

DR Mekonnen & JL Pretorius

Prosecuting the main perpetrators of international crimes in Eritrea: Possibilities under international law

If I commit the slightest harmful act to the national interest or to that of Eritrea, it would be just, even if I am killed by my own biological brother.

Goddena Harnet Kab Asmera

A supposedly Senior Eritrean Government Official using a pseudonym

5 September 2007

Summary

A growing international consensus has emerged in the last few decades on the need to prosecute egregious violations of international law. In this regard, the establishment of the International Criminal Court (ICC) is seen as a landmark development in the global protection of international human rights and humanitarian law standards. Since its independence in 1991, Eritrea has experienced heinous violations of international law. The violations amount to international core crimes, as defined by the ICC Statute and customary international law. These include crimes against humanity, war crimes and the crime of aggression. There are consistent reports, as well as documentary and testimonial evidence from reliable sources on this. Accordingly, a number of high-ranking government officials may be reasonably suspected of involvement in the perpetration of international crimes in Eritrea. However, Eritrea is not a state party to the ICC Statute and this means that many of the international crimes perpetrated in the country may not fall under the jurisdiction of the ICC. On the other hand, violations are continuing with impunity, as there are no effective domestic remedies to rectify the problem, giving rise to the need for immediate intervention by the international community. The article discusses the legal implications of the ICC Statute with regard to international crimes committed in Eritrea before and after the coming into effect of the Statute. Drawing on the latest developments of international criminal law, it explores possible options for the prosecution of the main perpetrators of international crimes pursuant to Security Council referral as stipulated under article 13(b) of the ICC Statute.

Vervolging van die hoof plegers van internasionale misdade in Eritrea: Moontlikhede ingevolge die internasionale reg

'n Groeiende internasionale konsensus het ontstaan oor die afgelope paar dekades betreffende die noodsaak om growwe skendings van die internasionale reg te vervolg. In hierdie opsig word die instelling van die Internasionale Strafhof (ISH) gesien as 'n mylpaal in die globale beskerming van internasionale standaarde met betrekking tot menseregte en die humanitêre reg. Sedert onafhanklikwording in 1991, het Eritrea gruwelike skendings van die internasionale reg beleef. Die skendings kom neer op internasionale kernmisdade, soos gedefinieer deur die ISH-statuut en die internasionale gewoontereg. Dit sluit misdade teen die mensdom, oorlogsmisdade en die misdaad van aggressie in. Daar is aanhoudende

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berigte, sowel as dokumentêre en getuiebewyse van betroubare bronne hieroor. Gevolglik kan 'n aantal hoë regeringsamptenare redelikerwys van betrokkenheid by die pleging van internasionale misdade in Eritrea verdink word. Eritrea is egter nie 'n staatsparty tot die ISH-statuut nie en dit beteken gevolglik dat baie van die internasionale misdade wat in die land gepleeg is nie onder die jurisdiksie van die ISH val nie. Aan die ander kant vind die skendings straffeloos plaas, aangesien daar geen effektiewe plaaslike remedies bestaan om die probleem reg te stel nie, wat die noodsaak van onmiddellike ingryping deur die internasionale gemeenskap onderstreep. Die artikel bespreek die regsimplikasies van die ISH-statuut met betrekking tot die internasionale misdade wat in Eritrea voor en na die inwerkingtreeding van die Statuut gepleeg is. Met verwysing na die nuutste ontwikkelings in die internasionale reg, word moontlike opsies vir die vervolging van die hoof plegers van internasionale misdade, volgend op 'n verwysing van die Veiligheidsraad, soos bepaal ingevolge artikel 13(b) van die ISH-statuut, bespreek.

1. Introduction

The coming into force of the Statute of the International Criminal Court (ICC) on 1 July 2002 has heralded the dawn of a new era in the protection of human rights. This has added momentum to the growing international consensus that egregious violations of human rights should never be left unaccounted. The ICC enjoys the broadest jurisdiction to try individuals suspected of international crimes.¹ This development has particular relevance in relation to the deteriorating state of affairs in Eritrea. Since the country's independence in 1991, Eritrean government officials have committed serious violations of human rights that attract universal concern. There is consistent and reliable testimony from various sources attesting to this fact.

The perpetration of international crimes is continuing with impunity, especially since September 2001, as there are no effective domestic remedies to rectify the problem. This gives rise to the need for intervention by the international community through a possible jurisdictional trigger mechanism of the ICC. The crisis demands urgent response, especially as far as the rights and interests of victims of violations of international law are concerned. Drawing on the latest developments in international criminal law, this article explores the possibility of prosecuting the main perpetrators of international crimes in Eritrea.

Grave human rights violations entail legal implications under international law. An increasingly important means of challenging the perpetration of international crimes is the punishment of persons responsible for such violations through the principle of universal jurisdiction or ICC prosecution. In the context of countries such as Eritrea, other options of transitional justice, such as truth and reconciliation commissions, may also be taken as alternative or supplementary approaches to dealing with a history of human rights violations. Leaving this issue for another contribution,² this article focuses on prosecution as a major option of transitional justice.

1 For a definition of "international crimes", see section 4 below.

2 For a detailed discussion on other options of transitional justice in the context of Eritrea, see Mekonnen 2008.

2. Contextual background

Eritrea is one of the youngest countries in the world and the youngest in Africa. The country gained its independence from neighbouring Ethiopia in 1991 under the dominant leadership of the Eritrean People's Liberation Front (EPLF). Soon after liberation, the EPLF established itself as a provisional government until such time when the country would draft its constitution and conduct free and fair elections. In 1993, Eritrea was officially recognised as an independent state after a UN-monitored national referendum, which resulted in an overwhelming vote³ for national sovereignty. Between 1993 and 1994 the EPLF proposed a four-year transition to democratic governance, established a commission entrusted with the drafting of a constitution and renamed itself the Peoples' Front for Democracy and Justice (PFDJ). The constitutional commission established by the PFDJ finalised its task in 1997 by formulating the first ever 'democratic' constitution,⁴ which was soon ratified by the Eritrean government as the supreme law of the land. Until then, the country was experiencing a relatively peaceful political transition.

However, Eritrea was plunged into a catastrophic war with Ethiopia between 1998 and 2000. The conflict ended officially on 18 June 2000 with the ratification of the Agreement on Cessation of Hostilities between Eritrea and Ethiopia. The truce finally led to the Algiers Peace Agreement, which was signed on 12 December 2000. A boundary commission, established pursuant to the Algiers Peace Agreement, resolved the border conflict in April 2002 by a final and binding decision which delimitedated the common border between the two countries.⁵ Due to Ethiopia's intransigence to genuinely implementing the decision of the boundary commission and Eritrea's diplomatic and political ineptness, the contested border remained undemarcated on the ground. As a result, a situation of "no war, no peace" has persisted between the two countries for the last six years. However, in a strictly legal sense, there is no state of emergency in Eritrea.

Ever since the outbreak of the new war with Ethiopia, the Eritrean government has exploited the conflict as a pretext not to implement the constitution that was drafted and ratified with its full support. In effect, the country has been ruled without a democratic constitution in force since independence for more than seventeen years. Using the same fabricated excuses of "war and threats of

3 According to Connell, the 1993 referendum was "the first and last national ballot independent Eritrea ever held". See Connell 2005:233.

4 Apart from the controversial issues of legitimacy revolving around it, the 1997 Eritrean Constitution also remains unimplemented. As will be seen later, Eritrea is the only country in the world without an operative constitution. See Mekonnen 2006:27 and 50. On this issue, see also generally Weldehaimanot 2008.

5 Accordingly, the flashpoint of the border conflict, Badme, was awarded to Eritrea. See Eritrea-Ethiopia Boundary Commission, *Decision on the Delimitation of the Border between Eritrea and Ethiopia, Chapter 8, Dispositif*, award of 13 April 2002. According to a separate judgment rendered by another arbitral tribunal, the Eritrean government violated international law by initially invading the flashpoint of the conflict, which before the war was under peaceful administration of Ethiopia. See Eritrea-Ethiopia Claims Commission, *Partial Award, Jus Ad Bellum, Ethiopia's Claim 1-8*, award of 19 December 2005, paras 14-16.

war”, the government postponed previously scheduled general elections⁶ and consequently the long-awaited political transition to democracy was frustrated. A combination of the reluctance of the government to facilitate democratic transition and the consequences of the recent war has precipitated unprecedented economic, social and political crises since the country’s independence in 1991, including severe disagreement among senior government officials. As from September 2001, the government has intensified the detention of senior government officials, critics, civil servants, business people and elders who called and supported a popular demand for democratisation. In the post-2001 era, Eritrea was literally converted into a police state. As a result, the country has seen the most disastrous political crisis of its brief post-independence history, which has resulted in gross human rights violations on an alarming scale.

The Eritrean government adopted a constitution in 1997, but has never implemented it. It had a peripheral parliament but only until February 2002. There were also privately-owned independent media outlets but only between 1997 and 2001. It has a judicial branch but with no real powers to challenge immunity and the perpetration of human rights violations. There has never been free and fair elections in Eritrea since its independence in 1991 and there are no political parties, apart from the ruling PFDJ. Currently, with bread queues “common in the streets of Asmara”⁷ life has become extremely difficult for the average Eritrean. Reminiscent of the last authoritarian rule in Eritrea, that of the *Derg*⁸ era, the Eritrean government seemed to have declared war against its own people. There is now a very common adage among Eritreans that the only difference between the *Derg* regime and the current authoritarian rule of the PFDJ is that the officials of the *Derg* regime used to speak in Amharic (the Ethiopian official language) while the PFDJ officials converse in Tigrinya, a popular Eritrean vernacular with a *de facto* official status in Eritrea. The government in Eritrea is now identified by many reliable sources as one of the worst violators of human rights in the world. Reports about the government’s ever-growing draconian rule are abundant at every quarter of human rights advocacy groups.⁹ In spite of this, Eritrean government officials categorically deny the exceedingly alarming human rights crisis in the country.

