Human Trafficking and Trauma in the Digital Era:
The Ongoing Tragedy of the Trade in Refugees from Eritrea

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Chapter 13

Prosecuting Sinai Trafficking: An Overview of Options

Daniel Mekonnen & Wegi Sereke

It is in fact a system that is prepared as if it was a loophole, for whoever who wishes to use it. It is like leaving money on the street without telling the people to take it. It is a system that is purposely left without administrative control, thereby inviting the military and others to exploit it.
(Interview, Van Reisen with KD Hosabay, Skype, 30 November 2016)

There are reasonable grounds to believe that Eritrean officials have committed the crime of enslavement, a crime against humanity, in a persistent, widespread and systematic manner since no later than 2002.
(UNHRC, 2016, para. 68)

Introduction

Human trafficking, particularly the phenomenon that has come to be known as 'Sinai trafficking', is a heinous violation of international law (Shelly, 2010; Gallagher, 2010; Van Reisen, Estefanos & Rijken, 2014). This new form of trafficking, which emerged at the end of 2008, is challenging academics and researchers to adopt a new definition of trafficking that takes into account the peculiar characteristics of human trafficking in the Sinai (Abdel Aziz, Monzini & Pastore, 2015; Berhane, 2015; Van Reisen & Rijken, 2015), namely, the commodification of human beings who are sold and on sold in the process of trafficking for ransom while "money is extorted from the relatives of hostages (initially migrants and refugees) by traffickers using mobile phones while hostages are tortured to pressure relatives

into paying the ransom amounts" (Van Reisen & Rijken 2016, p. 117). Sinai trafficking has been defined as: an identified pattern of "abduction and displacement, captivity, torture, sexual violence, humiliation, forced begging, extortion, commoditisation of people by selling, serial selling and killing" (Van Reisen *et al.*, 2014, p. 23). This phenomenon stretches from the Greater Horn of Africa region to the Sinai Desert and beyond.

Although no new cases of Sinai trafficking have been reported since 2015[48], its root causes have not been addressed and its perpetrators remain at large. As this chapter will reveal, the human rights situation in Eritrea, which drove the migration that fed the smuggling and trafficking networks, remains unchanged. Among the alleged perpetrators are high-ranking military officials, who have not been brought to justice. Therefore, the people of Eritrea are still fleeing Eritrea in large numbers and are still at risk of exploitation. Until those responsible for human trafficking in the Sinai are brought to justice, the Eritrean people will not be safe and cannot heal from what will be argued in this chapter are 'atrocity crimes'.

This chapter looks at the options for prosecuting Sinai trafficking, to hold those responsible accountable. By distilling the most pragmatic options for prosecutorial accountability, at the international level, this chapter aims to provide a cursory overview of the existing legal framework in this regard, followed by some practical recommendations towards the prosecution of human trafficking. It starts by looking at prosecution (as an essential element of combating human trafficking) and the international legal framework, followed by Eritrea's central role in the trafficking cycle. It then examines state responsibility and individual responsibility as the two main practical avenues for prosecution, as well as the different legal forums for prosecution. Finally, it looks at the responsibility of the international community to respond more broadly to the situation in Eritrea through the doctrine of the

[48] Reports have been provided reporting hostages being trafficked or killed in Sinai in 2015 and 2016 by Van Reisen (informal document, unpublished, anon, January 2017).

responsibility to protect (R2P). Without undermining the role of the other two components, this chapter examines the most effective available prosecutorial options, conceived under international and regional legal frameworks, for ensuring accountability for the transnational crime of human trafficking, in particular, Sinai trafficking.

Prosecution: Essential in combating human trafficking

Prosecution is one of the three elements of combating human trafficking, also known the '3P paradigm', the other two being: prevention and protection (United States Department of State, 2011; Mekonnen & Estefanos, 2011). It emphasises the need to prosecute human traffickers and those who aid and abet in the perpetration of this grotesque violation of international law, which is akin to modern day slavery.

The prosecution of human traffickers is not an easy endeavour, mainly due to the fact that the crime is highly clandestine and, as a result, the great majority of human trafficking cases go unreported. Due to its transnational nature, it involves a wide range of actors, including international criminal organisations, spanning a global network (Rijken, 2003; Mekonnen & Estefanos, 2011; Van Reisen, *et al.*, 2014). The lucrative nature of the business means that members of local law enforcement agencies, diplomats, and others may at times even collaborate with criminal syndicates, making prosecution extremely difficult. Moreover, the victims of human trafficking, the most important sources of information and evidence for criminal prosecution, are often unwilling to testify against traffickers, for various reasons, including fear of reprisals and reticence to speak about the trauma they experienced.

In countries that are severely affected by the crisis of human trafficking (e.g., countries in the Horn of Africa), the most critical challenge is the unwillingness and/or inability of the governments of these countries to take effective prosecutorial measures against traffickers. This is also the case in relation to other atrocity crimes,

such as: genocide, war crimes, and crimes against humanity (Scheffer, 2008, p. 320; Murungu & Biegon, 2011; Abass, 2013; Garcia, 2013, p. 57). In a world order still dominated by elastic concerns related to the preservation of the old-age prerogatives of national sovereignty, the prosecution of the transnational crime of trafficking is indeed a daunting task. While these are some of the typical challenges that may be faced at the implementation level, there is a need to clearly understand the legal framework for prosecution at the international and regional levels, with a particular focus on what can be done by African Union and European Union policymakers.

