



RELEASE ERITREA

KIDNAPPING, HOSTAGE-TAKING AND RANSOMING OF
ERITREAN ASYLUM SEEKERS IN THE SINAI DESERT

Legal opinion sought and commissioned by Release
Eritrea

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[☒]* *Based in the United Kingdom, Release Eritrea is a human rights charity working on the right to freedom of faith for Eritreans. Simon M. Weldehaimanot provided the legal opinion on behalf of the Eritrean Law Society. The legal opinion is for guidance only.*

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I. INTRODUCTION

[1] This legal opinion is written in reply to a request made by Release Eritrea on available legal recourse to tackle the recent development of trafficking in persons that has victimized thousands of Eritrean asylum seekers or immigrants. In the last decade, thousands of Eritrean youths have been fleeing Eritrea to escape unmatched political repressions. A significant number of them trek to reach Israel using smugglers that operate the route from refugee camps in Sudan to the common border of Egypt and Israel. In the last two years the smugglers have resorted to dreadful acts of kidnapping, hostage-taking, torture, rape and other sexual abuses and ransoming of Eritrean immigrants or asylum seekers in their custody. The allegations are backed by field reports, physicians who examined some of the victims, and some victims' testimonies. About 20 hours of interviews conducted with 60 victims while in a hostage situation have been audio-recorded.¹ Three NGOs - Physicians for Human Rights-Israel, Hotline for Migrant Workers and EveryOne Group – are also privy to the situation.² The facts stated below do not cover the entire evidence already gathered. Facts pertaining to the background of the atrocities are documented in official documents of the United Nations High Commissioner for Refugees (UNHCR). The allegations demonstrate such serious violation of rights that they may amount to crimes against humanity. More publicity, more investigation and referral of the situation to relevant human rights' bodies and, in the meantime, adequate treatment of the victims seem to be appropriate actions.

II. FACTS

A. Background

[2] The human rights situation in Eritrea has deteriorated to a level that has caused the youth population of the country to flee en-mass.³ Aware that sheer repression will compel citizens to leave the country, the Government of Eritrea has resorted to “draconian steps to prevent its citizens leaving”.⁴ Despite these fatal restrictions which have victimized unknown number of Eritreans, in the last several years, Eritrea has been one of the top refugee-generating countries. Following Zimbabwe (158,400) and Myanmar (48,600), in 2009 Eritrea was the third largest country of origin of asylum seekers (43,400).⁵ In recognition of the harshness from which they flee, Eritrean asylum seekers have been granted 80 to 90% refugee recognition rate.⁶

¹ Meron Estefanos, Bedouin Rashaida: The Human Traffickers in North-East Africa, (09 March 2011) <<http://asmarino.com/articles/958-eritrea-bedouin-rashaida-the-human-traffickers-in-north-east-africa>>.

² For more on the NGOs see their websites: <http://www.phr.org.il/default.asp?PageID=4>; <http://www.everyonegroup.com/EveryOne/MainPage/MainPage.html> & <http://www.hotline.org.il/english/index.htm>

³ See generally Human Rights Watch, *Service for Life - State Repression and Indefinite Conscription in Eritrea* (2009).

⁴ Finding of the Asylum and Immigration Tribunal of the United Kingdom in *MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT00059*, at paragraph 353.

⁵ UNHCR, *Statistical Yearbook 2009: Trends in Displacement, Protection and Solutions* 8 (2010).

⁶ *Ibid*, at 38. See also UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Eritrea* (2009).

[3] A considerable number of the fleeing youths remain in refugee camps in Ethiopia and Sudan. A significant number trek further to the Americas and Europe through networked human smugglers. A major route to Europe is through Libya and the Mediterranean Sea. Since 2005, as a result of closer scrutiny of these two routes and the high price smugglers ask, increasing number of Eritreans in Sudan and Ethiopia directed themselves to Israel along with mass African immigrants. By the end of 2009, there were 11,852 Eritrean asylum seekers in Israel.⁷

B. The Route to Israel and Human Rights Abuses

Smuggling and/or trafficking

[4] For clarity in stating the facts, it is important to distinguish in advance “trafficking in persons” from “smuggling immigrants”. The first is defined as “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” which includes prostitution or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁸ The consent of a victim of trafficking in persons to the intended exploitation is irrelevant where any of these ways listed above are used.⁹ “Smuggling of migrants” on the other hand is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.¹⁰

[5] The difference between these two operations is not always readily apparent. Generally speaking, human trafficking involves coercion or some sort of false pretense (heavenly life across the sea) by which the victims is lured. Smuggling, on the other hand, is understood to be an agreement between smuggler and customer, a meeting of the minds and a contract between the two. Often the difference is framed around the dichotomy of coercion and consent: people who are trafficked are considered “victims” or “survivors”, individuals who are smuggled are seen as having engaged willingly in a criminal enterprise – a framework evident in the protections afforded for each group. The presence or lack of consent, exploitation, and some time a gender dimension are important determinants.