6 The first democratic election was scheduled for 1997 but never took place. In September 2000, the government promised to conduct general elections in December 2001. With the emergence of a political crisis in September 2001 no election took place. For further details, see generally Mekonnen 2006; Connell 2005; Awate Team 2002.

7 *Newsweek* 2007. See also *New York Times* 2007.

8 *Derg* denotes the notorious military dictatorship of Mengistu Hailemariam, which ruled Eritrea between 1974 and 1991. It was the most ruthless of all colonial rulers in Eritrea. In reference to this, an Eritrean writer recently lamented that after independence “we found ourselves subjected to conditions similar to that of the *Derg* regime, if not worse”. He then adds: “We have to ask ourselves what good is it to have independence without freedom ... Eritrea is under deep and dark political clouds”. See Abraham 2008.

9 See generally the periodic reports of Amnesty International, Human Rights Watch, Reporters Without Borders and other rights groups. See, in particular, Amnesty International 2006; Amnesty International 2004; Amnesty International 2002; Human Rights Watch 2006; Reporters Without Borders 2006; UK Home Office 2007; US Department of State 2007; US Department of State 2006a; US Department of State 2006b.

3. The general pattern of human rights violations

It is generally accepted that individuals who do not subscribe to state ideology are systematically targeted and receive the severest of punishments by the security and military apparatus of the Eritrean government. Fear of retribution for independent political and religious thought is part of daily life in Eritrea. As will be seen in detail, most of the crimes committed in Eritrea characteristically display the basic features of crimes against humanity. In a recent initiative by a volunteer at the Eritrean Movement for Democracy and Human Rights (EMDHR), a communication¹⁰ lodged with the African Commission on Human and Peoples' Rights (ACHPR) against the Eritrean government exhaustively narrates the violation of the right to freedom of movement of hundreds of thousands of Eritrean youths, in the context of which the violation of several other fundamental rights are discussed. Most of the accounts and allegations in the communication have been sufficiently verified, directly or indirectly, by UN-mandated bodies, immigration tribunals, foreign municipal courts and regional judicial bodies which include the following:¹¹ the UN Working Group on Arbitrary Detention,¹² the European Court of Human Rights,¹³ the ACHPR,¹⁴ the Federal Court of Australia,¹⁵ US District Courts,¹⁶ High Court of South Africa, Transvaal Division,¹⁷ South African Refugee Appeal Board,¹⁸ and the UK Asylum and Immigration Tribunal.¹⁹ The information analysed by all these independent sources convincingly indicates that atrocities have been committed in Eritrea with the acquiescence of senior government officials and army commanders.

10 See the communication lodged by a volunteer at EMDHR with the ACHPR in September 2007 and the accompanying body of evidence (hereinafter '*ACHPR-EMDHR Communication*').

11 See generally Weldehaimanot 2007.

12 *Mahmoud Sherifo et al v Eritrea*, UN Working Group on Arbitrary Detention, UN Doc E/CN4/2003/8/Add1, 54 (2002), 5 March 2002. See also UN Working Group on Arbitrary Detention, Opinion No 23/2007, adopted on 27 November 2007.

13 *Said v The Netherlands*, No 2345/02 (section 2) (bil), ECHR 2005-VI – (5.7.05); *Bereket Okubay v Sweden* [Application No 17276/05].

14 *Liesbeth Zegveld and Mussie Ephrem v The Government of Eritrea*, ACHPR, Communication No 250/2002, 19th Activity Report of the ACHPR; *Article 19 v Eritrea*, ACHPR, Communication No 275/2003, 22nd Activity Report of the ACHPR, Annex II.

15 *VSAI v MIMIA* [2004] FCA 1602.

16 *Selamawit Kifleyesus v Attorney General of the United States*, US Court of Appeals for the Eighth Circuit, No 05-3304; *Selamawit Zehatye v Attorney General of the United States*, US Court of Appeals for the Ninth Circuit, No 04-73295; *Ghebregziabher Gheberemedhin v Attorney General of the United States*, No 03-1815 & 03-3836; *Nuru v Gonzales*, 404 F 3d 1207 (Ninth Circuit).

17 *Yoel Alem v The Minister of Home Affairs and others*, Case No 2597/2004 (unreported).

18 *Tesfalidet Abraha Asfaha v Refugee Status Determining Officer*, Appeal No 1760/06, Department of Home Affairs, South Africa (unreported).

19 *MA (Draft evaders – illegal departures – risk) Eritrea* CG [2007] UKAIT 00059; *AH (Failed asylum seekers – involuntary returns) Eritrea* CG [2006] UKAIT 00078; *KA (draft-related risk categories updated) Eritrea* CG [2005] UKAIT 00165; *WA (Draft related risks updated – Muslim Women) Eritrea* CG [2006] UKAIT 00079; *YL (Nationality – statelessness – Eritrea-Ethiopia) Eritrea* CG [2003] UKAIT 00016.

In order to correctly define the categories of international crimes perpetrated since the country's independence in 1991, a thorough survey of a multitude of reports and compilations has been conducted, which include reports of governments, inter-governmental organisations, UN treaty bodies, non-governmental organisations, international rights groups, exiled civil society and opposition groups, as well as publications and research outputs of recognised individuals and publicists. The sources contain a consistent and reliable body of information, persuasively indicating the individual criminal responsibility of a certain category of high-ranking government leaders in Eritrea. This is supported by a legal appraisal of the violations as evaluated against established principles of international law. In view of this, collective and individual incidents are presented according to the type of violation involved or international crimes identified.

Analyses of facts by most observers indicate that the magnitude, intensity and consistency of crimes against humanity increased noticeably after September 2001, when, as a result of a widespread political crackdown, the country was literally turned into a police state. It is generally agreed that the escalation coincided with the arrest of eleven top government officials, scores of private media journalists, business people, the elderly and others who initiated, supported or sympathised with a popular call for democratisation. A common conclusion is that in response to growing political dissent, the government consistently implemented repressive policies, which amount to international crimes.

There are consistent accounts of a recurrent pattern of attacks against purported opponents, minority religious groups, members of the national military service programme (NMSP) and civilians. Hundreds of incidents have been reported involving massacres, summary executions, rape and other forms of sexual violence, torture, abduction, enforced disappearance, detention without trial and other categories of international crimes. While a majority of the reports are consistent in the description of events and violations, information on the exact number of victims of such violations is yet to be established. Nonetheless, several reports indicate that thousands²⁰ of people have been directly affected by the violations. This strengthens the argument that crimes against humanity have been committed to achieve common or specific objectives and interests of Eritrean government officials. Most of the crimes discussed in this article are violations of international human rights law. However, it should be noted that violations of international humanitarian law have also been perpetrated in the context of domestic and international armed conflicts that have taken place since 1991.²¹

20 See, for example, Amnesty International 2004.

21 On the distinction between human rights law and humanitarian law, see generally Sassoli & Bouvier 1999:67-68. International human rights law represents the concept of fundamental rights, which comprise civil, political, economic, social, cultural, environmental and other rights as belonging to every individual by virtue of their being human. International humanitarian law, on the other hand, is the *lex specialis*, which only applies in situations of armed conflict. By limiting the use of violence in armed conflict, international humanitarian law spares those who do not participate in hostilities. To do this, international humanitarian law differentiates between civilians and combatants, prohibits attacks against *hors de combat* and proscribes unnecessary suffering.

4. International crimes of a universal concern

From the viewpoint of international law, the investigation of human rights violations in Eritrea requires the legal characterisation of these violations; that is, whether these violations amount to international crimes and if so, under which categories of international crimes they fall.²² Legal characterisation is important, firstly, for the classification of international law violations. Secondly, it is important for purposes of identifying the most responsible perpetrators and for suggesting possible mechanisms for holding them accountable. As is quite common in all other authoritarian systems, the crimes perpetrated by Eritrean government officials are continuing with impunity. As a result, international criminal law presents the only viable legal regime under which to consider the nature of the violations.²³

The types of human rights violations perpetrated by Eritrean government officials are so grave that they can appropriately be defined as international crimes. According to Cassese, international crimes are “breaches of international rules entailing the personal criminal liability of the individuals concerned (as opposed to the responsibility of the State of which the individuals may act as organs)”.²⁴ They embrace violations of international rules spelled out by customary law or international provisions codified by treaties. International crimes violate certain values considered important by the whole international community and consequently binding on all states and individuals.²⁵ The most striking feature of international crimes is that, apart from the international responsibility of the state or a non-state entity, they entail the individual criminal responsibility of the author or authors. In the case of the state, responsibility means that the state would have to prosecute the authors of the crimes and compensate the victims for the violations. In the case of the author, it means that the individual perpetrator will be criminally responsible and sentenced for her or his acts.²⁶

Of the numerous categories of international crimes that are unambiguously condemned in various international treaties, this article focuses on crimes against humanity. Particularly odious crimes against humanity constitute a serious attack on human dignity.²⁷ Crimes against humanity are a wide-ranging but

22 This discussion adopts the methodology utilised by the *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 (2004)*, 25 January 2005 (hereinafter ‘*Report of the Darfur Commission*’), para 175-181.

23 Compare this with the observations of Du Plessis & Coutsoydis 2005:340, where the authors discuss the possibility of prosecution of international crimes in the context of grave human rights violations of the Zimbabwean government.

24 Cassese 2003a:23. Bassiouni, on his part, defines international crimes as “those international criminal law normative proscriptions whose violation is likely to affect the peace and security of humankind or is contrary to fundamental humanitarian values”. Bassiouni 2003:24. In another source, international crime is defined as “conduct on the part of individuals which a multilateral treaty obliges states to suppress through criminal sanctions”. See Bassiouni & Wise 1995:8; and generally Bassiouni 1987:21-65.

25 Cassese 2003a:23.

26 *Report of the Darfur Commission*, para 175.

