2004 Directive has been implemented:

> The fact that the 2004 Directive was so restricted is further borne out by the evidence, which I accept, from the experts, to the effect that the opportunities in Ethiopia itself for making use of the 2004 Directive were extremely limited, with registration being possible only between March and June 2004.[55]

Moreover, according to the expert opinion of Campbell, in addition to its "temporal limitation,[56] the implementation of the 2004 Directive was replete with several inconsistencies. He believed that the implementation of the 2004 Directive had expired at the latest in 2006/2007, also adding the following remarks:

> At the time that the Directive ceased to operate, there were still those trying to make use of its provisions. Anyone who persisted with such attempts was detained for three months and then released without being given the relevant documentation. In fact, Dr Campbell categorised the way in which the 2004 Directive had been implemented as arbitrary. A huge amount of discretion lay in the hands of local officials, some of whom were susceptible to bribery. Dr Campbell knew of a particular instance where a woman and her mother had wished to be registered but had been jailed for their pains. Eventually, a judge had ordered that the woman was entitled to a kebele card, pursuant to the Directive.[57]

The following statement by Schröder also strengthens the claim of inconsistency made by Campbell:

> Some who went to register were turned away on the basis that they did not need to do so since they had not voted or been given an Eritrean ID card. This confusing picture could be attributed to the fact that much depended on the whim of the officer in charge of the registration process in a particular place.[58]

In sum, there was some space in Ethiopia (although for a limited period) that may have enabled some Eritreans to (re)acquire Ethiopian citizenship. But as shown above, it was replete with several inconsistencies. The Eritrean practice is completely different from that of Ethiopia as will be shown in the following section.

53 See *ST (Ethnic Eritrean – nationality – return) Ethiopia CG* [2011] UKUT 00252(IAC), para 115 (and para 52 of the Appendix of the same judgement).

54 Ibid, para 115.

55 Ibid.

56 Ibid, para 52 of the Appendix.

57 Ibid, para 52 of the Appendix.

58 Ibid, para 92 of the Appendix.

4.2 The Eritrean practice

In the Eritrean context, the governance of citizenship rights is rather clear, as also discussed in Section 2 above. In law and practice, Eritrea has never permitted the right to dual nationality (as subsequent of acquisition of Eritrean citizenship) for Ethiopians who lived in Eritrea – even in limited instances as has been tried by the 2004 Directive of Ethiopia discussed in the preceding section.

Interestingly, however, Eritrean law permits the right to dual nationality to the extent that it is practiced by Eritreans who live abroad. This is clearly stipulated in Paragraph 5 of Article 2 of the *Eritrean Nationality Law* (Proclamation No. 21/192). It makes an exception for Eritrean citizens living abroad and who have obtained the nationality of other countries. It gives individuals the option of retaining their foreign nationality, provided they have a good reason to do so. This approach is prompted by the following considerations:

> Due to a prolonged history of forced migration, Eritrea has one of the largest diaspora communities in the world in which context many Eritreans have obtained the nationality of other countries, long before the emergence of Eritrea as an independent state. During the war of liberation, many in the Eritrean diaspora served as active and committed members of the liberation front, the EPLF, supporting the armed struggle for liberation in various forms, substantially, no less than what could have been done by the freedom fighters in the battlefield. In real terms, it was too costly and persuasively impossible for the newly independent State of Eritrea to categorically coerce many of its citizens to abandon many entitlements accrued to them by virtue of their prolonged stay in their adopted countries. Moreover, in proportion to its very small population size, the total number of Eritreans who live outside of the country is too big, prompting the Eritrean Government to adopt a less restrictive approach towards dual nationality.[59]

59 Mekonnen 2019, p. 71.

5. Concluding remarks

Most Eritreans flee the country without any identify-proving documents, thus the task of establishing their Eritrean national identity becomes challenging in asylum and family reunification procedures. A further lawyer of complexity is added to such procedures when the concerned applicant has only spent a short period in Eritrea. This is particularly true for those who returned or were expelled from Ethiopia after the border conflict of 1998-2000, to find themselves leaving Eritrea after a brief stay in the country.

In Section 2, we discussed the law and practice related to the issuance of Eritrean identity-providing documents. In the Eritrean context, besides the national ID card and the passport, there are other official documents issued in Eritrea, namely the residence card and the ration coupon, which have probatory value for the establishment of the identity of individuals. As a matter of general practice, access to a passport is extremely restricted in Eritrea. It is directly linked with a person's presumed ability to travel outside the country; and this issue by itself is linked with the country's pervasive practice of militarisation, epitomised by the NMSP. Only a certain category of individuals is entitled to what we call the "privilege of lawful exit" from Eritrea, and ordinary Eritreans within the age range of the NMSP cannot obtain a passport. The same is true about returnees from Ethiopia. Access to an Eritrean ID card may be easier, including for returnees from Ethiopia – provided the most essential requirements are fulfilled by the concerned applicant. Key among these requirements is the production of three adult witnesses who can attest to the fact of Eritrean ancestral roots of the applicant. The procedure under Eritrean diplomatic missions is subject to onerous preconditions, which are often unbearable for many applicants, and entails the payment of the "2% diaspora income tax" and the signature of the "regret form".

Our findings in Section 3 show that the requirement of fulfilment of the NMSP is obligatory to all Eritreans who are above the age of 18 years, including those who have been expelled from Ethiopia and returned to Eritrea for a brief period. At the height of the expulsions (during the 1998-2000 border conflict and few years after that) returnees from Ethiopia benefited from what we call a temporary "grace period" of one year during which they could try find employment opportunities or pursue educational programmes without having to enrol onto the NMSP immediately after their return from Ethiopia. However, the practice applied only on temporary basis. Eritrean law does not exempt them from the NMSP, and after the border conflict, the practice in that regard, through the WYDC, got stricter and the NMSP extended indefinitely.

Lastly, in Section 4, we engaged in a comparative analysis of the nationality laws of Eritrea and Ethiopia. We showed that in Ethiopia there was a limited window opportunity by which Eritreans living the country could have availed themselves of the right to obtain Ethiopian nationality. This was possible through the so-called *Directive Issued to Determine the Residence Status of Eritrean Nationals Residing in Ethiopia* (issued in January 2004), the implementation of which was replete with several inconsistencies, as sufficiently established by the UK Upper Tribunal Immigration and Asylum Chamber in *ST (Ethnic Eritrean – nationality – return) Ethiopia CG*. In comparative terms, however, there was some effort in Ethiopia to give the opportunity to Eritreans who lived in the country to obtain Ethiopian nationality should they decide to do so by officially renouncing their Eritrean nationality. In contrast, there was no such possibility in Eritrea. In very broad terms, however, we have also showed that individuals having ancestral backgrounds in both countries suffer from numerous instances of discrimination in both countries. We identify this as one of the most entrenched malpractices in both countries, owing to their prolonged history of recurring armed conflicts and political repression.