



Eritrea's National Service Program: The Human Rights – Human Trafficking Perspective

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Introduction

It has been suggested that Eritrea's National Service Program- which initially required eighteen months' participation from all citizens between the ages of eighteen and forty - will be the downfall of the state.¹ This makes it an important issue regardless of whether we view it as a human rights, economic, or international security problem. This paper, however, seeks to explore the human rights dimension of the issue, specifically the Program's link to human trafficking, in an attempt to anticipate how the human rights community may respond, and to point out where difficulties may arise.²

The first part of the paper gives a brief overview of Eritrea's historical and political background, which provides the context for understanding the N.S.P. abuses in Eritrea today. Part two sets out the legal standards that govern the issue, when conceived of as a human rights problem with a human trafficking dimension.

The remainder of the paper explores the remedies that the human rights-human trafficking paradigm facilitates. Thus, part three examines the possibility of the Security Council referring the Eritrean situation to the International Criminal Court (I.C.C.) in The Hague, concluding that a referral may be too drastic a course of action at this juncture. Part four evaluates the American response to Eritrea through the State Department's human trafficking office and outlines how American courts could be used to buttress the campaign against the abuses. In the final section, I discuss the poverty of public domain information on Eritrea and stress the importance of the international community making serious efforts to obtain greater access to the country to lay the groundwork for a better-informed and effective policy.

Background

Eritrea is an independent state in the horn of Africa that was a colony of Italy from 1890-1941.³ In 1941, the Italians were driven out and Eritrea was placed under

¹ INTERNATIONAL CRISIS GROUP, *ERITREA: THE SIEGE STATE* (September 2010).

² It should be noted that this paper presumes that the U.S. has a legitimate role to play in addressing this issue, but the decision to look to American remedies and not to other states is due to the author's familiarity with the U.S. legal system, as opposed to any judgment on the contributions that other states might be able to make in this arena.

³ Gov't of Eritrea, Ministry of Information, History & Culture, *available at*:
<http://www.shabait.com/about-eritrea/history-a-culture> (last visited May 9, 2010).

British administration,⁴ only to be handed over to federal Ethiopia in 1952.⁵ The new political arrangement created much frustration in Eritrea and from 1961-1991, it waged a war of independence against Ethiopia,⁶ ending with Ethiopia's withdrawal and an agreement for Eritrea's independence to be put to referendum.⁷

The government that finally achieved Eritrea's independence in 1993 has since devolved into one of the most oppressive regimes in the world which is responsible for forcing its citizens into slavery.⁸ However, it did not start out that way. When the Eritrean rebels – who are now in government – first began liberating areas from Ethiopian control in the mid-1970s, they appeared to be a force for good.⁹ They drove prices down and wages up, brought equality to the institution of marriage, set up schools, democratized the village counsels, and reformed land laws.¹⁰

In the 1970s the separatist movement was dominated by two forces: the Eritrean People's Liberation Front (E.P.L.F.) and the Eritrean Liberation Front (E.L.F.). Both desired independence, but subtle political differences prevented them from merging. Of the two, the E.P.L.F. was significantly more organized, and is now generally regarded as the forerunner to the current day governing party, the People's Front for Democracy and Justice (P.F.D.J.).

In the 1970's, journalist Dan O'Connell was a great admirer of the Eritrean rebels. In his book *Against All Odds*, which he completed just after independence, he writes approvingly about the E.P.L.F. and its accomplishments. Here he describes E.P.L.F. organizers in the town of Zagher in the 1970s, ensconced in the rebels' free zone - an area beyond the reach of Ethiopia's institutions:

[T]he organizers were humble and unhurried.... They also gave concrete advice on how to increase crop yields, and they gave villagers new seed varieties and new crops such as flowers that could be sold in the towns.... Most importantly, they never took a thing from the villagers without asking first and then paying for it. People in Zagher trusted these earnest organizers; more than this, they liked them.¹¹

⁴ *Id.*

⁵ CIA World Fact Book, Eritrea, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html> (last visited May 9, 2010).

⁶ *Id.*

⁷ *Id.*

⁸ Freedom House Ratings, Combined Average Ratings – Independent Countries (2009), available at [http://www.freedomhouse.org/uploads/fiw09/tablesandcharts/Combined%20Average%20Ratings%20\(Independent%20Countries\)%20FIW%202008.pdf](http://www.freedomhouse.org/uploads/fiw09/tablesandcharts/Combined%20Average%20Ratings%20(Independent%20Countries)%20FIW%202008.pdf) (last visited May 9, 2010).