27 *Report of the Darfur Commission*, para 178.

sufficiently well-defined sphere of international crimes. One of the early definitions of crimes against humanity was provided by the Court of Assizes of Hamburg. The court defined the term as:

any conscious or willed attack that, in connection with [a] system of violence and arbitrariness, harmfully interferes with the life and existence of a person or his relationship with his social sphere, or interferes with his assets and values, thereby offending against his human dignity as well as humanity as such (*die Menschheit als solche*).²⁸

There are four essential characteristic elements of crimes against humanity. Firstly, the crimes are characteristically abhorrent attacks on human dignity, which most of the time take place in the form of grave humiliation or degradation of one or more persons.²⁹ Secondly, their perpetration is intentionally tolerated, condoned or acquiesced in by a government or a *de facto* authority having the effect of a *systematic* or *widespread*³⁰ practice of atrocities.³¹ *Systematic* and *widespread* refer to the fact that such crimes are backed by state authorities or by leading officials of a *de facto* state-like organisation or organised political group.³² Furthermore, it means that the practice is not limited to a sporadic event but that it takes place as a pervasive pattern of misconduct. This is one of the most important elements of crimes against humanity in that the crimes in question must be committed on a large scale by the “cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude”.³³ In elaborating on the systematic nature of crimes against humanity, the Trial Chamber of the International Criminal Tribunal for former Yugoslavia

28 *Harlam Veit (Jud Suss case)*, Germany, Court of Assizes (*Schwurgericht*) of Hamburg, decision of 29 April 1950, unpublished typescript 52, as quoted in Cassese 2003a:66. Similarly, in the *Albrecht* case, the Dutch Special Court of Cassation described crimes against humanity as offences “characterised either by their seriousness and their savagery ... or by their magnitude, or by the circumstances that they were part of a system designed to spread terror ... or that they were a link in a deliberately pursued policy against certain groups of the population”. See The Netherlands Special Court of Cassation, judgment of 11 April 1949, *Neder J*, 747-751 (English excerpts in *Annual Digest* 1949). Bassiouni 1999: 60-61 also notes that the modern concept of the term “crimes against humanity” was introduced for the first time by the London and the Far East Charters of the International Military Tribunals (IMTs). See London Charter, article VI and Far East Charter, article V.

29 *Report of the Darfur Commission*, para 178.

30 Cassese 2003a:64; Cassese 2002a:97.

31 See also *Naletilic and Martinovic*, ICTY Trial Chamber, judgment of 31 March 2003, para 236; *Akayesu*, ICTR Trial Chamber, judgment of 2 September 1998, para 579; *Kunarac and others*, ICTY Trial Chamber, judgment of 22 February 2001, para 431; *Blaskic*, ICTY Trial Chamber, judgment of 3 March 2000, para 206; *Kunarac and others*, ICTY Appeals Chamber, judgment of 12 June 2002, para 94; *Semanza*, ICTR Trial Chamber, judgment of 15 May 2003, para 329; *Kordic and Cerkez*, para 179; *Kayishema and Ruzindana*, ICTR Trial Chamber, judgment of 21 May 1999, para 123.

32 For further discussions on what constitutes a systematic and widespread attack under international criminal law, see Cassese 2003a:64; Kittichaisaree 2001:96; Schabas 2004:36.

33 *Kordic and Cerkez*, para 179.

(ICTY) held that “for an action to be systematic it requires an organised nature and the improbability of random occurrence.”³⁴ The ICTY Appeals Chamber also enumerates the following traits as amongst the most important factors for the determination of the widespread or systematic nature of an attack:

The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable pattern of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a ‘widespread’ or ‘systematic’ attack.³⁵

In the third place, crimes against humanity, like all other international core crimes, may be punished, irrespective of whether they are committed in time of peace or war.³⁶ Fourthly, the victims of the violence may be civilians or enemy combatants.³⁷ Most of the fundamental features of crimes against humanity discussed above fall under the objective or material element of a crime (*actus reus*).³⁸ According to the International Commission of Inquiry on Darfur (Darfur Commission), the subjective element or *mens rea* required for crimes against humanity is twofold: (a) the mental element required for the underlying crime (such as murder or torture) and (b) the knowledge that the offence is part of a widespread or systematic practice.³⁹ However, the Darfur Commission notes that *persecution* as a specific category of crimes against humanity in addition requires a further mental element. Such a mental element must be manifested in the form of persecutory or discriminatory animus “to subject a person or a group of persons to discrimination, ill-treatment or harassment on religious, racial, political, ethnic, national or other grounds”. This must be accompanied by great suffering or injury to that person or group.⁴⁰

34 *Naletilic and Martinovic*, para 236; see also *Kunarac and others*, para 94.

35 *Kunarac and others*, para 95; *Jelusic*, ICTY Trial Chamber, judgment of 14 December 1999, para 53.

36 Cassese 2003a:285.

37 Schwelb 1946:207. In the early development of the notion of crimes against humanity, a link or nexus with an armed conflict was required. The requirement of a nexus was clearly spelled out by the most prominent instrument that defined crimes against humanity for the first time: the London Charter of the International Military Tribunal (IMT). Article 6(c) of this instrument required that, for crimes against humanity to come under the jurisdiction of the IMT, they must be perpetrated “in execution of or in connection with” war crimes or crimes against peace. Presently, no importance is attached to such a nexus in international law. The ICC Statute, for instance, explicitly ruptures the link between crimes against humanity and armed conflict. The link was reinstated in the ICTY Statute. Nonetheless, the current understanding remains the other way round. The distinguishing feature between crimes against humanity and war crimes is that the former are to a large extent predicated upon international human rights law, while the latter derive from and are closely linked to international humanitarian law, in other words the law of warfare. See Cassese 2003a:64.

38 *Report of the Darfur Commission*, para 179.

39 *Report of the Darfur Commission*, para 180.

40 *Report of the Darfur Commission*, para 180, quoting Kuprešić and others, ICTY Trial Chamber, judgment of 14 January 2000, para 616-627.

Since the establishment of the International Military Tribunals (IMTs) at Nuremberg and Tokyo, a number of international treaties have provided definitions of different types of crimes against humanity.⁴¹ More than any other body of international law, crimes against humanity were crystallised and codified by the Statutes of the recently created *ad hoc* tribunals of former Yugoslavia and Rwanda, which clearly provided for individual criminal responsibility for crimes against humanity.⁴² The Statutes also required states to cooperate in the investigation and prosecution of persons accused of crimes against humanity. At a final stage, article 7 of the ICC Statute with its bulk of customary law foundations codified the notion of crimes against humanity with an exhaustive definition.⁴³

Du Plessis and Coutsooudis note that article 7 of the ICC Statute “can generally be considered to be a crystallisation of customary international law in relation to what constitutes a crime against humanity”.⁴⁴ Cassese indicates that article 7 of the ICC Statute is in some ways broader than customary international law in the sense that it expands the category of crimes against humanity by adding some sub-sections such as forced pregnancy, enforced disappearance of persons and the crime of apartheid. It also expands the category of discriminatory grounds by adding cultural grounds and gender, as well as “other grounds that are universally recognised as impermissible under international law”.⁴⁵ Many of the wrongs classified under crimes against humanity also arise as infringements of several international standards enshrined by international and regional human rights instruments, many of which are ratified by Eritrea. In the next section, the most representative factual findings as related to the perpetration of international crimes in Eritrea will be discussed briefly.

41 Bassiouni & Wise 1995:112.

42 See articles 3 and 5 of the ICTR and ICTY Statutes, respectively. Related to crimes against humanity are the four Geneva Conventions of 1949, as updated by the two Additional Protocols of 1977. The 1984 Convention against Torture also imposes an obligation on states to prosecute international crimes defined in the respective contents. Closely related to crimes against humanity in this regard is torture.

43 Article 7(1) of the ICC Statute defines the following acts as crimes against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering; or serious injury to body or to mental or physical health.

44 Du Plessis & Coutsooudis 2005:344.

45 Du Plessis & Coutsooudis 2005:344.

5. Common categories of crimes against humanity

The most common categories of crimes against humanity perpetrated in Eritrea include the following: murder;⁴⁶ imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law; torture, which can also be committed as a self-standing international law violation;⁴⁷ rape and sexual slavery; detention without trial; enforced disappearance; other inhuman acts of a similar character intentionally causing great suffering; or serious injury to mental or physical health.⁴⁸

A greater proportion of the violations perpetrated in recent years are the outcomes of the compulsory and indefinite NMSP. Effectively implemented since 1994, the NMSP is perhaps the most unjust government policy, with far-reaching implications for the fundamental rights of hundreds of thousands of citizens. The abusive implementation of this plan has caused immense suffering to a large number of Eritreans. Another abusive government programme is the Warsay-Ykealo Development Campaign (WYDC), which is an extension of the NMSP. Under these two abusive government programmes, hundreds of thousands of Eritrean youths have been subjugated to prolonged schemes of forced labour in which several human rights violations, such as torture, extra-judicial killings, arbitrary detention, rape, sexual violence and other international crimes are perpetrated with impunity by army commanders who oversee the two programmes.⁴⁹ Apart from the abusive practices associated with the NMSP and the WYDC, the following major violations and incidents are generally regarded as the most representative in terms of magnitude, intensity and consistency.

5.1 Incidents of mass killings

The post-2001 political crisis has resulted in, among other things, two shocking mass murders known as the Adi Abeito and the Wia Massacres.⁵⁰ The first incident reportedly involved the massacre of 54 individuals on the night of 4 October 2004 in the Adi Abeito Detention Camp at the outskirts of Asmara, the capital of Eritrea. Most of the victims were killed by government troops while fleeing an excessively

46 Murder in the current context should be understood to mean extrajudicial execution of thousands of people since the country's independence in 1991 in violation of established standards of international law.

47 Compare this, for example, with the Zimbabwean situation as discussed by Du Plessis & Coutsoudis 2005:342.

48 For a definition of these crimes, see generally article 7 of the ICC Statute. On the importance of categorisation of crimes, Du Plessis & Peté 2007:17 note that "labelling and categorising is an inevitable and essential means by which to make sense of human rights violations perpetrated against individuals".