The international legal framework

There is a wide range of regional and international legal frameworks that provide a basis for defining the parameters of human trafficking and that impose obligations on various actors. Some of the most important legal instruments and consensus documents aimed at defining and combating human trafficking include:

- The UN Convention against Transnational Organised Crime and its Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children (2000)
- The Council of Europe Convention on Action against Trafficking in Human Beings (2005)
- The EU Directive on prevention and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU)
- The Global Plan of Action to Combat Trafficking in Persons (2010)
- ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015)
- Inter-American Convention on International Traffic in Minors (1994)

- The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (2006)

Perhaps the most cited international legal definition of human trafficking is the one provided by Article 3(a) of the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children of 2000 (the 'Trafficking Protocol') which states:

> *Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.* (United Nations, 2002, §3a)

Without questioning the validity of this definition, a point of clarification is in order here with regard to the specific phenomenon of human trafficking in the Sinai, also known as 'Sinai trafficking', which begs for a re-consideration of the definition provided by the Trafficking Protocol. In this regard, guidance is provided by Van Reisen and Rijken, who argue that Sinai trafficking has unique characteristics, including abduction, torture, sexual violence, killing, the sale and re-sale of victims or hostages, and, most of all, brutal methods of extortion accompanied by torture and well-orchestrated phone calls to relatives of victims (Van Reisen & Rijken, 2015).

One important question that comes into play at this juncture is the extent to which Sinai trafficking can be considered a sub-category of atrocity crimes. As will be elaborated on in the next section, any form of trafficking, let alone Sinai trafficking, which is possibly the most malignant form, can meet the threshold of an 'atrocity crime' when there is widespread and systematic perpetration of

enslavement, thus marking it as a crime against humanity, as defined by Article 7 of the Rome Statute of the International Criminal Court (ICC) (Moran, 2014; van der Wilt, 2014).

In this regard, it is important to determine the relevance (if any) of Article 7 of the Rome Statute to prosecutorial efforts targeting the crime of human trafficking (Moran, 2014; van der Wilt, 2014). As most of the violations discussed in this publication took place in the Greater Horn of Africa region, extending up to the Sinai Desert, Africa-centred challenges related specifically to ICC prosecutorial initiatives also need to be addressed. Such challenges emanate mainly from the deep-seated crisis of legitimacy that the ICC is suffering from by reason of the growing hostility of African countries towards the ICC and, in particular, the threat of collective renunciation by some African countries (spearheaded by Kenya and Zimbabwe and followed by other countries, such as South Africa, Burundi and Gambia). This existential threat that is hovering over the ICC (Mbeki & Mamdani, 2014) may result in the en mass withdrawal by African countries from the Rome Statute of the ICC (Mekonnen, 2017; Tiba, 2013; Maru, 2013; Dersso, 2013).

Moreover, as will be seen later, with a view to mapping out the responsibility of states, not only in prosecuting perpetrators of human trafficking, but also in protecting vulnerable groups from the danger of human trafficking, it is important to ask if states have any obligation emanating from the doctrine of R2P, and, if not, whether it would be helpful to include human trafficking in the realm of R2P (Farrugia, 2012).

The discussion in this chapter will be articulated using the theoretical and methodological framework of international criminal law and accountability for atrocity crimes. This is premised on the understanding that, when committed in a widespread and systematic manner, human trafficking can also be categorized as a crime against humanity (as defined by Article 7 of the Rome Statute).

Thus, mixing normative and empirical dimensions, the methodology applied in this chapter has a strong bias towards a doctrinal approach relying predominantly on the relevant legal

framework or international legislation on human trafficking and atrocity crimes in general. The methodology aspires to extract credible findings with a view to reaching meaningful, practical conclusions regarding the transnational crime of human trafficking, especially as affecting tens of thousands of victims originating from countries in the Horn of Africa. More importantly, the discussion will pay particular attention to Eritrea, on two grounds, as described in the next section.

Eritrea at the centre of Sinai trafficking

Eritrea occupies a central place in the Sinai trafficking phenomenon, for at least two major reasons. First, the vast majority (95%) of victims of Sinai trafficking are Eritrean (Van Reisen & Rijken, 2015, p. 114). Thus, Eritrea, as a major source country of victims, is a very important case study. Second, there are widespread allegations of the direct involvement of high-ranking Eritrean government officials, especially from the military, in the cycle of violence that constitutes Sinai trafficking (United Nations Security Council, 2012, 2013). Thus, there is a prima facie identifiable link between what is happening in the Sinai and what is happening in Eritrea (Van Reisen & Rijken, 2015), making a focus on Eritrea imperative.

Accordingly, it is important to look more deeply into Eritrea's role in Sinai trafficking. This requires a methodological inquiry into the prevailing situation of gross human rights violations in Eritrea, which, according to the most authoritative report on this issue, namely, the second report of the UN Commission of Inquiry on Human Rights in Eritrea (COIE) (United Nations Human Rights Council, 2016), reaches the threshold of crimes against humanity. In addition to the detailed findings of the two COIE reports, there is a plethora of academic and non-academic literature chronicling the grave violations of human rights and international law that have been taking place in Eritrea since 1991 (Kibreab, 2009; Mekonnen, 2006; Mekonnen, 2009; Mekonnen & Pretorius, 2008; Tronvoll &

Mekonnen, 2014; Amnesty International, 2013; Human Rights Watch, 2013).