⁹ DAN CONNELL, *AGAINST ALL ODDS: A CHRONICLE OF THE ERITREAN REVOLUTION*, 27-44 (The Red Sea, Inc., 1997) (1993).

¹⁰ *Id.* at 109-137.

¹¹ *Id.* at 120.

It bears mentioning, however, that even this author, once so full of admiration for the E.P.L.F., has spoken out against the regime in recent years.¹² He admits that the changes he has seen since independence have transformed him “from a stalwart supporter of more than a quarter century to a reluctant but determined critic.”¹³

The orderly functioning of the Free Zone, in and around Zagher, (which Connell describes) was a short-lived phenomenon in Eritrea’s history. In 1978, Ethiopia rallied an enormous peoples’ army to bring Eritrea under its control again.¹⁴ The pressure caused the Liberation Front to splinter and created huge refugee populations in neighboring countries, especially Sudan.¹⁵ The 1980s were brutal years in Eritrea, during which the rebels spent mostly in retreat. Towards the end of that decade, however, they began pulling themselves out of the pit and in 1991 they were able to drive Ethiopia out of the capital, Asmara, and effectively assert independence.¹⁶ Two years later, in 1993, the Eritrean independence question was put to referendum and carried, resulting in the declaration of independence.¹⁷

In 1995, the new Eritrean government unveiled a National Service Program (N.S.P.) as part of the post-war reconstruction effort.¹⁸ The stated aim was to create “a new generation...ready to participate and serve in the reconstruction of the nation...[and] to foster national unity among our people by eliminating sub-national feelings.”¹⁹ Initially, the program required eighteen months of national service from all citizens aged between eighteen and forty years.²⁰ What happened subsequently can only be partially explained by external events.

In May of 1998, Eritrea entered into armed conflict with neighboring Ethiopia over disputed border territory, central to which was the town of Badme.²¹ The Eritrean government used this state of emergency as an excuse to extend national service from eighteen months to an indefinite period of time up until the age of forty.²² A U.N.

¹² Dan Connell, *A Critique of Eritrea’s Post Liberation Politics*, Nov. 6, 2003, available at <http://allafrica.com/stories/200311060876.html?page=1> (last visited May 9, 2010).

¹³ CONNELL, AGAINST ALL ODDS, at 120.

¹⁴ *Id.* at 157-64.

¹⁵ *Id.* at 161, 169.

¹⁶ Clifford Kraus, *Eritrea’s Capital Reported Seized*, N.Y. Times, May 25, 1991.

¹⁷ *Eritrea Marks Independence After Years Under Ethiopia*, N.Y. Times, May 25, 1993.

¹⁸ Proclamation of Nat’l Service No.82/1995, Art. 5, available at <http://www.unhcr.org/refworld/docid/3dd8d3af4.html> (last visited May 9, 2010).

¹⁹ *Id.*

²⁰ *Id.* at Art.2 (3).

²¹ Eritrea-Ethiopia Claims Commission, Partial Award, *Jus Ad Bellum*, Ethiopian Claims 1-8(April 13, 2002), available at <http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf> (last visited May 9, 2010).

²² HUMAN RIGHTS WATCH, SERVICE FOR LIFE: STATE REPRESSION AND INDEFINITE CONSCRIPTION at 3 (April 2009).

boundary commission attempted to resolve the issue but to this day Ethiopia has refused to accept the supposedly binding decision, which awarded the border town of Badme to Eritrea.²³ Thus, the Eritrean government claims that the state of emergency is ongoing, and indeed, to this day Eritrea deploys tens of thousands of troops along its border with Ethiopia.²⁴ However, the additional conscripts are used not only to guard the border but also in a range of ever-expanding government owned commercial ventures both in Eritrea and abroad.²⁵

The extent of the government's labor abuses and its link to the growing international phenomenon of human trafficking only registered with the world in 2009, when the U.S. Department of State (D.O.S.) and Human Rights Watch (H.R.W.) both published reports which focused on the government's role in slavery and other human rights abuses.²⁶ The International Crisis Group (I.C.G.) followed suit shortly after, weighing in on the issue in 2010.²⁷ It appears that there is a snowball effect starting to take hold, though it is not apparent that there is a great deal of genuinely new information coming to light.

The H.R.W. Report provided a damning one-hundred page account of the methods and means of the government's exploitation of its people through the N.S.P., describing in detail how various torture methods are used, and how specific religious and ethnic groups are targeted by the regime.

