(Unofficial translation)

Complaint

Prosecution Office for International Cases

Criminal complaint

1. Crime
   Crimes against humanity
   Enforced Disappearance
   Torture
   Kidnapping

2. Crime scene
   Asmara (Eritrea)/Prisons/Prison camps in locations held secret by the State of Eritrea

3. Suspects
   3.1. Isaias Afewerki, President of the State of Eritrea,
   P.O. Box 257, Asmara
   Fax 125 123
   3.2. Osman Saleh Mohammed, Minister for Foreign Affairs
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   3.3. Fozia Hashim, Minister for Justice
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   3.4. Yemane Ghebremeskel, Minister for Information
   P.O Box 242, Asmara
   Tel 117 111/201 820 Fax 124 847
   3.5. Yemane Gebreab, Presidential Adviser and Head of Political Affairs PFDJ
   P.O Box 4888, Asmara
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   3.6. Major General Filipos Woldeyohannes, Chief of Staff
   P.O Box 629, Asmara
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   3.7. Brigadier Abraha Kassa, Head of National Security
   3.8. Colonel Simon Gebredingel, Deputy Head of National Security

4. Grounds

Six years ago, the jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau filed a criminal complaint against President Isaias Afewerki of Eritrea and other representatives of the Government of Eritrea. (Case no: AM-94502-14). After a decision by the Prosecution Office for International Cases in Stockholm decided not to open a criminal investigation into the case an appeal was sent to the Prosecutor General.

In his decision the Prosecutor General wrote:

“I find that there is reason to believe that at least Crimes against humanity in the form of Enforced disappearance [- - -] have been committed against Dawit Isaak in Eritrea [- - -].
I also find that this falls under Swedish jurisdiction and that evidence is partly to be found in Sweden. Furthermore, it is not to be ruled out that some of the persons implied in the Complaint may come to Sweden, voluntarily or not. It is also a fact that, based on the international crime that is suspected, at least some of the persons in the Complaint do not enjoy Immunity. Furthermore, I find that the case relates to suspicion of very serious crimes committed against a Swedish citizen.
In conclusion there are relatively strong reasons to open an investigation.”

One single circumstance made the Prosecutor General decide not to open a criminal investigation about Crimes against humanity, namely that the Ministry for Foreign Affairs had said that an investigation would “negatively affect the relations between Sweden and Eritrea” and that this would probably “diminish the possibilities to act for a release of Dawit Isaak”. (Decision of 25 March 2015. Case no. ÅM 2014/8820)

Five years have now passed since the decision by the Prosecutor General, but Dawit Isaak is still
victim of Crimes against humanity, at least in the form of Enforced Disappearance:
Dawit Isaak is thus in detention since 23 September 2001. The last certain proof of life is from November 2005. Since then his case is shrouded in complete darkness where no one even knows where he is held or his physical condition. The Eritrean authorities refuse to provide any information at all about him. No one is permitted to visit him. Not his family. Not Swedish diplomats. Not representatives of the International Red Cross. Not representatives of the UN or the African Union. No one.

4.1 Crimes against humanity
Herein, reference is made, primarily, to the arguments given in the complaint of 30 June 2014, by jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau, and to the conclusions drawn from this complaint by the Prosecutor General (Case no. ÅM-94502-14).

Still today, Eritrea is a country with thousands of political prisoners.
Torture as well as enforced disappearances and extra-judicial executions are commonplace. Human rights are systematically and grossly violated, and it is done with the purpose to quell dissenting political views and beliefs. Dawit Isaak is one of the prisoners. Thus, the objective requisites for Crimes of humanity are fulfilled.