Since 1991, the Eritrean government has committed a long list of international crimes that fall within the definition of crimes against humanity, as codified by Article 7 of the Rome Statute of the ICC (United Nations Human Rights Council, 2016). In the words of the COIE, these crimes include: "enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder" (United Nations Human Rights Council, 2016, p. 1 and paras. 59–95). In addition to these internal actions, the Government of Eritrea has been busy destabilizing peace and security in the Horn of Africa to ensure its own narrow political objective of regime preservation (United Nations Security Council, 2012, 2013).

Trafficking and the crime of enslavement

Trafficking, although a grave violation in its own right, may only trigger international concern when it becomes a crime against humanity. In this chapter it is argued that Sinai trafficking qualifies as a crime against humanity. This is based on the definition of 'enslavement' provided by Article 7 of the Rome Statue of the ICC, in which trafficking is mentioned. Article 7(2)(c) defines enslavement, when committed as a crime against humanity, as: "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children".

This crime of enslavement has been committed in Eritrea in the context of the country's controversial programme of national service. Years before the establishment of the COIE, Human Rights Watch (2013) described this practice as a form of forced labour and a collective method of punishment by the Eritrean people against a considerable proportion of the Eritrean people (see also, Kibreab, 2009; Mekonnen, 2009). In elaborating on enslavement in Eritrea, the COIE cites a long list of case law from the International Criminal

Court, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia (United Nations Human Rights Council, 2016, para. 64). Remarkably, the COIE links the crime of enslavement committed by the Eritrean regime to that of the crimes committed by Germany during the Second World War, Cambodia during the Khmer Rouge regime, and the former Yugoslavia and Sierra Leone in the 1990s. In the words of the COIE, although the "victims of the military/national service schemes in Eritrea are not [necessarily] bought and sold on an open market [...] the powers attaching to the right of ownership" are evidenced by:

> *(a) the uncertain legal basis for the national service programmes; (b) the arbitrary and open-ended duration of conscription, routinely for years beyond the 18 months provided for by the decree of 1995; (c) the involuntary nature of service beyond the 18 months provided for by law; (d) the use of forced labour, including domestic servitude, to benefit private, PFDJ-controlled and State-owned interests; (e) the limitations on freedom of movement; (f) the inhumane conditions, and the use of torture and sexual violence; (g) extreme coercive measures to deter escape; (h) punishment for alleged attempts to desert military service, without an administrative or judicial proceeding; (i) the limitations on all forms of religious observance; and (j) the catastrophic impact of lengthy conscription and conditions on freedom of religion, choice, association and family life.* (United Nations Human Rights Council, 2016, para. 65)

The COIE, therefore, concludes, that in this context its military/national service programme, Eritrean officials exercise powers attached to the right of ownership over Eritrean citizens. In light of this, the national service programme of Eritrea is no longer being used for its intended purpose, as defined by the relevant Eritrean legislation. Instead, it is being abused with the primary objective of furthering the economic interests of state-endorsed enterprises and individuals and to maintain control over the population "in a manner inconsistent with international law" (United Nations Human Rights Council, 2016, para. 68). Based on this, the

COIE states that "there are reasonable grounds to believe that Eritrean officials have committed the crime of enslavement, a crime against humanity, in a persistent, widespread and systematic manner since no later than 2002" (*Ibid.*).

Hence, it is clear that the main cause of the flow of victims to traffickers in the Sinai was the unbearable political situation brought about by the enslavement of the Eritrean people (under the guise of military service) in Eritrea. It is argued that this is sufficient to establish the existence of a prima facie link between Sinai trafficking and the human rights situation in Eritrea. Sinai trafficking also fulfils at least one aspect of the definition of crimes against humanity, namely, that of widespread abuse, as 25,000–30,000 people are estimated to have been the victims of Sinai trafficking (Van Reisen *et al.*, 2014).

The next section looks at the involvement of high-ranking government officials in the ongoing human rights violations committed within the national borders of Eritrea and outside Eritrea, particularly their involvement in Sinai trafficking.

Involvement of Eritrean officials

Most of the Eritrean victims of human trafficking in the Sinai are former national service conscripts, which is tantamount to enslavement, constituting a crime against humanity, as discussed in the previous section. In their effort to escape from this abuse, which is systematic and widespread in Eritrea, the victims find themselves trapped in another instance of pervasive abuse (Sinai trafficking), which also qualifies as a crime against humanity. There is also a clearly identifiable link between Sinai trafficking and the overall situation of gross human rights violations in Eritrea.

Despite this link, Sinai trafficking is not addressed in the two reports of the COIE. This is due to the narrow interpretation of its mandate adopted by the COIE in its first report (Mekonnen, 2017, in press). In particular, with regard to the interpretation of the geographic scope of its mandate (*ratione loci*), the COIE was indeed

very conservative, limiting its investigations to violations committed within the national territory of Eritrea. However, following the report of the UN Commission of Inquiry on North Korea (United Nations Human Rights Council, 2014, para. 8), with which the first COIE report shares remarkable similarities, it would have been much better if the COIE had investigated extraterritorial actions originating from the State of Eritrea.