The route to Israel

[6] The route to Israel has been used with the employ of smugglers who are from local tribes inhabiting the Red Sea coastal areas of northern Eritrea extending to Egypt. This Arabic speaking

⁷ Ibid, at 76.

⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, article 3(a) & (b).

⁹ Ibid.

¹⁰ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted 15 November 2000, article 3(a).

Bedouin tribe is commonly known as the “Rashaida”.¹¹ In an area historically known for conflicts, mass displacement and escape through tight borders, some individuals from the Rashaida have been in the business of smuggling people.¹² These smugglers are assisted at many ends by different nationals.

[7] For long, the smuggling route from refugee camps in Sudan to Sinai (the Egypt/Israel border) has been governed by the norms generally accepted in the circumstance by both parties - the smuggled and the smugglers. Despite the illegal nature of the activity, both parties managed to develop effective and trustful way of honoring their words and paying or getting paid for their services.

The abuses

[8] However, horrific abuses in the smuggling business started in late 2009 and as of this time the business might have become human trafficking. From asking some extra amount in excess of the agreed price of smuggling, the smugglers started hostage-taking and kidnapping. In the first and majority cases the victims agree to be smuggled to the Egypt/Israel border for a pre-set price and mode of payment. Then the smugglers breach their words and under hostage situation they demand money by far exceeding the initial agreed amount. “Numerous migrants reported that smugglers ask for US\$2,500 to \$3,000 to guide them to the border with Israel. But once these migrants arrived in Sinai, they found themselves in the hands of traffickers who shackled them and demanded additional money - ranging from \$500 to \$10,000.”¹³ In the second case, victims are kidnapping from the wilderness while leaving Eritrea, in adjacent Sudanese territory or from refugee camps in Sudan.¹⁴ Given that the publicity of the abuses is resulting in fewer number of asylum seekers willing to reach Israel, the traffickers are resorting more to acts of kidnapping from refugee camps.¹⁵

[9] In both cases, victims are held in places set for this purpose by smugglers/traffickers usually close to the Israeli border in Sinai.¹⁶ One place where the victims are held hostage is reportedly known to one NGO which have been following the matter.¹⁷ Two migrants held by traffickers confirmed that at one time traffickers were holding 105 Eritreans, including nine women, for

¹¹ For more on the Rashaida see Abdelrahim Salih, The Rashaida Bedouin, (Project Paper, Cultures of the Middle East, 16 March 2008).

¹² Burhan Ali, WikiLeaks, Rashaida and Egypt, (14 December 2010) <<http://awate.com/wikileaks-rashaida-and-egypt/>>.

¹³ Human Rights Watch, [Egypt: End Traffickers' Abuse of Migrants](http://www.hrw.org/en/news/2010/12/09/egypt-end-traffickers-abuse-migrants), (9 December 2010) <<http://www.hrw.org/en/news/2010/12/09/egypt-end-traffickers-abuse-migrants>>. See also Hotline for Migrant Workers, “The Dead of the Wilderness”: Testimonies from Sinai Desert 2010 (February 2011) at 6.

¹⁴ Mussie Hadgu, The Situation of Eritrean Refugees in the Sudan, (Field (Sudan) Report Submitted to Human Rights Concern – Eritrea, No Date) <<http://www.hrc-eritrea.org/article.php?id=116>> at 2-3; Estefanos, supra note 1.

¹⁵ Estefanos, supra note 1.

¹⁶ Hadgu, supra note 14.

¹⁷ EveryOne Group, Eritrean Refugees: We Know Where They Are Being Held - Authorities to Intervene Now, (4 December 2010), <http://www.everyonegroup.com/EveryOne/MainPage/Entries/2010/12/4_Eritrean_Refugees_We_know_where_they_are_being_held_Authorities_to_intervene_now.html>.

ransom in about 10 underground rooms.¹⁸ The victims are held under tight control, their hands and legs chained and their body searched thoroughly for a mobile phone or an address book that shows they have relatives abroad who can be blackmailed for ransom.¹⁹

[10] The overall treatment is very harsh and cruel: victims are whipped, beaten, burned with fire and threatened to be killed and under these conditions they are forced to talk to their families on the phone.²⁰ “In dozens of cases asylum seekers and migrants said that to coerce relatives to make payments, traffickers would make them call their relatives by mobile phone and then shoot in the air or physically abuse them so the relatives would hear their screams.”²¹ “As the victims speak on the phone while being tortured, what their families/relatives/friends hear at the other end of the line is crying, groaning and shouting for help.”²² If they did not pay, victims were threatened with death and in several cases that their organs (kidneys) would be removed for a large illegal market in Egypt. During the duration of the captivity, the victims were beaten, branded, buried in sand, hung by their hands or feet and chained, burned with hot iron bars, whipped with electrical cords, and forced to do work for the traffickers whilst awaiting ransom payments or even after payments had been made.²³ Women were repeatedly raped and some kept as sex slaves for the duration of the captivity.