In its final report 2016, the UN Commission of Inquiry on Human Rights in Eritrea mentions Dawit Isaak. The Commission writes: ”The arrests and detentions described by witnesses have not been random or isolated. They have not been committed by individuals in their private capacity pursuing personal agendas. On the contrary, the evidence demonstrates that arrests and detentions in violation of fundamental rules of international law, have been and remain, central to an Eritrean leadership policy designed not only to discourage dissent but to suppress independent or critical thought, and instill fear in the population. This in order to maintain control over the Eritrean population in a manner inconsistent with international law. Thus, the Commission concludes there are reasonable grounds to believe that Eritrean officials have committed the crime of imprisonment, a crime against humanity, in a large-scale and methodical manner since May 1991. As noted above, Eritrean officials continue the crime of imprisonment” (A/HRC/32/CRP.1 s.62 p.248; Vide below)

4.2 Enforced disappearance

Herein, reference is made, primarily, to the arguments given in the complaint of 30 June 2014, by jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau, and to the conclusions drawn from this complaint by the Prosecutor General (Case no. ÅM-94502-14).

The Eritrean authorities' refusal to give information as to where Dawit Isaak is detained constitute a so called "enforced disappearance". i.e. a violation of i.a. the UN International Convention for the Protection of All Persons from Enforced Disappearance.
As a result, Dawit Isaak is also refused his right to legal protection, which in turn violates the right to stand trial, the right to liberty and security of person and the right not to be subjected to torture or to other cruel, inhuman or degrading treatment or punishment. The convention about enforced disappearances ban on detaining persons in undisclosed locations is unconditional. The obligation to give information about the detainee's fate and locations is also unconditional. No circumstances, not even war or state security, can legitimise secret detention or refusal to give information (E.g. E/C.N 4/1997/3/4).
Not only Dawit Isaak, but his family too, are to be seen as victims of crime in the sense of the convention on enforced disappearances: "For the purpose of this Convention", "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance" (Art. 24 p. 1)
Enforced disappearance is by its nature a crime that can go on for a long time. It is a so-called perpetual crime.

4.3 Torture
Herein, reference is made, primarily, to the arguments given in the complaint of 30 June 2014, by jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau, and to the conclusions drawn from this complaint by the Prosecutor General (Case no. ÅM-94502-14).
The long-lasting isolation of Dawit Isaak, in itself, constitutes a breach of the prohibition of torture in International law. That this is the case is clear from international case law (i.a. Communication 275/2003, Article 19 v. State of Eritrea; General Comment 20, 44th Session, 1992; Human Rights Committee: El-Megreisi v. Libyan ArabJamahiriya, Communication No 440/1990, CCPR/C/50/D/440/1990, para. 5.4; Human Rights Committee Polay Campus v. Peru, Communication No 577/1994, CCPR/C/61/D/577/1994 para.8.4); Commission on Human Rights Resolution 2005/39 para 9; Human Rights Chamber for Bosnia and Herzegovina, Decision on Admissibility and Merits. Case No CH/99/3196)

4.4 Personal criminal responsibility. Offenders. Accomplices.
Not only the person who has committed a crime (the offender), but also a person who has aided or abetted the criminal act has a criminal responsibility.
A person shall be seen as an offender even though the crime is committed through another person (Rome Statute Art. 25a)
A person shall be seen as an accomplice if he:
- Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted (Rome Statute Art. 25b and Swedish Criminal Code BrB Chapter 23 4§)
- For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission (Rome Statute Art. 25c and Swedish Criminal Code BrB Chapter 23 4§)

There is no doubt that the persons who are reported in this complaint have aided in the reported crimes as offenders or as accomplices.
Whether the suspects are to be seen as offenders, accomplices or collaborators in the crime does not affect their criminal responsibility. They have aided in the crime either as abettors or accomplices. Furthermore: civilian and military leaders, from heads of state and ministers to police commanders and foremen in public service whether in state or locally, are to be brought to justice for Torture, Enforced disappearance and Crimes against humanity if they:

-fail to take the necessary precautions to stop and prevent the crimes
-neglects information that such crimes are being committed.
Simply to “obey orders” is not a basis that overrides the criminal responsibility for gross international crimes.

5 International initiatives
Representatives of the United Nations and the African Union, the UN special Commission of Inquiry on Human Rights in Eritrea, the Parliamentary Assembly of the Council of Europe, the European Parliament and others have on numerous occasions asked to know where Dawit Isaak is detained, how he is, why he is denied all contacts with the outside world, what the reason is why his wife or children cannot see him or even exchange letters and why the authorities year after year deny him his right to be tried in a Court of Law.
There have been no replies.