Similarly, the 2009 U.S. D.O.S. Trafficking in Persons (T.I.P.) Report claimed that the national service program, whereby Eritrean youths are conscripted to the army and to assist in public service projects, was essentially a front for internal and transnational human trafficking.²⁸ It claimed that conscripts were used as laborers on commanding officers' personal property and that some were compelled to continue their service indefinitely. It is also alleged that in 2007 roughly 40 conscripts were sent to work in hotels in the UAE and that in 2008 an unstated number of conscripts were sent to work in hotels in Sudan.²⁹ The authors charged the government with complicity in conscripting children into military service, and recommended that steps should be taken to "curb abuses of Eritrean citizens in the national service program."³⁰ Though substantially the same in most other respects, the 2010 report omits the recommendation to curb N.S.P. abuses. The deletion may be a response to new evidence, but the report does not explain the apparent policy shift.³¹

²³ *Id.*

²⁴ *Id.* at 22.

²⁵ *See, e.g.*, U.S. DEPT. OF STATE, TRAFFICKING IN PERSONS (T.I.P.) REPORT: 2009 at 129-130.

²⁶ HUMAN RIGHTS WATCH, SERVICE FOR LIFE at 3; T.I.P. REPORT: 2009 at 129-130.

²⁷ ERITREA: THE SIEGE STATE, *see* note 1, *supra*.

²⁸ T.I.P. REPORT: 2009 at 129.

²⁹ *Id.*

³⁰ *Id.* at 130.

³¹ *Id.* at 142.

ICG's report acknowledges the same facts as the U.S. D.O.S. and H.R.W. but prioritizes the economic crisis it sees looming on the horizon over the human rights issue.³² ICG argues that the national service program is damaging Eritrea's interests because it compels the best and the brightest to flee, while also preventing those trapped in the system from making a significant contribution to the national economy. It warns that if some form of demobilization is not undertaken more or less immediately, the regime risks collapse.³³

All reports also stressed the general vulnerability of paperless refugees forced to flee each year to Sudan, Ethiopia and Kenya, many as a result of the N.S.P..³⁴ The reports criticized Eritrea for limiting the number of foreign N.G.O.s in the country.³⁵ The I.C.R.C. has been the only international N.G.O. permitted to operate effectively in the country in recent years.³⁶

The reaction of the Eritrean government to these reports was denial and outrage. When the 2009 T.I.P. Report was released, the Eritrean embassy in Washington, D.C. issued a press release stating that the report did not provide an accurate picture of Eritrea's policies, that it "was not based on well defined evidentiary standards or fact" and that "if [the State Department] wants to be taken seriously, ought to consider... getting the facts instead of relying on dubious and disinterested sources. Human trafficking is too serious an issue to be used as a tool for furthering illicit political agendas."³⁷ The H.R.W. report was dismissed as not only short on facts, "but also short on intellectual and professional integrity."³⁸ The same government-affiliated commentator also noted that H.R.W. had apparently failed to interview any government officials about the allegations.³⁹

³² ERITREA: THE SIEGE STATE *see* note 1, *supra* at 14.

³³ *Id.* at 26.

³⁴ T.I.P. REPORT: 2009 at 121; T.I.P. REPORT: 2010 at 142; SERVICE FOR LIFE at 4,9, 65-77, 101; ERITREA: THE SIEGE STATE, *see* note 1, *supra* at 9.

³⁵ T.I.P. REPORT: 2009 at 130; SERVICE FOR LIFE at 6, 8.

³⁶ U.S. DEPT. OF STATE, HUMAN RIGHTS REPORT: 2008, *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119000.htm> (last visited May 9, 2010).

³⁷ Embassy of Eritrea, Press Release, June 18, 2009, *available at* <http://www.eastafricaforum.net/2009/06/19/eritrea-rejects-us-country-report-on-human-trafficking/> (last visited May 9, 2010).

³⁸ Tesfamariam, Sophia, Human Rights Watch at Chatham House-A Peddlers Event, American Chronicle, Apr. 29, 2009, *available at* <http://www.americanchronicle.com/articles/view/100657>. (alleging that H.R.W. had placed too much reliance on a group in the diaspora that is, in her opinion, "a dubious alliance of the jilted and scorned, of like-minded defectors, disgruntled runaway diplomats, pedophiles, rapists, self-professed 'intellectuals and professionals', deceitful counterfeiterers, information launderers and an assortment of shameless scandalous opportunists.").