[11] In the majority of cases the contacted families have managed to raise the ransom money. In some instances, failure to secure the ransom money ends up in the death of a victim. Victims have testified that “some hostages were murdered when the traffickers realized that the families could not pay the ransom.”²⁴ In late November and early December 2010, traffickers shot or beat to death six Eritreans.²⁵ In other instances, victims have simply disappeared.²⁶ The disappearances need to be seen in light of the threat by traffickers that they would sell organs of those whose families cannot be contacted or raise money.²⁷ In one incident, four young Eritreans were taken to an illegal clinic, where they had a kidney removed and thereafter disappeared.²⁸

[12] The main leverage of the traffickers is that they can get in touch with relatives of the victims via satellite phones and let the relatives hear as their sons or daughters are tortured. Thus, the abuses have been known to Eritreans who, being familiar with similar abuses by their government at home, remained unalarmed. The abuses came to the attention of the international community when a clinic operated by the nonprofit Physicians for Human Rights-Israel noticed in January 2010 a surge in

¹⁸ Human Rights Watch, *supra* note 13.

¹⁹ Estefanos, *supra* note 1.

²⁰ See the testimonies of six victims in *Hotline for Migrant Workers*, *supra* note 13, at 11-27.

²¹ *Ibid.*

²² Hadgu, *supra* note 14, at 3.

²³ Human Rights Watch, *supra* note 13; *Hotline for Migrant Workers*, *supra* note 13, at 3.

²⁴ *Hotline for Migrant Workers*, *supra* note 13, at 7.

²⁵ Human Rights Watch, *supra* note 13.

²⁶ Hadgu, *supra* note 14.

²⁷ *Hotline for Migrant Workers*, *supra* note 13, at 3.

²⁸ *Ibid* (citing EveryOne Group), at 4.

requests for treatments commonly needed by victims of abuse, such as orthopedics. “In early 2010, Israeli medics began to see signs of a sinister new business venture: Sinai traffickers holding their prey for ransom for large sums and using extreme abuse to nudge such ‘deals’ along.”²⁹

The extent of the abuses

[13] The magnitude of the abuses and number of victims is not difficult to estimate. In 2010 alone, 11,763 people were smuggled to Israel through the Egyptian border, a significant percentage of which were Eritreans.³⁰ Since late 2009, when the traffickers turned to extortion and violence, 6,000 to 7,000 Eritreans have entered Israel, almost all of them with help from the traffickers and the majority reported being subjected to abuses.³¹ In October 2010, Physicians for Human Rights-Israel began surveying patients asking what really went on in Sinai. Of 167 people interviewed, 77% said they had been physically assaulted and some 38% of women said they had been sexually assaulted.³² An interview with six randomly selected recent female arrivals in Israel revealed that only one was without complaint regarding the smugglers’ behavior.³³ As of November 2010, out of 165 facilitated abortions, a clinic run by Physicians for Human Rights-Israel suspects that half were requested by women who had been sexually assaulted in Sinai.³⁴ Testimonies collected from victims confirm that the majority of the women who were held by the smugglers in the Sinai desert in 2010 were raped, many of them repeatedly.³⁵ These samples indicate that the number of victims of abuses is many thousands.

The abusers

[14] One source indicated that the traffickers have an extensive network of collaborators and facilitators including Sudanese security forces and intelligence, and Sudanese, Eritrean and other nationals.³⁶ They have extensive networks for the transfer of money.³⁷ Another source has described the traffickers as the “de facto administrators of the western borders of Eritrea and Eastern Sudan” who “set their mobile tents across the scorching deserts of Eastern Sudan, waiting for new prey to come.”³⁸ According to another source, the vast, sparsely populated Sinai Desert where the abuses are taking place “has long been something of a lawless no-man’s land.”³⁹ The claimed organized

²⁹ Nathan Jeffay, *Eritrean Tells of His Cruel Odyssey to Israel*, 29 December 2010, <<http://www.forward.com/articles/134315/>>.

³⁰ Hotline for Migrant Workers, *supra* note 13, at 3.

³¹ Jeffay, *supra* note 26.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ Hotline for Migrant Workers, *supra* note 13, at 4.

³⁶ Hadgu, *supra* note 14, at 2.