6.1 The Swedish Ambassador to Eritrea
The Swedish Ambassador to Eritrea, Svante Liljegren, has on several occasions stated that the MFA makes great efforts to at least be allowed to visit Dawit Isaak. Numerous attempts are supposed to have been made to get consular access to Dawit Isaak, but with no success. The reply from Eritrea remains the same: No to any contact in any form with Dawit Isaak.

11 December 2019 Ambassador Liljegren took part in a Swedish Parliamentary hearing in Stockholm. He explained the Swedish policy in the case and said that Sweden has spent large resources to obtain Dawit Isaak’s release, and continues to do so. He did, however, also stress that the Swedish government sees “no signs of any significant change” in the official Eritrean attitude.

6.2 Foreign Minister Ann Linde’s contacts with Eritrean representatives
The account given by Ambassador Liljegren during the Parliamentary Hearing was linked to the reply given by Foreign Minister Ann Linde to an interpellation in Parliament a month earlier (12 November 2019). Asked about what the Swedish government does for Dawit Isaak Minster Ann Linde replied that the government works methodically and actively to achieve the release of Dawit Isaak. She noted that the Swedish efforts have not made Eritrea change its position: “At the same time we note that no clear changes are yet to be noted in Eritrea”. (Reply to interpellation 2019/20:87. Protocol 2019/20:30 12 November).
During the Parliamentary debate following the formal reply Minister Linde said that she had personally raised the case of Dawit Isaak with the Eritrean Minister for Foreign Affairs, Mr. Osman Saleh. Not even such a direct contact between the Ministers for Foreign Affairs made any difference, however. Ann Linde noted that whatever the Swedish government and the MFA did and whatever amount of diplomatic efforts that is put in to achieve his release Eritrea does not accede: “Madame Speaker! I want to once more underline that the Swedish government does everything in its power for Dawit Isaak. He has been imprisoned for more than 18 years… I have, personally, brought his fate up with the Eritrean Minister for Foreign Affairs. At the same time, I am forced to conclude that Eritrea, in no way has listened to our concerns or acted on them (Reply to interpellation 2019/20:87. Protocol 2019/20:30 12 November).

7. The African Commission of Human and Peoples’ Rights (ACHPR)
The jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau sent a complaint against Eritrea to the African Commission of Human and Peoples’ Rights 29 October 2012.

In its decision the Commission upheld all the demands in the complaint. (Dawit Isaak v. Republic of Eritrea, Communication 428/12).

Eritrea was, thus, found guilty of gross violations of the human rights of Dawit Isaak, namely:

- Not to be subjected to torture and other cruel and inhumane treatment
- The right to liberty and security
- The right to Habeas Corpus
- The right to be presumed innocent until proven guilty according to law
- The right to a defence
- The right to a fair trial within reasonable time or to liberty awaiting trial
- The right to privacy and family

The decision by the African Commission further includes an obligation for Eritrea to release Dawit Isaak and to compensate him for his loss and suffering.

The Commission has repeatedly admonished Eritrea to adhere to the decision, most recently in the autumn of 2019. This has not happened, a fact that has been noted and strongly criticised by the UN Human Rights Committee (See below, item 6)

8. The UN HRC Commission of Inquiry on Human Rights in Eritrea has found Eritrea to commit Crimes against humanity
In 2014, the UN Human Rights Council decided to set up a special commission to investigate the human rights situation in Eritrea (Resolution 26/24): Commission of Inquiry on Human Rights in Eritrea (COI).
The Commission had three members:

Mike Smith, Chair, Professor in the Department of Policing, Intelligence and Counter-Terrorism at Macquarie University, New South Wales, Australia; Executive Director of the UN Counter-Terrorism Committee Executive Directorate; Member o the Board of Advisors of the International Centre for Terrorism in the Hague; former Minister in the Australian Embassy, Washington, and former Ambassador to Egypt, Sudan, Algeria and Tunisia.

Sheila B. Keetharuth: UN Special Rapporteur on the situation of human rights in Eritrea.

Victor Dankwa: Professor of Law; former Member of the African Commission on Human and Peoples' Rights; former Special Rapporteur on Prisons and Detention Centres in Africa.