³⁹ *Id.*

It is possible that the Eritrean government is overly sensitive to criticism because it has received frequent criticism from the international community, mostly as a result of what is viewed as its antagonistic stance towards other governments in the region, in particular, Somalia and Djibouti.⁴⁰ For example, reports surfaced in May 2009 that Eritrea was supplying military support to al-Shabaab, a terrorist group in Somalia.⁴¹ In December 2009, Eritrea's perceived aggression towards Djibouti, and its alleged sponsoring of terrorism in Somalia, became the subject of a U.N. Security Council Resolution.⁴²

Al-Shabaab, also known as the Harakat Shabaab al-Mujahidin, is the militant wing of the Somalia Council of Islamic Courts that took over most of Southern Somalia in late 2006.⁴³ Combined Ethiopian and Somali forces managed to dislodge the group temporarily, but it regained power in much of Southern Somalia.⁴⁴ According to the U.S. government, the rank and file members of the organization are primarily motivated by nationalism but the upper echelons of the organization are associated with Al-Qa'ida.⁴⁵ Its operations are said to include roadside bombings, kidnappings and assassinations of government officials, and threatening and expelling agencies and their staff in southern Somalia.⁴⁶ It has been on the U.S. government's terrorist list since February 29th, 2008.⁴⁷

In May 2008, Eritrea was accused of digging trenches on the Djibouti side of their international border.⁴⁸ The following month, a spat of conflict broke out in which two Djiboutian soldiers were killed and several more wounded.⁴⁹ Significantly, both France and the United States have military bases within Djibouti.⁵⁰ Eritrea continued to send troops to the border after the Security Council first issued a resolution to withdraw in January 2009.⁵¹

On December 23, 2009, the Security Council imposed an arms embargo on Eritrea for allegedly attempting to destabilize the Transitional Federal Government in

⁴⁰ *Djibouti Says Eritrea Risking War*, B.B.C. News, Oct. 24, 2008.

⁴¹ *US Alarmed at Eritrea "Arms Link"*, B.B.C. News, May 16, 2009.

⁴² S.C. Res. 1907, Preambles, ¶3, U.N. Doc. S/RES/1907 (Dec. 23, 2009).

⁴³ National Counterterrorism Center, Al-Shabaab, *available at* http://www.nctc.gov/site/groups/al_shabaab.html (last visited, May 9, 2010).

⁴⁴ *Id.*

⁴⁵ National Counterterrorism Center, *see note 42, supra; see also*, U.S. DEPT. OF STATE COUNTRY REPORTS ON TERRORISM: 2008 at 287, *available at*

<http://www.state.gov/documents/organization/122599.pdf> (last visited May 9, 2010).

⁴⁶ STATE COUNTRY REPORTS ON TERRORISM: 2008 at 29.

⁴⁷ National Counterterrorism Center, *Al-Shabaab*, *available at*

http://www.nctc.gov/site/groups/al_shabaab.html (last visited, May 9, 2010).

⁴⁸ *Eritrea Army "Entered" Djibouti*, B.B.C., May 6, 2008.

⁴⁹ *Djiboutian Troops Killed on Border*, B.B.C., June 11, 2008.

⁵⁰ *Id.*

⁵¹ S.C. Res. 1862, U.N. Doc. S/RES/1862, (January 4, 2009).

Somalia.⁵² The resolution demanded that Eritrea “cease arming, training, and equipping armed groups and their members including al-Shabaab, that aim to destabilize the region or incite violence and civil strife in Djibouti.”⁵³ The Eritrean government dismissed the resolution as U.S.-fueled propaganda.⁵⁴ Curiously, months before the resolution was passed, al-Shabaab reportedly issued a statement threatening Eritrea for its supposed opposition to the implementation of Shari’a law in Somalia.⁵⁵ The motivation for this statement remains unclear.⁵⁶

Eritrea’s human trafficking problem is particularly intractable for a number of reasons. First is the apparent extent of the government’s involvement. Because the government continues to maintain that the N.S.P. is being used in a legitimate manner, in spite of evidence to the contrary, it is impossible to enter into a meaningful discourse. In any case, its deep suspicion of outsiders makes the government difficult to approach. In addition, due to the lack of access to the country which is necessary to ascertain the extent of the problem, it is difficult for the international community to make a strong case for more stringent measures to be taken.

However, it is becoming increasingly apparent that N.S.P. abuse is a matter of international concern, regardless of whether the concern is for human rights or regional security. The human rights framework involves legal remedies that could have a considerable impact on the region. The rest of this paper demonstrates how the international community could take up this issue as a human rights matter, beginning with an effort to frame the issue in terms of the applicable legal standards.