49 The abuses associated with these two programmes are so pervasive that some of the practices are described by rights groups as collective forms of punishment. See Amnesty International 2006b; Human Rights Watch 2006.

50 These two incidents are to be seen in the context of the indefinite and abusive NMSP and the infamous WYDC, the repercussions of which have affected hundreds of thousands of Eritrean youths. The resultant human rights abuses associated with the NMSP and the WYDC are thoroughly discussed in the *ACHPR-EMDHR Communication*.

overcrowded detention facility.⁵¹ The Wia Massacre, another shocking *en masse* killing, involved the extra-judicial execution of 161 members of the NMSP in the Wia Detention Camp. Victims of the Wia Massacre were conscripts who attempted to flee the detention facility on account of the harsh living conditions in the detention centre.⁵² From the pre-2001 era, the Maihabar, the Dirfo, the Qarora and the Dembelas-Qohain Massacres can also be mentioned as some of the most representative and awful incidents of mass murders.⁵³ The Dirfo Massacre, for example, involves the following horrendous violation:

On January 23, 1997, with a secret order from Abraha Kassa, the chief of the National Security Office of Eritrea, and under the direction of President Isaias Afwerki, security forces rounded up 150 Eritrean Muslim men under the guise of being collaborators with the Islamic Jihad movements. They were picked from their homes and workplaces. News coming from Asmara has confirmed that, six months after they were taken in custody, with the knowledge of both [Abraha Kassa and Isaias Afwerki] they were executed on 18 June 1997 from 8:20 pm to 2:00 am the next day.⁵⁴

Parts of the above report were later confirmed by a former member of the Crime Investigation Unit (CIU) of the Eritrean Police. The witness,⁵⁵ who currently lives in Sweden, asserts that the decision on the extra-judicial execution was carried out by a committee composed of seven to twelve people. The CIU can be described as the “secret police” of the PFDJ and it is one of the main government organs responsible for several extrajudicial executions since 1991.⁵⁶

51 See, for example, the dismissive accounts of Eritrea’s Acting Minister of Information given to the *VOA Tigrinya Programme* 2004. See also *BBC News* 2004; Eritrean Anti Tyranny Global Solidarity 2006. The last report lists the names of victims of the massacre.

52 The most authoritative account on this incident was given by US Department of State 2006a. Quoting a London-based rights group, the report asserted that “on June 10 [2005] military personnel shot and killed 161 youth at Wia Military Camp who were trying to escape”.

53 For further discussions on other atrocities, see generally Mekonnen 2008.

54 Awate Team 2003a, quoting *TV Zete* broadcast of 23 January 2003. In an indirect reference to the Dirfo Massacre, Amnesty International reported that “Muslims, especially in the western areas bordering Sudan, have often been suspected of links with predominantly-Muslim armed Eritrean political opposition organisations based in Sudan”. The consequence was that the government had frequently suspected any outspoken Muslim Eritreans of links with the Sudan-based armed opposition groups. As a result, some members of those communities were treated harshly. See generally Amnesty International 2004.

55 Awate Team 2003b. The witness was also previously a member of ‘Unit 72,’ a code name for EPLF’s former intelligence specialists.

56 The CIU was headed for years by Colonel Simon Ghebredingil, who survived an attempted assassination on 13 October 2007. See *Shabait.com News* 2007a. The attempted assassination came as an unprecedented overt skirmish between top military commanders. For a detailed account and background information, see Asmarino Independent 2007. According to this report, Eritrea is sadly heading to a dangerous path of regionalism (ethnicity) which may erupt any time as a deadly civil war, unless solved wisely.

5.2 Incidents of death in prison

Since September 2001, several incidents of death in prison have occurred in Eritrea.⁵⁷ Among the most publicised are the deaths of former senior government officials and journalists of the private media, all of whom reportedly died at different times between 2002 and 2007 in the notorious Ira-Iroa Prison⁵⁸ and other prison sites. With regard to the death of a prominent Eritrean poet, playwright and journalist, who reportedly died in a secret prison as a result of severe ill-treatment and denial of medical care,⁵⁹ Amnesty International laments that:

Because Eritrea refuses to permit international human rights investigators, Amnesty International is unable to confirm by direct evidence the reports of Joshua's death. Nevertheless, Amnesty believes the reports to be highly credible. Eritrean authorities have failed to either confirm or deny the reports.⁶⁰

In spite of the shocking revelation by Amnesty International and other rights groups, the Eritrean government has constantly refused to say where some political prisoners have been detained and under what conditions. In the words of Amnesty International, "the Eritrean government, defying international concerns, has shrugged off all reports of human rights abuses as fabrications".⁶¹ For example, in July 2005, more than 50 members of the US Congress, led by Congressmen Mark Kirk and Mark Udall, called on the Eritrean president to free political prisoners, but to no avail.⁶²

5.3 Religious persecution

Religious persecution dates back to the early years of independence. It intensified after 2002 with the implementation of a draconian policy, which targeted minority religious groups.⁶³ Eritrea is one of the worst places in the world when it comes to religious persecution. Amnesty International reports that there are currently more than 2000 individuals imprisoned arbitrarily and in dire conditions solely for their religious beliefs.⁶⁴ Consequently, Eritrea has been re-designated for

57 For similar accounts on the pre-2001 era, see generally Mekonnen 2008.

58 Aiga Forum 2006. In 2008, the Paris-based Reporters Without Borders said that the sources for the information in the report were former prison guards at the Ira-Iroa Prison. See Reporters Without Borders 2008a.

59 Amnesty International 2007a. A documentary filmed in honour of the deceased reported that at the time of his death he had already spent 65 months in prison; "he could hardly walk, he had one hand paralysed, and his fingernails had been ripped out". See Marginal Media Productions 2007.

60 Amnesty International 2007a.

61 Amnesty International 2007a.

62 Amnesty International 2007a.

63 Amnesty International 2005. See also generally UK Home Office 2007; US Department of State 2007; US Department of State 2006b. In the case of religious persecution, a most authoritative source comes from the testimony of gospel singer Helen Berhane, who recently fled the country after unbelievable suffering. See Release Eritrea 2007.

64 Amnesty International 2007b.

the fourth time as one of 11 “countries of particular concern” (CPC) in the 2007 *International Religious Freedom Report* compiled by the US Department of State, Bureau of Democracy, Human Rights, and Labour.⁶⁵ The death of Nigisti Haile represents one of the most barbaric incidents in this regard. She was “allegedly tortured to death” on 5 September 2007 after she had refused “to renounce her faith in Jesus Christ”. As is the case with many other minority Christians, she was “tortured specifically for refusing to ‘sign a letter recanting her faith.’”⁶⁶

5.4 Torture, arbitrary detention and extrajudicial executions

Since 2001, the practice of torture, arbitrary detention and extra-judicial execution has been intensified in Eritrea. Torture and extrajudicial execution are inflicted indiscriminately against members of the NMSP who are accused of “defeatism”, “cowardliness”, and other legally unrecognised “crimes”.⁶⁷ Torture is also inflicted indiscriminately against thousands of religious minorities, political dissidents, “draft evaders”, journalists, senior government officials and others. Normally inflicted as a method to extract information or as a punishment to terrorise people, the crime of torture is widespread and systematic. Many have died as a result of torturous punishment, dire prison conditions or lack of medical treatment, and others have sustained permanent bodily injuries in several known and unknown prison sites.⁶⁸ Inhumane methods of punishment are practised indiscriminately against anyone who demonstrates the slightest sign of disobedience to draconian policies implemented harshly by military commanders and security personnel.⁶⁹ Quoting former NMSP conscripts, Beilliet, for example, notes that army commanders from the rank of colonel and above have been given permission to execute those who run away or travel without permission.⁷⁰

According to the findings of the Darfur Commission, the element of discrimination can give the crime of torture an attribute amounting to a “*crime*”

65 US Department of State 2006b. See also Amnesty International 2007c; *BBC News* 2007.

66 *The Christian Post* 2007.

67 See, for example, the most revealing interviews of former NMSP conscripts as depicted in the documentary produced by Human Rights Concern — Eritrea (HRC-E) 2006. See also the testimony of a former NMSP conscript quoted in Amnesty International 2004.

68 Amnesty International 2004; Mekonnen 2007b.

69 HRC-E 2006. Amnesty International, for example, acknowledges that the NMSP has become a major cause of arbitrary detentions where torture and extrajudicial execution are meted out as a standard military punishment. Amnesty International also recognises five major types of torturous punishments, which are routinely practised by Eritrean security and military apparatus: “helicopter”, “otto”, “Jesus Christ”, “ferro” and “torch”. See Amnesty International 2004.

70 See, for example, Bailliet 2007:508, who also discusses rape and sexual violence in the army. A recent example of grotesque extrajudicial killing is the Mosdip incident, which involved the summary execution of five individuals who were caught while crossing to Sudan on 16 June 2008. The military squad involved in the killing has been identified as a special Task Force (*Haili Emam*) which is directly accountable to the state president. The *Haili Emam* was established to control the unprecedented outflow of the youths to neighbouring countries. See Asmarino Independent 2008.

against humanity” or the crime of “persecution” as a crime against humanity.⁷¹ There is a credible body of information testifying to the fact that torture is perpetrated against a multiplicity of victims, mainly on political and religious grounds. The attacks are systematic, carried out pursuant to a preconceived government policy and plan.⁷² As such, they demonstrably warrant prosecution as an instance of the international crime of torture or crime against humanity as defined by article 7 of the ICC Statute.

Although international law has never sought to quantify a minimum number of casualties necessary to constitute a crime against humanity,⁷³ official accounts released by the Office of the Eritrean Attorney General reveal an appalling statistic of prisoners who were kept in detention without trial in the year 1999. The statistics, as seen in Table 1 below, attest to the pervasiveness of human rights violations, even in those years when the human rights crisis was relatively at a “lower peak”.