8.1 The Commission's work and its Collection and Preservation of Evidence

The Commission and its staff worked intensively for two years. It submitted two reports to the UN Human Rights Council, one in 2015 and one in 2016.

There was extensive material for the final report, including, among other things, 833 testimonies. Most of these come from Eritrean political refugees, but there is also written testimony from persons will well-founded fear of political persecution etc., who have not been able to leave Eritrea.

8.2 The conclusions of the Commission

The Commission asserted that the State of Eritrea is guilty of widespread and gross violations of human rights in Eritrea – from torture, long time and secret imprisonments without trial to enforced disappearances, extra-judicial killings and Crimes against humanity:

” The Commission finds that there are reasonable grounds to believe that crimes against humanity have been committed in Eritrea since 1991. Eritrean officials have engaged in a persistent, widespread and systematic attack against the country’s civilian population since 1991. They have committed, and continue to commit, the crimes of enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder”. (A/HRC/32/CRP.1 s.83)

The case of Dawit Isaak is one of the cases the Commission bring up as special examples of the gross violations of human rights committed in Eritrea.

8.3 Demanding legal responsibility for, e.g., Crimes against humanity

The Commission establishes, without doubt, that criminal responsibility is possible to claim from individual representatives of the Government and the ruling Party and other institutions, according to international law: ”Particular individuals, including officials at the highest levels of State, the ruling party – the People’s Front for Democracy and Justice – and commanding officers bear responsibility for crimes against humanity and other gross human rights violations…the National Security Office is responsible for most cases of arbitrary arrest, enforced disappearance and torture in official and unofficial detention centres.”

Our complaint concerns several of the representatives the Commission found to be guilty of gross violations of human rights.

8.4 The Commission’s investigative files: interviews, testimonies, records

In order to serve as a basis for future expected legal processes the Commission gathered an extensive amount of evidence. It is concrete evidence against certain suspected offenders of Crimes against humanity. The Commission is willing to give access to, among others, national entities that have started or intend to start criminal investigations into these crimes:
”In order to assist future accountability mechanisms, the Commission compiled files on a number of individuals it has reasonable grounds to believe bear responsibility for the crimes it has documented. These files include the names of suspects, information about the potential suspect’s position and a summary of evidence compiled by the Commission relating to the potential suspect. With regard to individual statements, the Commission did not include any information that could identify witnesses. In compiling the files, the Commission bore in mind that, under customary international law, there are various types of liability for the crimes described above. Liability may be attached not only to those who commit crimes directly but also to individuals who plan, order or instigate them. In addition, both civilian and military superiors may be liable for crimes committed by their subordinates. Future accountability mechanisms may wish to consider whether a joint criminal enterprise existed during the period covered by the Commission in its reports, or any part of that period; for that reason, the Commission also took into consideration information on individuals who may have contributed to such an enterprise. Lastly, the Commission recalls that individuals who aid and abet the execution of a crime may themselves also be liable for the crime, and that providing such assistance may take a variety of forms.

The files and other relevant information are stored and safeguarded in the Commission’s confidential database. The Commission has requested that the United Nations High

Commissioner for Human Rights grant access to information for purposes of accountability where confidentiality and protection concerns have been addressed". (A/HRC/32/CRP.1 p. 81-82)

8.5 Report from the Special Rapporteur on the Situation of Human Rights in Eritrea, June 2020.
In her report presented to the Human Rights Council in its session 15 June-3 July 2020 (A/HRC/44/23) the Special Rapporteur Ms. Daniela Kravetz points to the case of Dawit Isaak. She writes: "The Special Rapporteur recalls that this September will mark the nineteenth year of incommunicado detention of a group of former Eritrean politicians, known as the "G11", and of at least 16 journalists, including Dawit Isaak, a national of both Sweden and Eritrea, imprisoned without trial since September 2001. The authorities have provided no information about their fate and whereabouts and have not complied with the decisions of the African Commission on Human and Peoples' Rights regarding these cases."

Further, the Special Rapporteur points to the risks of COVID-19 for the detainees in Eritrea's overcrowded prison system.
Her report to the Human Rights Council contains unambiguous demands on Eritrea to:

"Release political prisoners, prisoners of conscience and persons unlawfully and arbitrarily detained."