³⁷ *Ibid.*, at 3.

³⁸ Estefanos, *supra* note 1.

³⁹ Dina Kraft, *Bedouin Smugglers Abuse Africans Held for Ransom, Israel Group Says*, (15 February 2011) <http://www.nytimes.com/2011/02/16/world/16bedouin.html?_r=1>.

nature of the traffickers arguably transform the abuses from the realm of national law to international crimes, mainly crimes against humanity.

[15] Given the size of the abuses and the manner they are conducted, some analysts have rightly suspected the might of these kidnapers who have the logistics that enable them to kidnap inside Sudan and then ship the victims to camps in Sinai. They are said to be beyond the reach of the Egyptian security apparatus, have the ability to erect prisoners' camps in a well controlled, closely protected part of Egypt, and use satellite phones for coordination and control. Some observers find it "hard to believe that these smugglers work independently all by themselves" but conclude that they are part of "a confederation of crime" in which some government officials from Eritrea, Sudan and Egypt are collaborators.⁴⁰

[16] Collaboration by Sudanese officials seems to be a case of corruption and the state's failure could be attributed to its inability to control its entire territory, a significant part of which is desert. Egypt's role seems ambivalent. In regard to Eritrea, desiring to block its citizens from leaving the most repressive state, the Government of Eritrea has resorted to a "shoot to kill" policy in respect of the fleeing youth, imprisoning their parents and draconian treatment of deportees or apprehended attempters that "amount to persecution, serious harm and ill-treatment."⁴¹ Already, Israel has put two Eritreans on trial for aiding the traffickers in collecting the ransom demanded from Eritreans in that country but it has not been established if they were working for others.⁴² Officials of the Government of Eritrea, particularly some commanders of the border surveillance units, have been suspected of participation in helping Eritrean youths flee the country at a considerable price. However, their participation in abuses in Sinai has not been shown. Yet, the cause of the mass exodus from Eritrea is the unmatched repression in the country. Whether the state thus can be held criminally liable for being the cause of the abuses its fleeing citizens are facing needs to be studied in the context of *criminal causation*.

Motives

[17] The aim of the abuse is to extract as high a price as possible from relatives and others that can pay in exchange for the release of the captives. This is evident from the fact that victims were released after the ransom is obtained. However, discrimination based on faith and/or race features in the perpetration of the abuses. As a price of the initial deal, one survey showed that victims from Eritrea or Ethiopia paid traffickers directly or indirectly an average of \$2,672 while those from other countries, mostly Sudan, paid an average of \$741.⁴³ Only Christian Eritreans and Ethiopians are apparently *routinely* subjected to kidnapping and ransom. Traffickers reserved the worst extortion and violence for Eritreans and a small number of Ethiopians who make the journey while Muslim and Arabic-speaking Sudanese who are related to the traffickers in many ways are

⁴⁰ Ali, *supra* note 12.

⁴¹ MA (Draft evaders – illegal departures – risk) Eritrea CG [2007] UKAIT00059, *supra* note 4, at paragraph 445.

⁴² Sam Mbale, Eritreans Arrested for Working with Egyptian Gangs, Abducting African Refugees, (22 January 2011) <<http://polytiko.blogspot.com/2010/01/eritreans-arrested-for-working-with.html>>.

⁴³ Jeffay, *supra* note 29; Hotline for Migrant Workers, *supra* note 13, at 6.

subjected to less harsh treatment.⁴⁴ Another reason for the discriminatory treatment could be the traffickers' unfounded perception that Eritreans have more money than the rest.⁴⁵

III. LEGAL RECOURSES

[18] The above mentioned abuses are prohibited everywhere by the laws of every nation and international law. However, considering the nature of the three countries primarily involved, national legal systems are not the sources of remedies. It is to cater for situations such as this that an international legal order is needed. Yet, a very sad reality of this legal system is that there is no swift and effective remedy. Protection of human rights has depended largely on a hue and cry and international mobilization of shame. Unfortunately, regimes of the three states have no reputation to guard.

A. Recourse to Human Right Bodies

[19] Egypt ratified the United Nations Convention against Transnational Organized Crime and the Protocols thereto - the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air - on 5 March 2004, 5 March 2004 and 1 March 2005 respectively. Sudan ratified the Convention on 10 December 2004. Eritrea is a party to none of these widely ratified treaties.⁴⁶ The Convention requires member states to criminalize many of the abuses committed by the traffickers. Member states are also required to adopt within their domestic legal systems, measures necessary to enable confiscation of proceeds of human trafficking. They are also required to adopt measures necessary to enable the identification, tracing, freezing or seizure of any item derived from trafficking.