As is widely known, the Eritrean government has an "extensive spying and surveillance system targeting individuals within the country and in the diaspora" (United Nations Human Rights Council, 2015, para. 27) implemented via the so-called "long" or "extended arm of the State", as established by the Court of Amsterdam in the recent case of Bahlbi vs. Van Reisen (2015). Moreover, other violations of human rights, such as Sinai trafficking, can be broadly regarded as violations that are causally enabled by, or the immediate consequence of, violations committed in the State of Eritrea. Thus, it is contended that these violations should have been rigorously investigated by the COIE. Failure of the COIE to address such issues stands as one of its major shortcomings. However, some tentative observations can be made in this regard based on other investigations and findings on Sinai trafficking, particularly on the suspected collusion of some high-ranking Eritrean government officials with Sinai trafficking.

The most important starting point is the alleged involvement of high-ranking Eritrean government officials in Sinai trafficking, as verified by UN experts in the Monitoring Group on Somalia and Eritrea (United Nations, 2012, 2014). Since 2009, the Eritrean government has been subjected to sanctions imposed by the UN Security Council, on account of the government's foreign policy in the Horn of Africa, which entails grave breaches of established norms related to international peace and security. In relation to these sanctions, the behaviour of the Eritrean government is under constant watch by the Monitoring Group, which was appointed by the UN Security Council with the objective of monitoring the

effectiveness of the sanctions imposed on the Eritrean government in 2009, which are still in force.

In relation to this mandate, the Monitoring Group has published detailed accounts of the direct involvement of high-ranking Eritrean government officials in Sinai trafficking. This needs to be seen in the context of the mass exodus of Eritreans, which is considered by some high-ranking Eritrean government officials as a blessing in disguise (Mekonnen, 2016a). Indeed, this mass exodus has dual benefits for the Eritrean regime. First, it is seen as "a social safety valve for frustrated youthful constituencies" (International Crisis Group, 2014, pp. 9–10). Second, it has become "a lucrative side-business" for high-ranking Eritrean government officials, who are said to be colluding in the business of smuggling and trafficking people to neighbouring Ethiopia, Sudan and Egypt (*Ibid.*, pp. 9–10).

More concretely, the Monitoring Group reports that a well-known and high-ranking Eritrean army commander, General Teklai Kifle (also known as 'Manjus') is involved in human and weapons trafficking operations ranging from eastern Sudan all the way to the Sinai Desert (United Nations Security Council, 2013, paras. 70, 141; United Nations Security Council, 2012, paras. 59, 77, 80, 82, 86). Given that this individual is a high-ranking military officer, it is difficult to think of his actions as not representing those of the Eritrean government, or as something committed without the knowledge or acquiescence of the Eritrean state.

Trafficking as a lucrative business

In explaining how high-ranking Eritrean officials are involved in the lucrative side-business of trafficking without any measures taken by the state, the former Head of the Eritrean National Treasury, Mr Kubrom Dafla Hosabay, states that:

> *It is in fact a system that is prepared as if it was a loophole, for whoever who wishes to use it. It is like leaving money on the street without telling the people to take it. It is a system that is purposely left without administrative control, thereby inviting*

the military and others to exploit it. (Interview, Van Reisen with KD Hosabay, Skype, 30 November 2016)

The Eritrean regime, embodied in the totalitarian behaviour of its President, Isaias Afwerki, is primarily concerned with its own preservation. The most effective way of ensuring this is by 'buying' the loyalty of high-ranking military officials – who are indispensable if the regime is to survive – for the simple reason that the military happens to be among the most important government agencies in which real power (the barrel of the gun) rests, the other important branch being the secret police.

It is a well-known fact that since the political crisis of September 2001 (Awate.com, 2013; Connell, 2005), President Isaias Afwerki is ruling the country by a system of impunity deliberately designed to proliferate illegal methods of economic exploitation by which army commanders enrich themselves exponentially, without any legal consequences, in exchange for the utmost level of loyalty towards the President. In this context, a disturbing informal economy and trade has thrived, in which generating income through all forms of illegal activities has become the norm rather than the exception, mainly for high-ranking army commanders (Interview, Van Reisen with KD Hosabay, Skype, 30 November 2016).

Looking at the history of other African dictators, Isaias Afwerki is repeating the same tactic of ruling by political patronage, perhaps with a more sophisticated method, which includes acquiescence or complicity in the trafficking business. His behaviour is explained by an Eritrean scholar as follows:

A one-time liberation hero but widely and deeply despised today, Isaias [Afwerki] runs the tiny nation as his personal fiefdom with a degree of fear that earned him the infamous appellation of eti diablos (Tigrinya for the "devil"). He rules not only by brute force but also through a Mobutu-style breeding of ceaseless instability and power struggles among his subordinates blended with Félix Houphouët-Boigny's art of buying legitimacy by granting privileged access and clientelistic distribution of state resources to the tegadelti (former freedom fighters) and a few civilian supporters.