"Ensure that all persons deprived of their liberty are detained only in official places of detention and are provided with all legal safeguards, including access to a lawyer and health care, family visits and prompt judicial review of their detention".

9. The Swedish Migration Court of Appeal excludes Eritrean Asylum Seeker from Refugee Protection on the basis of her Participation in Crimes Against Humanity in Eritrea.

The Swedish Migration Court of Appeal has, in a case of political asylum, examined whether Crimes against humanity are being committed and continue to be committed by the State of Eritrea. The Court specifically considered to what degree the prison conditions and the treatment of prisoners in Eritrea can be seen as Crimes against humanity according to the Rome Statute. The main issue in the case was whether an asylum seeker who had worked as a prison guard in Asmara as a result can be considered as guilty of Crimes against humanity and therefore excluded from the right to asylum and to refugee status.

The Migration Court of Appeal had apparently clearly taken account of the decision by the Prosecutor General in the case against President Isaias Afewerki of Eritrea and others that was raised by the jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau in 2014 (Case no ÅM-94502-14).
The Migration Court of Appeal thus concluded that "- -the conditions in the prisons and defence establishments in Eritrea are extremely hard and include overpopulation under very difficult hygienic circumstances. Insufficient of health care combined with random punishments result in epidemics and deaths. Additionally, it is common that prisoners are isolated without any contact with the outside. Persons detained for political or religious reasons can be in isolation for years. The use of torture is reported to be used extensively as punishment, as coercive measure and method of interrogation. In June 2016, the UN Commission of Inquiry concluded that the use of torture has been, and is, extensive and systematic in civilian and military establishments. - - - Given the Country Information about

the situation at the Fifth Police station in Asmara, which furthermore is supported by A's own information that she has witnessed torture there, the Migration Court of Appeal finds it evident that the circumstances at this police station during A's time there constitute crimes against humanity." (Case UM 17559-18. Verdict 14 June 2019)

10. The UN Human Rights Committee

Eritrea has acceded to the UN International Covenant on Civil and Political Rights (ICCPR). For Eritrea the Covenant came into force 22 April 2002.
The UN Human Rights Committee monitors the Covenant and examined the human rights situation in Eritrea last year. The monitoring was executed within the framework of the general scrutiny of the Human Rights situation conducted regularly by the Committee. It is rare that the Committee brings up a specific case in this context. This time, however, the Committee brought up Dawit Isaak's case in its report and recommended Eritrea to follow the decision by the African Commission as soon as possible:
"The Committee is concerned about a lack of access to an effective remedy for victims of violations of rights protected under the Covenant. It is further concerned at an absence of a mechanism to implement decisions of the relevant international human rights bodies. The State party has not yet implemented the decision in Dawit Isaak v. Republic of Eritrea (communication 428/12) by the African Commission on Human and Peoples' Rights concerning the 18 journalists who have been arrested on 19 September 2001 (art. 2).The State party should provide all victims of violations of rights protected under the Covenant with access to an effective remedy and full reparation. It should take immediate measures to implement decisions of the relevant international human rights bodies, including release or trial of the 18 journalists who were the subject of the above-mentioned decision in Dawit Isaak v. Republic of Eritrea". (CCPR/C/ERI/CO/1 p.2 items 9 and 10. 29 March 2019).

Thereby, the Committee made it clear that Eritrea must release Dawit Isaak and the other 17 journalists who were arrested with him or at the same time.

11. Justice delayed is justice denied
There is a legal saying 'Justice delayed is justice denied', or alternatively, 'to delay Justice is Injustice'.
The origin of the saying is unclear, but it is clear that the principle expressed was established in what is still seen as a source for the rule of law: The Magna Charta. Therein is stated no one will sell, to no one will we refuse or delay, right or justice.

In article 14.3.c in The UN Covenant on Civil and Political Rights this principle is stated as the right to "be tried without undue delay".

The UN Human Rights Committee gave an authoritative comment on this rule in its General Comment 13 dated 13 April 1984:

"*Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end, and judgement be rendered; all stages must take place "without undue delay". To make this right effective, a procedure must be available in order to ensure that the trial will proceed "without undue delay", both in first instance and on appeal*."