[20] On the other side, member states are required to offer various treatments to victims. As a party to the Convention and the Protocol on trafficking and as a receiving state of victims of trafficking, Israel is required to consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking; the provision of appropriate housing; counseling and information in particular as regards their legal rights; medical, psychological and material assistance; and employment, educational and training opportunities.⁴⁷ Israel is also required to "consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases."⁴⁸ Israel cannot use the Convention and the Protocol on trafficking to affect its duties under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-

⁴⁴ Ibid. See also Hadgu, supra note 14, at 2.

⁴⁵ Ibid, Hadgu, at 2.

⁴⁶ As of 29 September 2010 the three treaties have 157, 141 and 126 ratifications respectively. See http://www.unodc.org/documents/treaties/organized_crime/COP5/CTOC_COP_2010_CRP4/CTOC_COP_2010_CRP4_E.pdf.

⁴⁷ Protocol on Trafficking, supra note 8, article 6(3). Israel ratified the Convention and the Protocol on 27 December 2006 and 23 July 2008 respectively.

⁴⁸ Ibid, article 7(1).

refoulement as contained therein.⁴⁹ In this regard it is important to carefully monitor Israel's branding of the many victims of human trafficking as mere "infiltrators". It is helpful to remind the Ministry of Health of Israel of its duty with regard to the sexually abused women.

[21] Generally, under international human rights law, states bear the responsibility to respect, protect, fulfill and promote human rights. States can thus be challenged for failing to protect right-holders from abuses non-state actors such as the traffickers can commit. The above three treaties do not have a forum for remedies. The abuses violate many of the rights in the International Covenant on Civil and Political Rights (ICCPR). Yet, Sudan, Eritrea and Egypt are not a party to the first Optional Protocol to the ICCPR. Thus, no complaint can be filed to the Human Rights Committee monitoring the ICCPR.

[22] The abuses by the traffickers violate several rights contained in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). The Committee against Torture – a body of 10 independent experts that monitors implementation of the Convention by member states – considers complaints. However, complaints cannot be lodged if a state party has not deposited the voluntary declaration recognizing the competence of the Committee to receive and consider complaints from or on behalf of individuals who claim to be victims of a violation of rights contained in the Convention.⁵⁰ Egypt is a party to CAT as of 25 June 1986 but it has not deposited the required declaration. Sudan signed CAT on 4 June 1986 but it has not ratified it. Eritrea has not even signed the Convention. Thus, a complaint cannot be filed against these three countries. The Optional Protocol to CAT that entered into force in June 2006 creates the Subcommittee on Prevention of Torture with a mandate to visit places where persons are deprived of their liberty in member states. However, Egypt, Eritrea and Sudan have not even signed this Optional Protocol. In addition, being a party in itself is not enough. States could simply deny entry to any inquiring body.

[23] A complaint can be filed before the African Commission on Human and Peoples' Rights as the abuses in Sinai violate several rights in the African Charter on Human and Peoples' Rights. Any individual or NGO can complain to the African Commission. However, as is the case with the other treaty bodies, the outcome of the process is a non-binding recommendation that comes out after three to five years. For a situation deliberately ignored by the three States and that needs urgent attention, a recommendation from the African Commission is not a solution. The three countries are notorious for disregarding recommendations of the Commission. However, the Commission can pass a resolution that is important for publicity. The African Court on Human and Peoples' Rights would have been a better avenue but the Protocol establishing the Court has not even been ratified by these states.⁵¹

[24] The Human Rights Council of the United Nations has a complaint procedure which theoretically is "established to address consistent patterns of gross and reliably attested violations of

⁴⁹ Ibid, article 14(1).

⁵⁰ See article 22(1) of CAT: "A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration."

⁵¹ For status of ratifications see http://www.au.int/en/sites/default/files/PROTOCOL_AFRICAN_CHARTER_HUMAN_PEOPLES_RIGHTS_ESTABLISHMENT_AFRICAN_COURT_HUMAN_PEOPLES_RIGHTS.pdf.

all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances.”⁵² There is a Working Group on Communications and a Working Group on Situations that examine complaints. The Working Group on Communications consists of five independent experts and meets twice a year for a period of five working days to assess the admissibility and the merits of a communication.⁵³ Communications not rejected in the initial screening are transmitted to the State concerned to obtain its views on the allegations of violations.