Table 1: The total number of Eritrean prisoners who remained in detention without trial in the year 1999

Month	Category A	Category B	Total
January	79	597	676
February	94	578	672
March	107	607	714
April	78	525	603
May	66	745	811
June	85	697	782
July	76	655	731
August	108	653	761
September	102	663	765
October	107	652	759
November	80	705	785
December	111	788	899
Total	1 093	7 865	8 958

Source: Office of the Eritrean Attorney General⁷⁴

71 *Report of the Darfur Commission*, paras 378-379 [emphasis original].

72 For further discussions on what constitutes a systematic and widespread attack under international criminal law, see Cassese 2003a:64; Kittichaisaree 2001:96; Schabas 2004:36.

73 Scharf 1996:33.

74 Office of the Eritrean Attorney General 2001:16. The subheadings in Table 1 were slightly amended to suit an abridged translation from the original Tigrinya version. The number of victims of human rights violations depicted in Table 1 may pale in comparison to the level of atrocities committed in other regions of the world. However, when seen in conjunction with the number of victims of other human rights violations, the number is significant. From estimations given by various sources, the total number of direct and indirect victims of human rights and humanitarian law violations in Eritrea is close to one million, with the major violations being war crimes, crimes against humanity and the crime of aggression.

Shown in Table 1 is the total number of prisoners who remained in detention without trial from January to December 1999. Those in “Category A” were prisoners who “were not able” to exercise their right to bail, although the reference to the alleged “inability” is not clearly defined. There were 1 093 of those. Those in “Category B” were prisoners who were denied their right to bail and they were 7 865 in number. There are claims that such a large number of victims of detention without trial were partly an outcome of the arbitrariness of the country’s Special Court, which tries suspects in closed proceedings without the right to bail, defence counsel or appeal.⁷⁵ The most important aspect of the data in Table 1 is that in the year 1999 only about 9 000 prisoners were kept in detention without trial throughout the country. Although Eritrea was at war with Ethiopia at that time, atrocities against civilians or, generally speaking, human rights violations were on a relatively “lower scale”.

Violations escalated exponentially after September 2001 in terms of magnitude, intensity and consistency of incidents. The total number of prisoners detained without trial after that time is believed to have increased significantly. Official information on the precise number of individuals imprisoned since September 2001 is difficult to obtain. However, in recent years, secret jails controlled by military squads and army generals have considerably outnumbered regular prison sites in the country.⁷⁶ Reporters Without Borders recently revealed that there are around 314 prison centres scattered throughout the country.⁷⁷ With the severity of post-2001 atrocities, and taking the 1999 data as a credible starting point, it is plausible to estimate that the number of prisoners could at least have doubled in recent years. If such an extrapolation could be taken as accurate, it may mean that close to 20 000 people have been victims of detention without trial.⁷⁸ In conservative estimates, Eritrea lost a total number of 19 000 combatants in the 1999-2000 border conflict with Ethiopia. Compared

75 This was the view of some participants at the Workshop on the Right to Bail. The view was prevalent, especially among criminal investigation officers.

76 Events Monitor 2005. The author, writing from Asmara, reveals that what remains of the regular police force is a mere shadow. “All army units, from the highest level ... down to the divisions and brigades, have their own prison systems, which are not confined to those in uniform but are increasingly used for incarcerating civilians. These jails are secret, not authorised by any legal jurisdiction, and unfit for human beings ... The same is said about the secret jails under the purview of the various security/intelligence units ... The formal (authorised) prison system has also effectively come under the control of the army generals ... These units are not accountable to the police officer in charge of the station but take their orders directly from the respective military commands ... The regular police here are like storekeepers with no authority to know the contents of what they are told to keep.”

77 See Reporters Without Borders 2007.

78 A recent estimation by the Eritrean Solidarity for Democratic Change (Toronto) claims that the total number of prisoners in Eritrea exceeds 30 000. A well-informed mid-level government official, who recently fled Eritrea, confided to one of the authors that in the Prima Country Detention Centre and its environs alone, there are close to 10 000 prisoners kept in large confinement compartments, including underground prison cells and shipping containers. Most of them are conscripts of the NMSP who have been given summary sentences and imprisoned in dire circumstances with their fundamental rights flagrantly violated.

with the small population of Eritrea and the casualties of the recent war, the estimated number of individuals detained without trial is exceedingly high.⁷⁹

The large numbers of victims, the apparent pattern of perpetration, and the participation or acquiescence of senior government officials are amongst the most important factors that lead to the conclusion that human rights violations are committed in both a widespread and systematic manner. This is contrary to Eritrea's international obligations as defined by international human rights treaties it has ratified.⁸⁰ Eritrean government officials have flagrantly violated a number of international human rights standards stipulated in these treaties. The following constitute the most important violations:⁸¹ (i) the right to life and not to be arbitrarily deprived thereof;⁸² (ii) the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;⁸³ (iii) the right not to be subjected to arbitrary arrest or detention;⁸⁴ (iv) the right of persons deprived of their liberty to be treated with humanity and with respect for their inherent dignity;⁸⁵ (v) the right to fair trial;⁸⁶ (vi) the right to effective remedy for any serious violations of human right;⁸⁷ (vii) the right to reparation for violations of human rights;⁸⁸ (viii) the obligation to bring to justice the perpetrators of human rights violations;⁸⁹ and (ix) the right to freedom of movement.⁹⁰ The violations are also contrary to the standards set by the relevant provisions of the ICC Statute, including peremptory norms of international law.

6. The legal basis for prosecution

The prosecution of international crimes involves consideration of two important factors: the legal basis for criminal responsibility and the possible forum for prosecution. This section discusses the first point.

The principle of individual criminal responsibility is the cornerstone of international criminal law. It emanates from a famous Nuremberg Judgement in

79 Compare the above estimations with those provided by Amnesty International 2004; Human Rights Watch 2006; Reporters Without Borders 2007; UK Home Office 2006; US Department of State 2006a; *ACHPR-EMDHR Communication*.

80 These include: the International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC); and Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). At regional level, Eritrea has also ratified the African Charter on Human and Peoples' Rights (African Charter) and the African Charter on the Rights and Welfare of the Child (ACRWC).

81 Compare this with the international obligations of Sudan as discussed in the *Report of the Darfur Commission*, paras 147-148.

82 Article 6(1) of the ICCPR and article 4 of the ACHPR.

83 Article 7 of the ICCPR and article 5 of the ACHPR.

84 Article 9 of the ICCPR and article 6 the ACHPR.

85 Article 10 of the ICCPR.

86 Article 14 of the ICCPR and article 7 of the ACHPR.

87 Article 2(3) of the ICCPR and article 7(1)(a) of the ACHPR.

88 Articles 2(3), 9(5), and 14 (6) of the ICCPR.

89 Article 2(3) of the ICCPR.

90 Article 12 of the ICCPR and article 12(1) of the ACHPR.

which it was held that “crimes against international law are committed by men, not by abstract legal entities”.⁹¹ Other international judicial bodies, notably, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have firmly upheld this doctrine in their landmark judgements, facilitating the adoption of this cardinal principle of international criminal law in the ICC Statute.⁹²

However, international crimes are very rarely committed by single individuals. They involve a plurality of offenders, at the centre of which lie organisations or a group of cooperating individuals.⁹³ The just determination of guilt in international crimes needs a fair assessment of the mutual relationships and cooperation forms of those individuals and organisations.⁹⁴ Judgements and rulings on international crimes depend to a considerable degree on the assessment of criminal participation.⁹⁵ However, the determination always begins with individual criminal responsibility, which also has corresponding ancestors in both the common law and civil law legal traditions.⁹⁶

Article 25 of the ICC Statute recognises different modes of participation in the commission of international crimes. In the first place, international criminal responsibility arises when a person physically commits a prohibited conduct, in which case he or she is regarded as the perpetrator or the principal offender. A person can also be criminally liable when he or she did not physically commit a crime but is engaged in the perpetration in several other forms or modalities of criminal conduct.⁹⁷ When two or more people are implicated in the commission of international crimes, the involvement of such people in the crimes can be either in the form of perpetrating, ordering, aiding, abetting, planning, conspiring, inciting or any other act which involves common criminal purpose or design.⁹⁸ In clarifying this position by means of a hypothetical case, Cassese writes:

In the case of torture one person may order the crime, another may physically execute it, yet another may watch to check whether the victim discloses any significant information, a medical doctor may be in attendance to verify whether the measures for inflicting pain or suffering are likely to cause death so as to stop the torture just before the measures become lethal, another person may carry medicine, or food for the executioners, and so on.⁹⁹

Although varying degrees of culpability are to be taken into account at the sentencing stage, Cassese points out that all participants in common criminal action are equally responsible and are to be treated as principals if they “(i)

91 *Trail of the Major War Criminals*, Proceedings of the International Military Tribunal, Nuremberg, pt 22 (H. M. Stationary Office, 1950), 447.

92 See article 25 of the ICC Statute.

93 Van Sliedregt 2003:15.

94 Keijzer 2003:v.

95 Van Sliedregt 2003:15.

96 See, for example, article 48 of the Transitional Penal Code of Eritrea.

97 Cassese 2003a:179.

98 See article 25 of the ICC Statute. See also *Tadic*, Appeals Chamber, 5 July 1999, paras 191-192; and see generally Cassese 2003a:180-200 and Kittichaisaree 2001: 237-257.