In the case Lubuto v. Zamba (Communication No 373/89, Views of 31 October 1995) the Committee presented arguments and reasons which influence how this rule should be interpreted:
"*The Committee has noted the State party's explanations concerning the delay in the trial proceedings against the author. The Committee acknowledges the difficult economic situation of the State party, but wishes to emphasize that the rights set forth in the Covenant constitute minimum standards which all States parties have agreed to observe. Article 14, paragraph 3(c), states that all accused shall be entitled to be tried without delay, and this requirement applies equally to the right of review of conviction and sentence guaranteed by article 14, paragraph 5. The Committee considers that the period of eight years between the author's arrest in February 1980 and the final decision of the Supreme Court, dismissing his appeal, in February 1988, is incompatible with the requirements of article 14, paragraph 3(c)*[1]."

12. International Law: Duty to investigate

Article 344 of the 1990 report from UN Working Group on Enforced or Involuntary Disappearances E/CN.4/1990/13 reads:
"*Perhaps the single most important factor contributing to the phenomenon of disappearances may be that of impunity. The Working Group's experience over the past ten years has confirmed the age-old adage that impunity breeds contempt for law. Offenders of human rights violations, whether civilian or military, will become all the more brazen when they are not held to account before a court of law. Impunity can also induce victims of these practices to resort to a form of self-help and take the law into their own hands, which in turn exacerbates the spiral of violence*."

The UN General Assembly, 16 December 2005, adopted several basic principles relating to the victims of gross Human Rights violations: Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

One of the adopted principles pertains to the issue of a duty to investigate serious crimes against Human Rights: "*In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.(III. 4)*"

In the case of Genocide, Crimes against humanity and Torture international law has developed thus far that one would dare to say that there is a jus cogens duty to investigate these crimes.[2]

[1] ECHR: Kudla v. Poland (see below);Kalashnikov v. Russia , Application No. 47095/99, Judgement of 15 July 1 2002; Loffler v. Austria , Application No. 72159/01, Judgement of 4 March 2004. HRC: Fei v. Colombia , Communication No. 514/192, Views of 4 April 1995;Muñoz Hermoza v. Peru , Communication No. 203/86, Views of 4 November 1988.
[2] IACtHR, La Cantuta v. Peru, Judgment, 29 november 2006, § 160

The International Court of Justice in The Hague has, with respect to Genocide, stated that there is a duty to investigate regardless of frontiers: “”the obligation each State has to prevent and to punish the crime of genocide is not territorially limited by the Convention” (International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide - Bosnia and Herzegovina v. Yugoslavia - Preliminary Objections, 11 July 1996, para. 31 in fine.18)”

There is strong reason to believe, reasoning by analogy and law interpretation, that The International Court of Justice’s view regarding the duty to cross-border investigations, also implies Crimes against humanity - a crime which is rather like Genocide.

The International Criminal Tribunal for Rwanda did, in the case Prosecutor v. Ntuyahaga, call for all states to prosecute all gross violations of international human rights, including Crimes against humanity: “…encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide, crimes against humanity and other grave violations of international humanitarian law” (Case No. ICTR-90-40-T, Decision on the Prosecutor's Motion to Withdraw the Indictment, 18 March 1999).

An obligation to investigate crimes against the Human Rights can also be understood from Article 2(1) of the UN Covenant on Civil and Political Rights, a rule that obliges the states “to ensure to all individuals (...) the rights” included in the Covenant. In particular, this follows if the rule is read in conjunction with the UN Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.[3]

13. Universal Jurisdiction

The issue of whether Swedish jurisdiction applies, i.e. if a Swedish Court can try a crime according to Swedish Law and, consequently, if a Swedish prosecutor has the right to open a criminal investigation about the crime is regulated, foremost, in Chapter 2 of the Penal Code. From Section 3(7) follows that Swedish jurisdiction applies to crimes committed abroad when the minimum penalty is four years in prison according to Swedish Law. This applies to e.g. kidnapping and aggravated assault. According to Section 3(6) Swedish jurisdiction applies to certain listed crimes committed abroad, among which are Crimes against humanity.