[25] All admissible communications and recommendations thereon are transmitted to the Working Group on Situations comprised of five members. It meets twice a year for a period of five working days in order to examine the communications transferred to it by the Working Group on Communications, including the replies of states thereon, as well as the situations which the Council is already seized of under the complaint procedure.⁵⁴ On the basis of the information and recommendations provided by the Working Group on Communications, the Working Group on Situations presents the Council with a report and makes recommendations to the Council on the course of action to be taken.⁵⁵

[26] Subsequently, it is the turn of the Council to take a decision concerning each situation thus brought to its attention. At the end, what the Council can do is to (1) request the state concerned to provide further information within a reasonable period of time; (2) appoint an independent expert to monitor the situation and report back to the Council and/or (3) discontinue reviewing the matter under the confidential complaint procedure (the procedure is highly secretive) in order to take up public consideration.⁵⁶

[27] In addition to these complaint procedures, there are many Special Rapporteurs under the UN Human Rights Council. The most relevant ones to the situation in Sinai are the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Working Group on enforced or involuntary disappearances and the Special Rapporteur on the human rights of migrants. There is no specific procedure to be followed and sufficient instruction is available at the website of the Office of the High Commissioner for Human Rights.⁵⁷ What these Special Rapporteurs can do is again very limited.

[28] The available quasi-judicial human rights forums are not only slow-moving, largely ineffective but also of restricted access. These procedures are not capable of offering immediate solutions. If they must be tried, however, there are few points to be considered in order to avoid further delays. Generally, for a complaint to be admissible by these bodies it must not be manifestly politically motivated and its language must not be abusive of governments and exclusively based on reports disseminated by mass media but rather contain a factual description of the alleged violations, including the rights which are alleged to be violated based on reliable sources. If the victims cannot, complaints can be submitted by NGOs acting *in good faith* on behalf of victims.

⁵² Human Rights Council, Institution-building of the United Nations Human Rights Council, (9th meeting, 18 June 2007) UN Doc., A/HRC/5/21, paragraph 85.

⁵³ Ibid, paragraph 95.

⁵⁴ Ibid, paragraph 100.

⁵⁵ Ibid, paragraph 98.

⁵⁶ Ibid, paragraph 109.

⁵⁷ <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

Complaints to the UN Human Rights Council must refer to a situation that appears to reveal a consistent pattern of gross and reliably attested violations of human rights which the situation in Sinai is. In regard to the African Commission, even a single incident involving a single violation can be a subject of a complaint. A complaint already being considered by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights cannot be re-filed. Before petitioning to these bodies, domestic remedies have to be exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged. This seems the case with the three countries. In any case, demonstration of the latter scenario is needed in the complaint itself.⁵⁸

[29] The traffickers can be effectively prosecuted by criminal courts of western states particularly in those countries that are parties to the United Nations Convention against Transnational Organized Crime and the Protocol on Trafficking. Given its interests at stake, Israel is one favorable candidate. Yet, Israel needs to get hold of the traffickers and in the circumstances this seems very unlikely. Aiders and abettors in Israel can, however, face justice. Two are already being tried.

B. The International Criminal Court

[30] So far the most feared institution that can deal with this kind of situation is the International Criminal Court (ICC). However, there are many difficulties in getting the Court's attention. Even then, getting the abusers to the court depends on the cooperation of the three states. Yet, the court wields more pressure than the other forums and its pressure is higher if it gets backing by the UN Security Council.

Jurisdiction and elements of crime

[31] At present the ICC has jurisdiction over three crimes one of which is crimes against humanity - arguably committed by the traffickers. The ICC has power to deal with crimes committed in the territories of or by nationals of member states. Eritrea, Sudan and Egypt are not members and the abuses are taking places presumably by their nationals and in their territories. In this case, the ICC needs permission from these countries (very unlikely) to deal with the situation. Absent these two grounds for jurisdiction, the last and only ground is for the UN Security Council (UNSC) to authorize the ICC to deal with the situation. For the UNSC to do so, the situation to be referred must reach a level that threatens international peace and security.⁵⁹ Deserving publicity of the situation helps in influencing the judgment of the UNSC but it is highly unlikely that the UNSC will take the situation as threatening international peace and security.

[32] For the ICC to start moving, it needs to be convinced that a situation in which abuses are allegedly taking place is grave enough and one of the three crimes is being committed. In a world fraught with human rights abuses, the ICC is required to take the gravest situations. Even from such situations, a case is inadmissible where it "is not of sufficient gravity to justify further action by the Court."⁶⁰ This gravity threshold is not defined precisely. Each of the four situations already in the ICC involves thousands of wilful killings and large-scale sexual violence and abductions, and

⁵⁸ UN Doc., A/HRC/5/21, supra note 52, paragraph 87. In the case of the African Commission see article 56 of the African Charter.

⁵⁹ Statute of the ICC, articles 13-15 read together.

⁶⁰ Ibid, article 17(1)(d).

collectively, they have resulted in the displacement of more than 5 million people.⁶¹ A situation in Kenya in which around 1500 individuals were killed and many thousands victimized in different ways has met the gravity threshold. Considering these standards, the abuses being committed by the traffickers may not be grave enough. However, the gravity of the situation which has been primarily affecting Eritreans must be seen together with similar abuses in Eritrea.