99 Cassese 2003a:181.

participate in the action, *whatever their position and the extent of their contribution*, and in addition (ii) *intend to engage in the common criminal action*".¹⁰⁰ In terms of the degree of responsibility, international law makes no distinction between "the man who strikes, and a man who orders another to strike".¹⁰¹

A major theme in the discourse on international crimes is the doctrine of command responsibility or superior responsibility.¹⁰² Drawn from military law, this principle holds that:

[A] superior is criminally responsible for the acts committed by his subordinates if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.¹⁰³

Kittichaisaree has vividly contrasted two major ways by which a superior can be held criminally responsible for his or her actions. On the one hand, the active involvement of a superior in a certain crime in the form of ordering, instigating or planning may entail direct criminal responsibility of such a superior. This kind of responsibility is defined by article 23(3) ICC Statute. On the other hand, a superior may incur criminal responsibility indirectly "if he fails to take measures to prevent or repress his subordinate's criminal acts". This is the type of responsibility defined by article 28 of the ICC Statute.¹⁰⁴ Similarly, Cassese recognises this as responsibility by omission in terms of which a "person is criminally liable not for an act he has performed, but for failure to perform an act required by international law".¹⁰⁵ This principle applies to civilian and military superiors alike as long as they yield the requisite authority.¹⁰⁶ In differentiating the responsibility between civilian and military superiors, Schabas argues that:

In order to incur liability, a military commander must know or 'should have known,' whilst a civilian superior must either have known or 'consciously disregarded information which clearly indicated' that subordinates were committing or about to commit crimes'.¹⁰⁷

Of particular relevance in this regard are crimes against humanity, which, by definition, are perpetrated "pursuant to or in furtherance of a state or organisational policy".¹⁰⁸ There is a general understanding amongst scholars of international criminal law that, inherent in the nature of crimes against humanity is the element of "government or organisational" acquiescence, a most

100 Cassese 2003a:182 [emphasis original].

101 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte* (No 1) (1998) 4 All ER 897 (HL), 946.

102 *Delalic and others*, ICTY Trial Chamber, judgment of 16 November 1998, paras 333-343; *Kayishema and Ruzindana*, para 209.

103 Kittichaisaree 2001:251.

104 Kittichaisaree 2001:251.

105 Cassese 2003a:205.

106 *Kayishema and Ruzindana*, para 491.

107 Schabas 2004:107.

108 Article 7(2) of the ICC Statute.

important factor which implies the criminal responsibility of senior government officials for those crimes. Cassese argues that crimes against humanity are the manifestation of a policy or a plan drawn up, or inspired by, state authorities or by the leading officials of a *de facto* state-like organisation, or of an organised political group. Crimes against humanity are atrocities “tolerated, condoned or acquiesced by a government or a *de facto* authority”.¹⁰⁹ As such, criminal responsibility emanating from crimes against humanity is not merely incurred by principal offenders but also senior officials. The widespread and systematic nature of crimes against humanity means that their perpetration is difficult to contemplate without planning and incitement from above. Support for this argument is also to be found in *Kayishema and Ruzindana*¹¹⁰ in which the ICTR concluded that the policy element in crimes against humanity means that such crimes are committed with the encouragement or direction from either a government or a group or an organisation.

International crimes are committed in Eritrea not only with the acquiescence of senior government officials but also with their explicit approval. Repeated public pronouncements have been made by senior government officials at different times, openly condemning those who subscribe to any political conviction outside the dogma of the ruling party. The latest government pronouncement comes in the form of a pseudonymous public condemnation believed to have emanated from the State Palace. This statement has made it sufficiently clear that in Eritrea people will be killed continuously as long as they do not obey the policies of the ruling party. In the original words of the commentator, it was said that, if a person commits the slightest harmful act to the purported “national interest” of Eritrea, it would be just for such a person to be killed by her/his own biological brother.¹¹¹ This represents a deliberate plan to perpetrate international crimes.

Barring a legitimate defence¹¹² acceptable under international criminal law, some high-ranking government officials who are reasonably suspected of being involved in international crimes of universal concern could be prosecuted by a competent court. This requires a tentative identification of the most responsible perpetrators of international crimes in Eritrea. For this purpose, the methodology utilised by the Darfur Commission serves as an appropriate reference. Although the final verdict on criminal guilt can only be done by a competent court, the methodology¹¹³ of the Darfur Commission indicates that a tentative assessment of the likely suspects can be done based on “a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime”. In totalitarian regimes and police states, such as Eritrea, where information is intensely manipulated by the government, the most responsible perpetrators can be identified by analysing the structure and

109 Cassese 2003a:64. See also Cassese 2002a:361; Kittichaisaree 2001:97.

110 *Kayishema and Ruzindana*, paras 124-126.

111 Goddena Harnet Kab Asmara 2007.

112 Such defences, according to Cassese 2003a:219-256, include: mental disorder, self-defence, intoxication, necessity, duress, mistake of law and mistake of fact. Similar defences are also applicable under the Eritrean Penal Code. See articles 64-78.

113 *Report of the Darfur Commission*, para 15.

functioning of the government and making a determination of who holds the reins of power or who occupies which key government position (or ruling party high position), who heads the top security and military apparatus, and so forth.

This is one of the techniques utilised in a recent report¹¹⁴ compiled by the Awate Team. The report of Awate Team aims at identifying the most powerful individuals who have effectively controlled every aspect of life in Eritrea, especially since 2001. Based on such an instructive but non-authoritative assessment, the report indicates that these individuals can be plausibly considered as the most responsible perpetrators of international crimes in Eritrea. The assessment is based on the contents of interviews and conversations with hundreds of Eritreans conducted at different times. The informants include victims, relatives of victims, witnesses, conscripts of the NMSP, former government officials and others, who repeated the names of the same perpetrators over and over.

The perpetrators identified by Awate Team comprise officials regarded as persons in "the first circle or the first tier of the ruling party". The report describes the perpetrators as collectively responsible for the grave crimes committed in Eritrea because they are either in a position to know or should have known of the commission of international crimes. Governments, rights groups, tribunals and others frequently cite the findings of Awate Team as reliable.¹¹⁵ Seen against this background, the report can be taken as a reliable starting point for further investigation and identification of the main perpetrators of international crimes in Eritrea. Tentatively, the Awate Team report mentions some seventeen individuals as most responsible for perpetrating international crimes, ordering such violations and overseeing their implementation, as well as aiding, abetting, planning or cooperating in their implementation through rigid and cruel institutional structures.¹¹⁶ Understandably, the most responsible of these is the state president who enjoys absolute power over every aspect of Eritrean life.¹¹⁷

114 Awate Team 2007.

115 One example is the UK Asylum and Immigration Tribunal, which said the following about reports of Awate Team: "Awate.com [is] a site independent of opposition political parties ... [It] is one of the most reliable because it is rare to see a website that corrects itself if subsequently proven wrong on factual errors and it is a website upon which the [UK] Home Office often relies, indeed it is exemplified by the fact that it is quoted in [the UK's Central Office of Information]." See *MA draft evaders*, para 67. See also *ACHPR-EMDHR Communication*.

116 The individuals identified by the Awate Team report are categorised in four groups. In the first category is the state president. The second category includes six top army generals who, next to the state president, have effectively controlled every aspect of life in the country. Included in the third category are three security and intelligence chiefs. The fourth group includes seven high-ranking ruling party officials, ministers and ambassadors. Perhaps another high-ranking official who should have been included in the list is the Acting Minister of Information, who is notoriously known for his active involvement in several atrocities. It should be noted that the list compiled by Awate Team cannot be taken as an exhaustive. It cannot also be taken as conclusive in regards the criminal responsibility of the individuals listed therein.

117 With regard to the criminal responsibility of the state president, perceptive guidance can be borrowed from the latest indictment of the ICC Prosecutor on the individual criminal responsibility of the Sudanese president in relation to the atrocities perpetrated in the Darfur region of Sudan. In elaborating the criminal responsibility of the suspect,

Most notably, the high-ranking military commanders mentioned by Awate Team have full discretion to implement whatever type of punishment, including extrajudicial execution, and this has continued with impunity for several years. Each of the military commanders operates his own prison sites in his respective operation commands, where thousands of people are tortured and executed extrajudicially on a regular basis. In these prison sites, brutish methods of punishment, and degrading and inhumane treatment are meted out indiscriminately and on a daily basis against all who demonstrate the slightest sign of defiance against the draconian rules of the government, or who are believed to be politically or religiously 'different.' The military commanders also operate kangaroo courts where people are sentenced to imprisonment or execution in utter disregard of the requirements of a fair trial. The commanders routinely execute indiscriminate round-ups, locally known as *'14 (giffa)*, with the sole objective of terrorising the entire population. They imprison and fine thousands of parents whose children have left the country 'illegally.' Their actions are bolstered by the support, cooperation, encouragement and acquiescence of the security and intelligence heads as well as top ruling party and government officials, starting with the state president.

The next question to be answered is: Where, when and how are these individuals to be prosecuted?

7. Forum for prosecution

In relation to the international crimes perpetrated in Eritrea, there are two important options for prosecution. Perpetrators can be prosecuted either before foreign municipal courts that can exercise the principle of universal jurisdiction, or before the ICC.¹¹⁸ The options will be discussed separately.

7.1 The principle of universal jurisdiction

A most important component of international crimes is that, except under certain conditions, the perpetrators of such crimes are subject to universal jurisdiction.¹¹⁹ The underlying justification behind this principle is the protection of

the ICC Prosecutor argues that: "The Prosecution does not allege that Al Bashir physically or directly carried out any of the crimes. He committed crimes through members of the state apparatus, the army and the Militia/Janjaweed in accordance with article 25 (3)(a) of the Statute (indirect perpetration or perpetration by means). At all times relevant to this Application, Al Bashir has been President of the Republic of Sudan, exercising both *de jure* and *de facto* sovereign authority, Head of the National Congress Party and Commander in Chief of the Armed Forces. He sits at the apex of, and personally directs, the state's hierarchical structure of authority ... He is the mastermind behind the alleged crimes. He has absolute control." See Office of the ICC Prosecutor 2008. The Eritrean President enjoys similar absolute power in his country.