Isaias mercilessly punishes disloyalty by liquidation and temporary "freezing" – dishonourable dismissal of officials from active duty. (Nur, 2015, p. 99)

In Eritrea, no one is allowed to create wealth outside the informal money-generating system, which President Isaias Afwerki has deliberately created by killing the formal economy and through his tailor-made informal method of generating wealth, including the notorious coupon economy in the country (Welde Giorgis, 2014, p. 233; Ogbazghi, 2011). In this way, he distributes wealth to anyone who is willing to serve the ultimate objective of regime preservation and turns a blind eye to those who are involved in the most despised business of trafficking, as long as they do so without affecting their loyalty to him.

The most important evidence connecting Sinai trafficking with high-ranking Eritrean government officials is the fact that many of the people who later fall into the hands of traffickers in Sinai are actually smuggled out of Eritrea using government-owned station wagons or SUV vehicles (Interview, Van Reisen with KD Hosabay, Skype, 30 November 2016). Once in Sudan, they are handed over to other smugglers, facilitators or traffickers who promise to assist them in crossing the Mediterranean Sea. However, instead, the abusers hand the victims over to the main trafficking ring in the Sinai. The cycle continues likes this. Moreover, it is important to remember that on a number of occasions, ransom money to secure the freedom of victims held hostage in Sinai has been paid to people inside Eritrea (Van Reisen *et al.*, 2014). Looking closely at the circumstances of this whole story, there is plausible evidence pointing to the fact that this whole activity is taking place either with the knowledge, acquiescence or complicity of high-ranking government officials or the state in general. The next section discusses the legal basis for state responsibility pertaining to Sinai trafficking.

State responsibility

However, does the involvement of high-ranking Eritrean government officials in Sinai trafficking equate to state responsibility for this crime? In this section, it is argued that it does. To establish responsibility on the part of Eritrea, it is important to examine the existing body of international law on state responsibility. The starting point is Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts ('the Draft Articles'), which defines an internationally wrongful act as follows:

> *There is an internationally wrongful act of a State when conduct consisting of an action or omission:*
> *(a) is attributable to the State under international law; and*
> *(b) constitutes a breach of an international obligation of the State.* (International Law Commission, 2001)

In the case of Eritrea, it is clear that, although the core element of Sinai trafficking is taking place in a distant geographic location, there is a clear connection with high-ranking government officials in Eritrea. Article 7 of the Draft Articles envisages a scenario in which a government official (such as General Teklai Kifle) may have acted in excess of his authority or contrary to instructions, but where such an act is still considered an act of the state (International Law Commission, 2001, p. 45). The government may claim that the person in question was acting in a personal capacity, prompted by personal financial gain. By way of explaining a scenario like this, the International Law Commission states that "a State may be responsible for the effects of the conduct of private parties, if it failed to take necessary measures to prevent those effects" (International Law Commission, 2001, p. 39). As the Eritrean government is not taking any measures (at least at the official level) against high-ranking officials who are suspected of involvement in human trafficking in the Sinai, these acts can clearly be attributed to the state. Moreover, as asserted throughout this chapter, the trafficking issue cannot be

seen in isolation from the overall human rights crisis in the country, which is driving migration that is fuelling trafficking and about which the government is not doing anything – constituting another angle from which it may be held responsible for Sinai trafficking. It follows that, as trafficking is a well-known breach of international law (according to several international treaties, including Article 7 of the Rome Statute of the ICC), based on Articles 2 and 7 of the Draft Articles, it can be concluded that the Eritrean State is indeed responsible for the internationally wrongful act of Sinai trafficking.

Having established the culpability or responsibility of the Eritrean State, the next question to be addressed is that of remedy or accountability. The Draft Articles envisage a number of accountability options, which include the duty of cessation and non-repetition (Article 30) and the duty to make reparations (Article 33), among other things. The enforcement of these accountability options against the Eritrean government is a far-fetched reality until such time as Eritrea establishes a democratic system of governance and law. Meanwhile, the most pragmatic thing to do is to focus on the other accountability option envisaged under Article 48 of the Draft Articles. Under Article 48, if "the obligation breached is owed to the international community as a whole," what is known as obligation *erga onmes*, then the international community as a whole (acting through the UN Security Council) has an obligation to taking appropriate measures against the Eritrean State.

At this point, again, we need to look at the trafficking in the context of the prevailing situation of crimes against humanity in Eritrea, a situation which should in its own right trigger universal concern and which is encompassed in the concept of obligations *erga omnes* (Bassiouni, 1997). Following this argument, it is clear that the international community is duty bound to adopt appropriate accountability measures to address the dire human rights situation in Eritrea. The human trafficking crisis cannot, and should not, be seen in isolation from this.

The need to adopt appropriate accountability measures becomes more urgent when other additional factors are taken into

consideration. In addition to the human rights situation inside the country and the trafficking crisis in the Sinai, the Eritrean government has been frequently accused of perpetrating other grave violations of international law, including: state sponsored terrorism (in the context of its alleged involvement in Somalia, which included alleged financial, military and logistical support provided to Al-Shabab, an entity designated by the UN as a terrorist group) and violent interference in the domestic affairs of almost all neighbouring countries (by training and arming the rebel groups from these countries) (Mekonnen, 2009, pp. 113–117).

None of these violations of international law, which should have attracted international concern, are addressed by the two COIE reports (United Nations Human Rights Council, 2015, 2016), mainly because of the narrow interpretation of its mandate, as noted above. However, there seems to be a sound legal basis, premised on customary international law, for the international community to adopt effective accountability measures.