The UN Special Commission of Inquiry on Human Rights in Eritrea has emphasised the importance that Member States exercise jurisdiction over individual offenders of Crimes against humanity:

“*The Commission recommends that Member States and international organizations…exercise jurisdiction over crimes against humanity when any alleged offender is present on the territory of a Member State or extradite him or her to another State in accordance with its international obligations*.” (A/HRC/32/CRP.1 s.83)

That the rules in an international convention are respected is not only a matter for international monitoring bodies. It is a matter for the individual states who have acceded to the conventions.

This can be done in different ways. One of them is to exercise jurisdiction over and bring to justice representatives of those states that violate the conventions.

[3] E/CN.4/2005/102. Add 1. 8 February 2005

To open a criminal investigation in Sweden against representatives of Eritrea with respect to the on-going crimes against Dawit Isaak is to do just that.

14. Immunity

For long, Heads of State, diplomats and certain other state representatives have enjoyed immunity with regard to international law. In the past years, a development has occurred which emphasises the significance in that individuals, not least individuals in high offices, are to be held to account for serious international crimes.

The Prosecutor General (RÅ) underlined this development in his decision on the complaint brought by jurists Jesús Alcalá, Percy Bratt and Prisca Orsonneau against Eritrean State representatives (Case No. AM-94502-14 p. 5f)

Regulations in the Rome Statute for the International Criminal Tribunal confirms this development.

Art. 27 of the Rome Statute prescribes:
1.This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

These rules, formally, apply only in proceedings before the International Criminal Tribunal, but they are also expressions of a general legal principle.

15. Prosecution. On the Applicability of Swedish Law

With respect to crimes committed abroad the general rule is that prosecution shall not be instituted without the authorization of the Government or a person designated by the Government. Such a prosecution mandate is in accordance with Section 2(5) of the Penal Code.

The reason for the requirement of authorization to institute prosecution is that there must be a tangible and relevant interest for legal procedure in Sweden (Ds 2014:13 p 64f).

To decide if authorization to prosecute should be granted the seriousness of the actual case and Sweden’s interest in trying it must be assessed.

There can be no doubt that there is a very clear and just interest in investigating the Crimes against humanity that Dawit Isaak has been the victim of for more than 18 years. He is a Swedish citizen. His wife and children live in Sweden and are Swedish citizens.

In addition to this, strong consideration must be given to what international human rights organs advocate.

The consensus about the importance of investigating and prosecuting gross human rights violations, in particular Crimes against humanity, is total among international bodies. Among others the UN special Commission of Inquiry on human rights in Eritrea did, as mentioned above, expressly recommend all states to do everything in their power to execute jurisdiction over persons who in one way or other have taken part in Crimes against humanity.

16. The former argument against prosecution is no longer convincing

In his decision of 25 March 2015, the Prosecutor General drew a number of conclusions from the
facts in the complaint.

One conclusion was “that there is reason to believe that at least Crimes against humanity in the form of enforced disappearance - - - have been committed against Dawit Isaak in Eritrea.”

A second conclusion was that “there are relatively strong reasons to open a preliminary investigation”.

A third conclusion is that the Crimes against humanity committed against Dawit Isaak are ongoing and that “an investigation could affect the possibilities for the crimes to stop, in this case through Dawit Isaak being released.”

The Prosecutor General only stated one reason against starting an investigation: that such an investigation might “affect Sweden’s relations with Eritrea” and in that way, possibly “diminish the chances to act for a release of Dawit Isaak”.

This conclusion was based on information from the Ministry for Foreign Affairs, itself, to the Prosecutor General: “The information I have gathered from the Foreign Ministry in this matter has made me reach the conclusion that a decision to open an investigation would risk diminishing the chances for a release of Dawit Isaak.”

This argument is no longer valid. Five years have passed since the MFA told the Prosecutor General that a decision to open an investigation would harm the diplomatic discussions with Eritrea about Dawit Isaak. Five years! And Dawit Isaak is still “missing” and Eritrea continues to commit Crimes against humanity against him.