118 Compare this with the possibilities, proposed in the context of Zimbabwe, by Du Plessis and Coutsoudis 2005:355-356.

119 This argument has gained wide currency after the *Pinochet* case. See *R v Bow Street Stipendiary Magistrate and others, ex part Pinochet Ugarte*, UK, House of Lords,

universal values and repression of attacks against the entire world community.¹²⁰ Regardless of any territorial and nationality link with the perpetrator or the victim, there exists a universal interest in punishing and prosecuting international crimes by any state.¹²¹ States have an obligation either to try international offenders before their own courts or surrender them for trial before a foreign or international court.¹²² One possibility by which states can exercise universal jurisdiction over crimes of an international nature is through general, enabling legislation that allows a country's domestic courts to try international crimes. Such legislation generally emanates from international human rights treaty obligations assumed by signatory states.¹²³ In this regard, remarkable progress in the development of international case law is demonstrated in several countries.¹²⁴

However, there are some practical limitations to the principle of universal jurisdiction. As the ruling of the International Court of Justice (ICJ) in the *Arrest Warrant*¹²⁵ clearly demonstrates, there are certain immunities attached to incumbent high-ranking officials, such as the head of state, diplomatic agents and senior members of cabinet, trumping the possibility of prosecution for international crimes in foreign municipal courts. Accordingly, the immunity remains intact while the person is in office, no matter what the nature of the action is, even if it constitutes a crime of international concern.¹²⁶

judgment of 24 March 1999 in [1999] 2 All ER 97-192, speeches of Lord Browne-Wilkinson (112-115), Lord Hope of Craighead (145-52), Lord Saville of Newdigate (169-70), Lord Millet (171-191) and of Lord Phillips of Worth Matravers (181-190); see also *Fidel Castro*, Spain, *Audiencia Nacional*, order (auto) of 4 March 1999 (No. 1999/2723) (Legal Ground 1-4); and *Arrest Warrant* of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), ICJ Reports (2002) 3 ('*Arrest Warrant* case'), paras 57-61.

120 Cassese 2003a:285.

121 Cassese 2003a:24; Cassese 2002b:857-858; Mangu 2004:76.

122 See generally Bassiouni & Wise 1995:xi; Wise 1993:268; Orentlicher 1991:2537.

123 Du Plessis & Coustoudis 2005:359.

124 See for example, *Gadhafi*, France, Paris Court of Appeal (*Cour d'appel de Paris*), *Chambre d'accusation*, decision of 20 October 2000, No 1999/05921, in RGDIP (2001) 451-456, where the court quoted the Preamble of the ICC Statute as evidence of the international obligation to prosecute authors of international crimes. The relevant part of the ICC Preamble reaffirms "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

125 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, ICJ Reports (2002) 3, paras 51-55. This case involves the issuance of an arrest warrant by a Belgian court against an incumbent foreign minister of the DRC. In the warrant, the foreign minister was charged with grave violations of international law. The warrant was, however, declared unlawful by the ICJ as it was against an incumbent high-ranking government official who was protected by diplomatic immunity. Moreover, Belgium was also said to be prevented from exercising jurisdiction over the Congolese foreign minister as both countries are considered equal in international law. See also the latest obstacles with regard to the proposals of prosecuting Zimbabwean high-ranking officials in foreign municipal courts as discussed by Du Plessis & Coustoudis 2005:350-357.

126 Cassese 2003a: 271.

As a result of the unfortunate ruling of the *Arrest Warrant*, the principle of universal jurisdiction over international crimes is said to be “on its last legs, if not already in its death throes”.¹²⁷ This is a stringent obstacle relating to the enforcement of universal jurisdiction in foreign municipal courts against Eritrean government officials. On the other hand, some writers argue that there is no clear-cut demarcation according to which individuals, other than the head of a state and a foreign minister, enjoy immunity under customary international law.¹²⁸ Apparently, there might be a possibility of prosecuting those incumbent officials who do not enjoy immunity, provided that they are to be found in the territory of a country whose courts are empowered to exercise universal jurisdiction over international crimes.

In this regard, democratic dispensations of the world should consider the possibility of prosecuting the most responsible perpetrators whenever the prospect to do so materialises. The possibility of prosecuting individuals who are currently abroad for various reasons is much easier than that of others who still enjoy political power inside the country. The case of Mr Nazgi Kiflu,¹²⁹ the former Chief of National Security, is a good example in this regard. According to recent developments, it was revealed that Mr Kiflu is now living in the UK as an “ordinary” person, a fact that presupposes any diplomatic immunities attached to him previously may no longer apply to his current status. This can serve as a good test case laying the foundations for further prosecutorial actions that could be taken against other government officials in different jurisdictions. There is still another possibility for prosecution, as discussed below.

127 Cassese 2003b: 589.

128 Du Plessis & Coustoudis 2005: 352.

129 According to HRC-E 2008, Mr Kiflu is the most responsible government official, among other things, for the imposition of arbitrary prison terms against hundreds of former *Derg* officials in January 1996. When imposing the prison terms, the perpetrator gathered all prisoners in the compound of the Adi Quala Prison and summarily read the names of individuals and their “prison terms”, ranging from several years of imprisonment to life sentences. This was a flagrant violation of fair trial standards as stipulated in the relevant provisions of the Eritrean Criminal Procedure Code as well as in international law. In 2001 and 2004 the same perpetrator allegedly gave orders for the arrest of several journalists of the private media and the leaders of different religious groups. Many of his victims remain in *incommunicado* detention and some have already died in prison. In this regard, Reporters Without Borders says: “The fact that one of the regime’s barons and a key figure in its repressive system is living in Europe despite his continuing political activities raises questions for democratic governments that are supposed to protect the political refugees to whom [they grant] asylum.” Reporters Without Borders then adds: “The British authorities should ask themselves what this [senior official] of one of the world’s most brutal dictatorships is doing leading a comfortable life in London. There are lessons to be learned from this, and explanations need to be given to the British public and to the Eritreans who were the victims of the despotic regime imposed by Isaias and his close associates, of whom Naizgi is one of the most important.” See Reporters Without Borders 2008b; HRC-E 2008.

7.2 Prosecution before the ICC

The ICC Statute provides the most important means of prosecution of individuals responsible for serious human rights abuses that attract universal concern. According to article 13 of the ICC Statute, there are three jurisdictional trigger mechanisms for a case to be tried by the ICC.¹³⁰ A case can be referred to the ICC Prosecutor by a state party¹³¹ to the ICC Statute; it may be referred to the Prosecutor by the UN Security Council acting under Chapter VII of the UN Charter; or the Prosecutor can also commence investigation on her/his own initiative (*proprio motu*). In all cases, the jurisdictional trigger mechanism is subject to the principle of complementarity, as discussed below.¹³²

7.2.1 Initiation by a state or by the Prosecutor

One of the core principles in the ICC Statute is the principle of complementarity,¹³³ according to which the prosecution of international crimes is primarily the responsibility of national courts. The ICC prosecutes international crimes only when national courts fail to accomplish this task owing to unwillingness or inability. Apart from this, two other fundamental elements must also be fulfilled before the ICC can prosecute an offender. The crime must have been committed in a state which is a party to the ICC Statute, or the person who has committed the offence must be a national of a state party to the ICC Statute.¹³⁴ The possibility of prosecution of offences committed in a non-signatory state or by a citizen of such a state is unfortunately circumscribed by narrow parameters.

The above limitation was evident from the reply of the ICC Prosecutor given in response to a communication lodged with the ICC by a rights group known as Rights for Eritrean Citizens.¹³⁵ The group requested the ICC Prosecutor to initiate a prosecution against Eritrean government officials in 2003. In response, the Office of the Prosecutor wrote that none of the preconditions relevant for prosecutorial initiation by the Prosecutor (as stipulated by articles 12 and 13) were satisfied. As a result, the Prosecutor declined to proceed with further analysis as “the allegations appear to fall outside the jurisdiction of the Court”. However, the Prosecutor noted that the decision may be reviewed if there is acceptance of jurisdiction by Eritrea or a referral from the Security Council is obtained.¹³⁶ Under the circumstances, it appears that the most viable option for the prosecution of Eritrean government officials is via Security Council referral.

130 Kittichaisaree 2001:281.

131 Eritrea is not a state party to the ICC Statute. See ICC Website 2007.

132 Kittichaisaree 2001:281.

133 See 10th Preambular Paragraph, articles 1, 15, 17, 18 and 19 of the ICC Statute. Werle and Jessberger refer to this as a “decentralised criminal justice” system characterised by “conservative jurisdictional constraint”. Werle & Jessberger 2002: 193. See also Swanepoel 2007:136.

134 Article 12 of the ICC Statute.

135 See Rights for Eritrean Citizens 2004a; Rights for Eritrean Citizens 2004b.

136 Office of the ICC Prosecutor 2004.

7.2.2 Security Council referral

Given that the two jurisdictional trigger mechanisms of the ICC Statute are now regarded as not applicable to Eritrea, government officials can be prosecuted if the ICC Prosecutor decides to initiate a prosecution upon instructions to be given by the Security Council. Security Council referral is always possible, even when the ICC Statute is not ratified by a given state. This can be done regardless of where the offence took place or by whom it was committed.¹³⁷ For this to happen, the UN Security Council must believe that a situation in a given country amounts to a threat to international peace. The Security Council did this for the first time by Resolution 1593 (2005) of 31 March 2005, when the situation in the Darfur region of Sudan was regarded as a threat to international peace and regional security. As explained earlier, the factors relevant to classify the Eritrean situation as a threat to international peace and regional stability are all in place. The following considerations are also important in this regard.