In addition to the limited accountability options discussed in the context of the Draft Articles (focusing on state responsibility), the discourse on accountability can be taken one step further by focusing on the individual criminal responsibility of high-ranking government officials. In this regard, the salient observations made in 1946 by the International Military Tribunal (IMT) are pertinent: that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced" (IMT, 1946, p. 221). In the next section, we will examine the most important options and accountability mechanisms based on the individual criminal responsibility of high-ranking government officials.

Individual criminal responsibility

International crimes of universal concern, in particular crimes against humanity, are taking place in Eritrea with impunity. Sinai trafficking, which has a clearly identifiable link with the human rights

situation in Eritrea, can be seen as part and parcel of this crisis.

There are three important factors in the prosecution of offenders, who might be held accountable for the commission of grave violations of international law, including a version of trafficking in the form of enslavement (as provided by Article 7 of the Rome Statute of the ICC). The first is to clarify the legal basis for individual criminal responsibility. This issue will be dealt with here briefly, leaving further details to a previous work on this particular topic (Mekonnen, 2009, Chapter 5). Thus, building on the well-established principle of international criminal law espoused by the IMT, it follows that grave violations of international law entail serious legal consequences for individuals who are reasonably suspected of involvement in the perpetration of such violations (International Military Tribunal, 1946, p. 221). In more concrete terms, it can be said that individual criminal responsibility arises when an individual commits a violation, such as the criminal act of enslavement, as defined by Article 7 of the Rome Statute, or when such an individual aids or abets in the commission of trafficking (for example, by handing over victims to traffickers).

The second important factor is identification of the most responsible individuals. Based on a legal methodology used by the International Commission of Inquiry on Darfur (United Nations Security Council, 2005, para. 15), a 2008 study by one of the current authors provided a tentative list of the most responsible individuals for the crimes against humanity taking place in Eritrea (Mekonnen, 2009, p. 164). A more persuasive list was published by the first COIE report in June 2015. The relevant paragraph reads as follows:

> *The commission finds that systematic, widespread and gross human rights violations have been and are being committed in Eritrea under the authority of the Government. Patterns of systematic human rights violations have been identified, taking into account several factors. They include the high frequency of occurrence of the human rights violations documented and corroborated during the investigation, the number of victims and the replication of the violation during a certain period of time; the type of rights violated; and the systemic nature of these violations, meaning*

> *that they cannot be the result of random or isolated acts of the authorities. The main perpetrators of these violations are the Eritrean Defence Forces, in particular the Eritrean Army; the National Security Office; the Eritrean Police Forces; the Ministry of Information; the Ministry of Justice; the Ministry of Defence; the People's Front for Democracy and Justice (PFDJ); the Office of the President; and the President.* (United Nations Human Rights Council, 2015, para. 23)

From the statement of the IMT that "crimes against international law are committed by men, not by abstract entities" (International Military Tribunal, 1946, p. 221), it can be argued that some or all government officials running the above listed state institutions are among the most responsible individuals for the ongoing situation of human rights violations in Eritrea. The next question is: how can these individuals be held to account? This is related to the third important factor, which is identification of a prosecutorial forum. This is discussed in the next section.

Prosecutorial forums

With the complete non-availability of domestic legal remedies in Eritrea, international criminal justice, as applied by foreign courts, regional or intentional judicial bodies, is the only viable legal regime under which accountability mechanisms can be considered for the ongoing crimes against humanity taking place in the country and for Sinai trafficking. Each option is discussed separately in this section.

Prosecution by the ICC

Given that the situation of human rights in Eritrea (including that of Sinai trafficking) has reached the threshold of crimes against humanity, the ICC provides the most important means of prosecuting these crimes. According to Article 13 of the Rome Statute of the ICC, there are three jurisdictional trigger mechanisms for a case to be tried by the ICC:

- A case can be referred to the prosecutor of the ICC by a state

party to the ICC Statute.
- A case can be referred to the prosecutor by the UN Security Council acting under Chapter VII of the UN Charter.
- The prosecutor can also commence investigation on her/his own initiative (proprio motu).

The most likely scenario in this case is referral of the situation to the prosecutor of the ICC by the UN Security Council, acting under Chapter VII of the UN Charter. Given the high level of animosity between Africa at large and the ICC, and the diminished interest on the part of the Security Council in referring a new African country to the ICC, the chances of this happening are slim (Mekonnen, 2017).

Prosecution by foreign national courts

Given the current political situation in Eritrea and the limitations of prosecution by the ICC, prosecution by foreign national courts is perhaps the most important available option, with fewer obstacles (compared to the challenges involved in ICC prosecution). Embedded in the concept of 'universal jurisdiction', there is a well-known principle of international law that enables states to claim jurisdiction over persons whose alleged crimes are considered crimes of universal concern (Bassiouni, 1997). States can accordingly act against any offender regardless of the nationality of the offender or victim and irrespective of where the offence was committed.