In other words, nothing has changed. Or like Foreign Minister Ann Linde has put it:
“He (Dawit Isaak) has been imprisoned for more than 18 years - - - I have personally brought his fate up with the Eritrean Foreign Minister. At the same time, I am forced to conclude that Eritrea in no way has listened to our concerns and acted on them”. (Reply to interpellation 2019/20:87. Prot. 2019/20:30 12 November. See above 4.4)

It is our definite opinion that the Prosecutor General no longer, with any credibility, can refrain from opening a preliminary investigation by taking the “silent diplomacy” of the MFA into consideration.
It is also our decided opinion that it is of great importance to choose the “legal path” in this case. In this respect, the independence of the Prosecutor General vis-à-vis the political power is of utmost consequence.

17. Evidence

There is extensive evidence in this case. Our contacts with representatives of the UN, among them the UN Special Rapporteur on human rights in Eritrea and the Chairperson of the UN Commission of Inquiry of human rights in Eritrea will be available for Swedish Police and Prosecutors.

17.1 Written evidence

African Commission on Human and Peoples' Rights. Decision in: Dawit Isaak v. Republic of Eritrea, Communication 428/12
African Commission on Human and Peoples' Rights. Decision in: Article 19 v. Republic of Eritrea 275/03

Dossiers of evidence collected by the Commission of Inquiry on Human Rights in Eritrea. UN Human Rights Council

Report of the Commission of Inquiry on Human Rights in Eritrea - A/HRC/29/42

Report of the detailed findings of the Commission of Inquiry on Human Rights in Eritrea - A/HRC/29/CRP.1

Reports (1-5) of the Special Rapporteur on the situation of human rights in Eritrea.

Human Rights Committee. Concluding observations on Eritrea in the absence of its initial report (CCPR/C/ERI/CO/1 2019)

The documents from the Swedish Migration Court of Appeal. Case UM 17559-18. Decision 14 June 2019

Upper Tribunal (Immigration ad Asylum Chamber), United Kingdom. Decision 1 June 2016 in the case A.B. v. The Secretary of State for the Home Department (UKUT 00376[IAC)

17.2. Oral evidence

Interview with A. the asylum-seeking former MP and prison guard that the Swedish Migration Court of Appeal has considered as an accomplice in Crimes against humanity in case UM 17559-18, decision 14 June 2019. The witness resides in Sweden.

Interview with Betlehem Isaak, daughter of Dawit Isaak who was present when he was arrested in 2001 and who spoke to him when he was briefly out of prison for a few days in 2005.

Interview with Esayas Isaak, Dawit Isaak's brother who has been working for Dawit's release since he was arrested and who, in 2010, met with a prison guard who said he had guarded Dawit.

Interview with Aaron Berhane, editor-in-chief of Setit the newspaper where Dawit worked and which was banned 18 September 2001. He can describe how the pressure on the media increased in the time before the press ban. He was also present during the meetings where Dawit and others discussed what to expect and what to do in the days between the press ban and their arrest. Mr. Berhane went into hiding and managed to escape from Eritrea some months later. In exile in Canada

Interview with Yirgalem Fisseha poet and radio journalist who was arrested in a sweep against Radio Bana, where she worked in 2009. She was detained for six years without sentence and subjected to torture and isolation.

Interview with B, a journalist and writer who shared prison cell with Dawit Isaak for a period in 2005. In exile in Sweden.

Interview with Daniela Kravetz, lawyer and UN HRC Special Rapporteur on Human Rights in Eritrea since October 2018. Monitors Eritrea closely and reports to the Human Rights Council in Geneva.

Interview with Mike Smith, former chair of the Commission of Inquiry on Human Rights in Eritrea, Professor in the Dept of Policing, Intelligence and Counter-Terrorism, Macquaire University, New South Wales, Australia and Executive Director of the UN Counter-Terrorism Committee.

Interview with Victor Dankwa, professor of Law, former Member of the Commission of Inquiry on Human Rights in Eritrea, former Commissioner in the African Commission on Human and Peoples' Rights and former Special Rapporteur on Prison and Detentions Centres in Africa.

For security reasons we omit contact details here. Addresses, e-mail addresses and phone numbers will be supplied on request from the Prosecution Agency or the Swedish Police.

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