Apart from grave human rights violations (crimes against humanity), humanitarian law violations (war crimes and the crime of aggression) of a much graver nature have also been perpetrated in Eritrea in different contexts: during the 1996 Eritrea-Yemen border conflict, the 1998-2000 Eritrea-Ethiopia border conflict,¹³⁸ the 1996 and 2008 Eritrea-Djibouti border conflict, as well as in the context of Eritrea's violations of several Security Council Resolutions, which imposed stringent sanctions against Somalia and Sudan. Violations of international humanitarian law have also been committed in the context of low level internal armed conflicts that took place since the country's independence in 1991. There is a reliable body of information, including periodic reports by UN panels of experts¹³⁹ and monitoring groups,¹⁴⁰ reasonably indicating the direct involvement of Eritrean government officials in two of the most catastrophic humanitarian crises of our time, namely the civil wars in the Darfur region of Sudan and Somalia. Eritrean government officials have persistently violated Security Council Resolutions and norms of customary international law with the adverse effect of turning the entire Horn of Africa into a major spot of armed conflict and a devastating humanitarian crisis. Apart from arming, training, financing and supporting armed groups in Ethiopia, Somalia and Sudan, government officials have recently offered sanctuary to a notorious militant¹⁴¹

137 Kirsch & Robinson 2002:634. Kontorovich opines that the exercise of universal jurisdiction by the ICC on the basis of Security Council referral should be considered as a 'delegated' rather than pure exercise of universal jurisdiction: Kontorovich 2004:201.

138 As discussed in note 5 above, the Eritrean government was found to be in violation of international law by initially invading the flash point of the conflict, which before the war, was under peaceful administration of Ethiopia. This has legal implications on the individual criminal responsibility of Eritrean government officials as it involves the crimes of aggression.

139 See, for example, *Final Report of the Panel of Experts, Submitted in accordance with Resolution 1591 (2005)*, UN Doc S/2006/65, 30 January 2006.

140 See, for example, *Report of the Monitoring Group on Somalia, Submitted to the Security Council in Accordance with Security Council Resolution 1724 (2006)*, UN Doc S/2007/436, 18 July 2007.

141 The designated individual, Sheikh Hassan Dahir Aweys, officially attended a Somali National Conference hosted by Eritrea in September 2007, where he gave a press

designated by a UN Security Council as associated with Al-Qaida, Usama Bin Laden and the Taliban (in other words, a designated “terrorist”).¹⁴²

As a result of continued belligerent manipulations, Eritrean government officials have maintained a threatening influence in all conflicts in the Horn of Africa. This has given them a “potential authority to decide matters of peace and war on a land mass of 1.7 million square miles and a population of nearly 127 million”. Population-wise, this is the eleventh largest in the world.¹⁴³ This region has suffered continuously from massive human rights and humanitarian law violations, poor governance and severe economic deprivation. In terms of human development indicators, the Horn of Africa “ranks near the bottom in the world — and indeed below the rest of Africa”.¹⁴⁴ Certainly, Eritrean government officials are amongst the most responsible actors in destabilising the whole region. This is in addition to the massive human rights violations perpetrated against the Eritrean people inside the country.

The frustration and dismay emanating from such threats must be accompanied by international indignation and a firm resolve to react seriously to such inhumanity. Clearly, ICC prosecution through Security Council referral is a most important recourse to do justice not only to the suffering of the Eritrean population but also to the people of the Horn of Africa at large. The deterrent factor in Security Council referral is in particular relevant to the current humanitarian crisis in the Horn of Africa, which, if left unattended, might lead to another catastrophe.¹⁴⁵ In this regard, the international community is expected to act urgently lest it is condemned for repeating the mistakes of the past.

There may, however, be one unavoidable limitation to ICC prosecutions. According to the general view, even if an investigation is initiated upon Security Council referral, the ICC can only prosecute those crimes perpetrated in Eritrea after 1 July 2002, the date when the ICC Statute entered into force.¹⁴⁶

release from Asmara, defying Security Council Resolution 1267 (1999). *Shabait.com News* 2007b. See also *Consolidated List of Targeted Individuals and Entities Associated with Al-Qaida, Usama Bin Laden and the Taliban*, compiled by the Al-Qaida and Taliban Sanctions Committee of the UN Security Council, available at <http://www.un.org/sc/committees/1267/pdf/pdflist.pdf>, updated on 17 October 2007.

142 Security Council Resolutions 1267 (1999), 1333 (2000), para 8(c) and 1390 (2002), para 2(a).

143 Younis 2007.

144 Experts depict the Horn of Africa as “a rough neighbourhood” which has, since 1990, been ravaged by at least one conflict in each of the forms of inter-state conventional war, guerrilla-style liberation struggle, coups or revolutions. See Swan 2007.

145 Compare this with the responsibility of the international community as phrased in the *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (ICISS)*, December 2001: the responsibility of the international community to intervene in a given situation of humanitarian crisis or massive human rights violations, even without the consent and blessing of a given state under whose territory the problem arises. This can be done if it is reasonably proven or believed that such a state is unable or unwilling to reverse the situation. The situation in Eritrea pertinently fits into the kind of scenario foreseen by the above report. See also generally *In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the UN Secretary-General*, UN Doc A/59/2005.

146 Article 11(1) of the ICC Statute.

The unfortunate consequence of the purported temporal jurisdiction of the ICC is that all atrocities perpetrated before 1 July 2002 could be effectively excluded from the jurisdiction of the ICC. Due to the protracted political instability, the national judicial system in Eritrea has totally collapsed as far as the prosecution of international crimes is concerned. With the apparent limitations on the possibility of prosecution of incumbent high-ranking officials in foreign municipal courts and if the temporal jurisdictional limitations of the ICC hold true, there is a possibility that international crimes perpetrated in Eritrea before 1 July 2002 will remain unpunished.

Nonetheless, following the argument developed by the UN Human Rights Committee, a nexus of applicability can always be established in situations where human rights violations constitute a continuous act of perpetration. In *Carballal v Uruguay*, the UN Human Rights Committee found a continuing violation when a prisoner had been arrested before the ICCPR came into force in Uruguay, was never charged, and was not released until after the ICCPR had entered into force.¹⁴⁷ Most violations perpetrated by the Eritrean government constitute a continuous act. For example, there are thousands of prisoners in Eritrea who have been detained without a court order before the coming into force of the ICCPR in Eritrea. All such detainees remain in prison after the entry into force of the ICCPR in Eritrea. In so far as a violation starts before the coming into force of the ICCPR in Eritrea, and continues after the entry into force of the ICCPR, the ICCPR is applicable. The same argument shall apply *mutatis mutandis* with regard to the applicability of the ICC Statute.¹⁴⁸

On the other hand, the discussion in the previous sections reveals that most of the crimes perpetrated since Eritrea's independence in 1991 do qualify as crimes against humanity and torture. Crimes against humanity are "crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime".¹⁴⁹ This means that some international crimes that fall under the jurisdiction of the ICC were defined as such long before the coming into effect of the ICC Statute. A good example in this regard is torture, which, according to article 1(1) of the Convention against Torture, was defined as an international crime in 1984. In *Furundzija*,¹⁵⁰ the ICTY Trial Chamber made it clear that the prohibition of crimes against humanity, torture and other international crimes is now regarded a peremptory norm of international law. Accordingly, any state can prosecute and punish individuals suspected of these crimes. Moreover, in *Kunarac and others*,¹⁵¹ the ICTY held that torture, even if committed as a single

147 *Carballal v Uruguay*, (R8/33), ICCPR, UN Doc A/36/40, decision of 27 March 1981, 125, para 13.

148 With regard to the specific crime of enforced disappearance, Stahn comments that this violation is a typical international crime with a characteristic feature of perpetuity. This is so because enforced disappearance endures as long as the fate and the whereabouts of the disappeared remain concealed. The continued nature of the crime is subject to the revelation of concealed facts and as such this may extend over a long period of time, making the crime subject to the jurisdiction of any court that assumes jurisdiction after the commission of the crime. See Stahn 2005:706.

149 Tadić, para 271.

150 *Furundzija*, ICTY Trial Chamber II, judgment of 10 December 1998, paras 156-157.

151 See generally paras 488-497.

act, constitutes an international crime when committed by a state official or an official of a *de facto* state-like organ. Furthermore, in *Delalic and others*¹⁵² and *Kunarac and others*,¹⁵³ the ICTY restated that the elements set out in the definition of torture are now generally considered to be customary in nature. They were thus binding on all states of the world as customary international law long before the coming into effect of the ICC Statute.

Pending the implementation of the two prosecutorial options discussed above, the international community could also adopt interim measures or sanctions by imposing travel bans and freezing of assets of those who bear responsibility for the human rights and humanitarian law violations perpetrated in Eritrea and the Horn of Africa.

8. Conclusion

International crimes, especially crimes against humanity, have been perpetrated in Eritrea on an alarming scale. There is a wealth of credible information, which reasonably suggests that massive violations are committed as part of a widespread, systematic and preconceived government plan or policy. The violations sufficiently meet the threshold of international crimes as defined by article 7 of the ICC Statute. The Eritrean government has taken no measures to tackle this challenge. In fact, violations are continuing with the encouragement and acquiescence of senior government officials and army commanders. The perpetrators identified in this article have unlawfully, wilfully and knowingly committed grave human rights violations in a systematic and widespread manner. The perpetrators have acted as principals or accessories either by perpetrating, ordering, encouraging, aiding, participating, abetting or taking a consenting part in, and were connected with plans and enterprises involving the commission of international crimes which subjected thousands of people to murders, brutalities, cruelties, tortures, atrocities, and other inhuman acts.

It is reasonably apparent that all such perpetrators and others, who will have to be identified in due course as further evidence is obtained, have acted in terms of a common design to commit international crimes against the Eritrean people. The unabated perpetration of international crimes represents a hideous blot on the pages of modern Eritrean history. Together with the regional instability prevailing in the Horn of Africa, the crisis constitutes a threat to international peace and security. The situation merits intervention by the international community. It is, therefore, strongly recommended that the situation in Eritrea should be immediately referred by the Security Council to the ICC pursuant to article 13(b) of the ICC Statute. In the meantime, the international community should adopt interim punitive measures aimed at alleviating the suffering of the Eritrean people and its neighbours. Eritrea represents a bleak picture of a failed state in the making. By responding tardily, the international community should not allow the recurrence of mistakes of the past.

¹⁵² See generally paras 455-474.

¹⁵³ See generally paras 488-497.

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