However, there are certain challenges to the exercise of universal jurisdiction by foreign municipal courts. The ruling of the International Court of Justice in the Arrest Warrant case (2000, paras. 51–55) clearly demonstrates that there are certain immunities attached to incumbent high-ranking government officials, such as the head of state, diplomatic agents and senior members of cabinet (Du Plessis & Coutsoudis, 2005). Such immunities will continue to trump the possibility of prosecution for international crimes in foreign municipal courts (Cassese, 2003, p. 271). However, with regard to other government officials who do not fall under the protection of diplomatic immunity, such as army commanders and ruling party

officials, there is a possibility of prosecuting these individuals, if they are to be found physically in the jurisdiction of other states. The most prominent of such individuals, subject to the establishment of reliable evidence of individual criminal responsibility, is the Presidential Advisor, Mr Yemane Gebreab, who frequently travels to Europe and North America.

The passive personality principle

A very important aspect of universal jurisdiction is the principle of passive personality – also discussed in the context of extra-territorial jurisdiction (see the case of United States v. Yunis, 1991; Echle, 2013). This principle enables a third country to exercise jurisdiction over crimes committed in another country, provided the victim of the violation in question happens to be a citizen of the country wishing to exercise jurisdiction. With regard to the transnational crime of Sinai trafficking, it remains to be seen if there are victims of foreign nationality who can claim that the violation they have suffered while in Sinai was committed against them at the instigation of Eritrean government officials. There is an apparent research gap in this regard.

With regard to human rights violations taking place in Eritrea, the general understanding is that these violations are perpetrated primarily against Eritrean citizens, most especially government officials. There are, however, at least two well-known cases of crimes committed in Eritrea against a foreign national. The first is that of Eritrean-Swedish journalist, Dawit Isaak, who remains in detention without trial and in a state of enforced disappearance since September 2001. As a person with dual nationality (Eritrean and Swedish), the case of Dawit Isaak may not be the best example. Although the Swedish authorities could invoke the principle of passive personality to establish criminal accountability for the violations suffered by Dawit Isaak, the experience of the last 15 years indicates lack of interest on the part of Swedish authorities, presumably for fear of worsening the plight of the victim, whose whereabouts remain unknown.

The second example is that of six British nationals who were held in detention without trial and without consular access in Eritrea for about six months in 2010/11, under circumstances the full details of which still remain unknown (The Independent, 2011). If any of these victims are interested in instituting a legal action against Eritrean government officials, the passive personality principle may be an avenue.

Relatively speaking, Europe as a continental block has the most advanced prosecutorial infrastructure for holding perpetrators of international crimes to account. For obvious reasons, European governments are expected to play a lead role in this regard – in terms of implementing effective prosecutorial strategies, focusing mainly on individuals suspected of involvement in Sinai trafficking.

Related to persecution by foreign national courts or the exercise of extra-territorial jurisdiction by foreign courts, is the possibility of adoption of alternative accountability measures by the most important regional organisation, the African Union (AU). This option is clearly indicated in the recommendations of the second COIE report (United Nations Human Rights Council, 2016, para. 133). What shape and form such an alternative accountability mechanism will take is yet to be seen.

Other interim measures

Pending the implementation of a prosecutorial mechanism by national or international judicial organs, the international community, via its global and regional institutions, could also adopt interim measures aimed at ending the pervasive culture of impunity in Eritrea. Such measures include, but are not limited to, the imposition of sanctions, such as travel bans and the freezing of assets of those who are deemed the most responsible for perpetrating serious violations of international human rights and international humanitarian law.

As a start, the imposition of the recommended interim measures can focus on the list of individuals discussed in the previous section as the most responsible. In this regard, pertinent lessons are to be

gleaned from Security Council Resolutions 1907 (2009) and 2023 (2011a), which already impose stringent sanctions against the Eritrean regime and which were both prompted primarily by the Eritrean government's aggressive foreign policy in the Horn of Africa. The assumption underlying such measures is that the individuals in question are believed to be responsible for promoting or carrying out acts amounting to threats to peace or crimes against humanity and trafficking, which are also in their own rights threats to international peace and order.

The adoption of sanctions is not a measure that would be expected only on the part of the UN Security Council. Other regional bodies, such as the AU and EU also bear the same responsibility. With regard to the EU, there is a precedent pertaining to the Zimbabwean president, Robert Gabriel Mugabe, who remained the subject of stringent EU sanctions for many years on account of the dire situation of human rights in the country (European Common, 2002). With regard to the AU, the idea was proposed some years back by an Eritrean scholar, Weldehaimanot (2010), who argued that, by the standards of the African Constitutive Act, the situation in Eritrea amounts to a threat to regional peace and order. Thus, based on Article 4 of its Constitutive Act, the AU could also take measures aimed at reversing the sad state of affairs in Eritrea, with the objective of rescuing the Eritrean population from the impending risk of a humanitarian crisis.

Speaking of regional actors that can play a role in alleviating the suffering of the Eritrean people, one cannot forget about the EU, which is the leading partner for development of cooperation with the Eritrean government. As noted on a number of occasions, the EU's approach towards Eritrea is not the best of all available examples. While the crimes against humanity being perpetrated in Eritrea are well-documented, the EU still entertains an alternative approach of gradual and constructive engagement, as if it had no clue of the severity of the crimes committed. The next issue that will be addressed is the obligation of the international community at large,

framed in the context of the responsibility to protect (R2P). This will be discussed in the next section.