[33] Arguably, the abuses being committed amount to crimes against humanity. Crimes against humanity have evolved over the time adding and shading some elements. Many acts listed in the Statute of the ICC as the criminal acts (*actus resu*) of crimes against humanity have been committed by the traffickers but criminal acts in themselves are not enough. In a simplified way and omitting the elements not so important to the situation at hand, for a crime against humanity to occur, (1) one or more of the listed acts must have been committed against a civilian population, (2) in a widespread or systematic manner, (3) pursuant to or in furtherance of a state or organizational policy and (4) the perpetrator knew that the conduct was part of that widespread or systematic commission.⁶² The ICC's Pre-Trial Chamber I has rightly noted "that the terms 'widespread' and 'systematic' are presented in the alternative and thus a finding of one is sufficient."⁶³ In this case, it seems easier to establish "widespread" nature of the abuses as the systematic element of crimes against humanity requires that the crimes are committed in a thoroughly organized manner and follow a regular pattern on the basis of a common policy involving substantial resources.⁶⁴

[34] "Widespread" is a standard explainable in terms of numbers, time and space. With regard to widespread commissions, most of the decisions of the *ad hoc* tribunals simply focus on the scale of the commissions or, equivalently, on the number of victims.⁶⁵ More specifically, the Pre-Trial Chamber II of the ICC has said that the adjective "widespread" connotes the large-scale nature of the commissions and the number of targeted persons.⁶⁶ An incident in which 200 individuals were killed was considered widespread but it was taken in light of other incidents.⁶⁷

[35] Considering that crimes against humanity must be committed "pursuant to or in furtherance of a state or organizational policy" for long there has been a debate on whether non-state actors

⁶¹ K. Heller, Situational Gravity under the Rome Statute, *Future Directions in International Criminal Justice: Carsten Stahn and Larissa van den Herik, eds., TMC Asser/CUP*, (2009), 1-35 at 2.

⁶² Statute of the ICC, article 7. See also the Elements of Crimes.

⁶³ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, (30 September 2008), ICC-01/04-01/07-717 01-10-2008 135/226 VW PT, 412.

⁶⁴ Guy Hurton, *Dying Alive: A Legal Assessment of Human Rights Violations in Burma* (Report Sponsored by the Netherlands Ministry for Development Cooperation, 2005) <http://www.ibiblio.org/obl/docs3/Horton-2005.pdf>, at 60.

⁶⁵ Kai Ambos and Steffen Wirth, The Current Law of Crimes Against Humanity: An Analysis of UNTAET Regulation 15/2000, *Criminal Law Forum* 13, 1-90, at 20 (2002).

⁶⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, supra note 63, paragraph 394.

⁶⁷ *Ibid*, paragraph 408.

such as the traffickers can commit crimes against humanity.⁶⁸ It is now settled that non-state actors can commit crimes against humanity if they act under “a state or organizational policy”. With regard to this important and debatable requirement the Pre-Trial Chamber II of the ICC has said:

The requirement of “a State or organizational policy” implies that the attack follows a regular pattern. Such policy may be made by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised. Indeed, an attack which is planned, directed or organized--as opposed to spontaneous or isolated acts of violence--will satisfy this criterion.

[36] Crimes against humanity are recent crimes and they are in the process of refinement. On the number of the members of the criminal organization, perhaps the United Nations Convention against Transnational Organized Crime gives a helpful hint. For the purposes of the Convention, “organized criminal group” is defined as “a structured group of three or more persons, existing for a period of time and acting in concert”.⁶⁹ A “structured group” is “a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure”.⁷⁰ Although “not invincible” as Kofi Annan said, traffickers “are powerful, representing entrenched interests and the clout of a global enterprise worth billions of dollars”.⁷¹ Arguably, human trafficking is closest to crimes against humanity in its magnitude and manners of perpetration. The statement of facts shows that the traffickers are well organized.

[37] Another requirement is that the perpetrator must know that the conduct was part of widespread attack against a civilian population. However, such knowledge has not been interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization. It is understood “to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack.”⁷² The element of knowledge does not appear problematic in the case of traffickers even though remotely placed aiders may claim that they were oblivious of the situation in the desert.

Specific elements of crimes against humanity

[38] The listed acts of crimes against humanity are many and some are arguably committed by the traffickers. One of them is murder of which much need not be said. Even though the exact number of the murdered victims is not known, the facts show that at least seven individuals have

⁶⁸ For discussion in favor of excluding non-state actors see M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd Revision, 1999); M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Vol. I, 2005) and [William A. Schabas](#), State Policy as an Element of International Crimes, 98 *Journal of Criminal Law and Criminology* 953, (2008). For a contrarian application see Dermot Groome, The Church Abuse Scandal: Were Crimes against Humanity Committed? 11 *Chicago Journal of International Law* 439, (2011).