Obligation of international community: R2P

There are some underlying facts about Eritrea that cannot be denied by anyone who has an objective understanding of the challenges Eritrea faces. However, some seem to be impressed by the misleading ideological mind-set of the Eritrean regime, which is painted as being great for resisting the West at all cost. The sad part of the story is that buried under this hubris, Eritrea, as a new concept of a proud and unbowed state on the African continent, is dying so fast, and while still in its infancy, mainly due to the government's irresponsible actions of the last 15 years since the political crisis of September 2001.

What Eritrea has now is a brutal reality, something many want to hide from, but which keeps popping up in the form of a dead body of a refugee in the Sahara Desert; a victim of Sinai trafficking; or the cries of an Eritrean mother, who gave birth while drowning in the sea (Daily Mail, 2013; The Local, 2013). Although there is no commonly agreed legal definition of the term 'humanitarian disaster' or 'humanitarian crisis', all factors considered, Eritrea is unmistakably going through a humanitarian disaster or crisis, akin to those experienced in armed conflicts, internal disturbances, or natural disasters (Mekonnen, 2016a; Mekonnen, 2015) of the highest magnitude.

Perhaps the most authoritative account on the unfolding humanitarian disaster in Eritrea is that given in 2014 by four Catholic Bishops of Eritrea. Agitated by the frightening level of the mass exodus of the Eritrean population and societal ills, the bishops warned: "It is not just the continuous outflow, and hence the depletion, of the people on its own that is worrying us, but the fact that we are heading towards extinction [tsanta] as a result ..." (Catholic Bishops of Eritrea, 2014).

This is where R2P, as an evolving doctrine of international law and relations, becomes relevant to the situation in Eritrea (International Commission on Intervention and State Responsibility, 2001). As argued throughout this chapter, there is an ongoing situation of crimes against humanity in Eritrea and the Eritrean government is unwilling and unable to address the pervasive culture of impunity surrounding these crimes against humanity. The government will not act, simply because doing so is diametrically opposed to its aim of regime self-preservation.

Crimes against humanity are one major category of atrocity crimes (the other two being genocide and war crimes), which can trigger application of the doctrine of R2P against the Eritrean government. In light of this, and the looming humanitarian crisis in Eritrea, it becomes imperative for the international community to invoke the doctrine of R2P, with the sole objective of rescuing the Eritrean people from the continued perpetration of crimes against humanity by the Eritrean regime, including the unbearable humanitarian situation. In essence, the most important concept of R2P is captured in the first principle contained in the report of the International Commission on Intervention and State Responsibility, which reads as follows:

> *(1) Basic Principles*
> *A. State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself.*
> *B. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.* (International Commission on Intervention and State Responsibility, 2001)

The international community invoked the doctrine of R2P for the first time in relation to Libya, when it authorised international intervention to protect the people of Libya from the repression of the former Libyan dictator Muammar Gaddafi (United Nations

Security Council, 2011b). Without forgetting the shortcomings that were experienced in the Libyan context, there is a need for the international community to address the situation in Eritrea by invoking the doctrine of R2P or other alternative measures.

Conclusion

The crisis of Sinai trafficking is too complicated to be resolved by a single formula or panacea. Focusing on prosecution as one of the four essential elements of combating human trafficking, this chapter attempted to identify the most pragmatic options for prosecutorial accountability under international law. The discussion focused on Eritrea for two important reasons: first, Eritrea is a major source country for the overwhelming majority of Sinai trafficking victims and, second, there is a clearly identifiable connection between some high-ranking Eritrean officials and Sinai trafficking.

Furthermore, it is impossible to discuss Sinai trafficking in isolation from the situation of crimes against humanity in Eritrea, on which there is already an authoritative account by a United Nations fact-finding mission, the COIE. This makes Eritrea the only African country in which there is an ongoing situation of crimes against humanity, officially verified by a UN Commission of Inquiry.

Over and above the major arguments articulated in the previous sections of this chapter, the following observation by a Belgian politician shall provide additional impetus to our concluding remarks. In August 2014, at a European Parliamentary hearing, a Belgian member of the Parliament said that Eritrea as a state "is organised like a military detention centre under the absolute rule of Isaias Afwerki," who was described by the parliamentarian as "a bloody despot" (Tarabella, 2014). Indeed, Eritrea has become unmistakably "The African Garrison State" (Tronvoll & Mekonnen, 2014). Tarabella (2014) adds that the country is led by a ruler who behaves as if the country were still at war. In the context of an increasing level of political repression, the government perpetuates its grip on power by fabricating stories about a CIA plot. In the meantime, the country

is "steadily collapsing and its population dwindling" (*ibid.*), a situation also squarely captured by the 2014 seminal pastoral letter of four Catholic Bishops (Catholic Bishops of Eritrea, 2014).

All of the above observations point towards a looming humanitarian disaster in Eritrea, which can be halted by invoking the doctrine of R2P or other options at the disposal of the international community. This responsibility is equally applicable to all regional and international actors, ranging from the UN Security Council in New York, to the relevant organs of the EU and the AU. Pending such measures, it is also important to seek meaningful accountability measures through the available prosecutorial options discussed in this chapter, particularly the principle of universal jurisdiction. As in the case of crimes against humanity inside Eritrea, which have been established by the COIE, it appears that some high-ranking Eritrean government officials are also reasonably suspected of involvement in Sinai trafficking and should be held accountable for their crimes.

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