⁶⁹ United Nations Convention Against Transnational Organized Crime, adopted on 15 November 2000, article 2(a).

⁷⁰ Ibid, article 2(c)

⁷¹ Quoted in United Nations, *United Nations Convention against Transnational Organized Crime and the Protocols thereto*, iii (2004).

⁷² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, supra note 63, paragraph 401.

been killed. Enslavement is another criminal act committed by the traffickers. Enslavement is defined 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”.⁷³ The facts show cases of sexual enslavement too.

[39] Some of the victims were kidnapped from refugee camps. This may amount to the criminal act of “deportation or forcible transfer of population”. This criminal act is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”.⁷⁴

[40] The criminal act of imprisonment or other severe deprivation of physical liberty seems evident. Also evident is the criminal act of torture. Torture is defined as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.⁷⁵

[41] Rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization are *actus reus* of crimes against humanity. Any other form of sexual violence of comparable gravity is also considered *actus reus* of a crime against humanity. The first three acts have possibly been committed by the traffickers while the last two have not been for lack of some elements. Though many young women were forcibly impregnated, they were not confined until delivery with the intent of affecting the ethnic composition of the population they belong to. Thus, the element of motive that must accompany the criminal act of forced pregnancy is missing.⁷⁶ In fact, some victims were discharged when their pregnancy was revealed. The traffickers are primarily financially motivated and there is neither report nor any reason to suspect enforced sterilization.

[42] Intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity is another criminal act identified as “persecution”. The facts show discriminatory treatment meted out against Christian victims. While ability to pay the ransom appears one factor for victimization; racial, national, ethnic, cultural and religious factors are employed in the identification of victims. Arguably then, the criminal act of persecution is committed.⁷⁷

[43] Extermination is another criminal act. It “includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.⁷⁸ The victims were deprived of food and water. The available facts are not clear whether the deprivation was caused by a purely logistical problem or calculated to coerce victims to comply with the demands of the traffickers. In any case, such deprivations do not seem to have been calculated to bring about the destruction of the victims – an important requirement for the criminal act.

⁷³ Statute of the ICC, article 7(2)(c).

⁷⁴ Ibid, article 7(2)(d).

⁷⁵ Ibid, article 7(2)(e).

⁷⁶ Ibid, article 7(2)(f).

⁷⁷ Ibid, article 7(1)(h) read with article 7(2)(g).

⁷⁸ Ibid, article 7(2)(b).

IV. RECOMMENDATIONS

[44] The abuses amount to violation of several human rights. Egypt, Eritrea and Sudan can thus be called to be accounted before the listed human rights bodies on the ground they failed to protect individuals in their territories. Not too much should be expected from such course of action as these states are immune to shame. Domestically, the real perpetrators can face criminal prosecution if the three states show willingness that should not be expected. Given the magnitude of the abuses, and given that the widely ratified treaties require criminalization of them, the perpetrators can face justice in other jurisdictions if they can venture out (which is very unlikely). In the circumstance the ICC could come into the picture but there are many legal barriers in this regard. The following can be recommended.

1. Wide exposition of the abuses and mobilization of shame should continue. To this end, it is helpful to distribute a concise description of the situation to resourceful NGOs, human rights bodies and main political bodies such as the African Union and European Union. Some sources indicate that the Rashaida traffickers are very respectful of their religious leaders (Sheikhs). If there is a means to do this, it may also be very effective to yield pressure via religious leaders in the desert at least in terms of saving the lives of the remaining hostages.
2. The victims of trafficking, particularly the victims of rape and sexual abuses, should be assisted. As a receiving state Israel should be reminded of its obligation to such victims under article 6(3) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.
3. Identification of aiders and abettors in Israel and other states should be carried on towards bringing them to justice in those countries. Likewise the main traffickers should be studied more carefully.
4. The situation, grave as it is, needs to be brought to the attention of the Prosecutor of the ICC and the UN Security Council with a recommendation that the situation be referred to the ICC.
 - a. In consideration of the principle of complementarity, reference should be made to the evident absence of political will on the side of the Sudanese government to deal with the traffickers and to the recent political situation in Egypt that does not allow for the local judiciary to take charge.
 - b. In referring the matter to the bodies, its gravity needs to be underlined. In this context, the matter should be linked to similar abuses that have been committed in Eritrea by the state. If not in the criminal sense, this repressive state has been the main cause of the mass exodus of its citizens who have been forced to put themselves in life-threatening risks.



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