I. Definitions of Human Trafficking and Slavery

The prohibition on slavery is a *jus cogens* norm, meaning that it is binding on all nations.⁵⁷ In other words, a country’s law is either identical with the *jus cogens prohibition*, or it is invalid.⁵⁸ However, the fact that the conduct is universally prohibited does not mean that it is, *per se*, punishable in fact. Various factors come into play here, such as the requirements of proper jurisdiction and due process, as well as whether the political environment would permit trial and punishment. Before getting to those

⁵² S.C. Res. 1907, Preambles, ¶5-6, U.N. Doc. S/RES/1907 (December 23, 2009).

⁵³ *Id.* At ¶ 16.

⁵⁴ Ministry of Foreign Affairs, Press Release, Dec. 23, 2009, available at <http://www.capitaleritrea.com/category/insight/> (last visited May 9, 2010).

⁵⁵ Andrew McGregor, *Opposition Group Promises Attacks Following Sanctions on Eritrea for Support of Terrorism*, Terrorism Monitor, VIII THE JAMESTOWN FOUNDATION 1 (Jan 7, 2010), available at <http://www.jamestown.org/programs/gta/terrorismmonitorgta> (last visited May 9, 2010).

⁵⁶ *Id.*

⁵⁷ M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practices*, 42 VA. J. INT’L L. 81, 88 (2001).

⁵⁸ Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for International Customary Law*, 15 E.J.I.L. 97, 114 (2004).

considerations, however, it will be useful to examine the legal provisions that bear on the situation in Eritrea.

The prohibition on slavery is fleshed out in a variety of legal instruments that are relevant to Eritrea. To begin with, it is prohibited under Eritrean law. The 1997 Eritrean Constitution, although subsequently suspended, guarantees fundamental freedoms, and prohibits forced labor.⁵⁹ The penal code explicitly prohibits trafficking in women and children for sexual exploitation. However, there is no comparable provision for forced labor.⁶⁰

At the international level, the leading definition of human trafficking comes from the United Nations Protocol to the Convention on Transnational Crime, which aims to Prevent, Suppress and Punish Trafficking in Persons (herein, the “Protocol”).⁶¹ Although Eritrea is not a party to the Convention or the Protocol, it recognizes the criminal nature of conduct described in the Protocol through other international instruments, such as the African Charter on Human Rights,⁶² and the International Convention on Civil and Political Rights.⁶³ Even though Eritrea is not explicitly bound by the Protocol, it *is* bound to uphold the norms expressed therein. The definition of human trafficking in that document is as follows:

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

⁵⁹ ERI. CONST. art. 14 – Equality Under the Law; art. 15 – Right to Life and Liberty; art. 17 - Arrest, Detention and Fair Trial; art. 26 - Limitation Upon Fundamental Rights and Freedoms; art. 27 – State of Emergency, *available at* <http://www.unhcr.org/refworld/docid/3dd8aa904.html> (last visited May 9, 2010).

⁶⁰ T.I.P. REPORT: 2009 at 130 (citing Art. 605, Art. 607 of the Eritrean Penal Code).

⁶¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, U.N.G.A., *available at* <http://www.unhcr.org/refworld/docid/4720706c0.html> (last visited, May 9, 2010).

⁶² African Union, List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and People’s Rights, *available at* http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf, (last visited May 9, 2010); African Charter on Human and People’s Rights, *available at* http://www.achpr.org/english/_info/charter_en.html (last visited May 7, 2010) (making punishable exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment (Art 5.) and prohibiting discrimination (Art. 2; Art. 28)).

⁶³ Status of International Covenant on Civil and Political Rights, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en&clang=_en, (last visited May 7, 2010); International Convention on Civil and Political Rights, *available at* <http://www.hrweb.org/legal/cpr.html>, (last visited May 7, 2010) (prohibiting slavery and the slave trade but excepting military).

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.⁶⁴

The above definition breaks down into three basic elements: (1) the perpetrator's act, (2) the means with which perpetrator commits the act and (3) the purpose for which the act is committed.⁶⁵ However, because the definition is not tailored to governmental actors, it does not fully reflect the nature of the criminal conduct at issue. For instance, it does not describe the widespread nature of the regime's criminality, which is only possible due to a government's monopoly over certain resources.

Furthermore, the Convention does not have a punitive mechanism. The United Nations Office of Drug and Crime Prevention (U.N.O.D.C.) is the guardian of the Protocol and assists states in implementing the Protocol's demands but its purpose is not to punish conduct that meets the legal definition of human trafficking.⁶⁶ Because the Rome Statute better reflects the criminality inherent in a nationwide system of slavery, and because it is a punitive instrument, it is worth considering in relation to Eritrea.⁶⁷

The Rome Statute of the International Criminal Court contains a trafficking-related provision at Article 7, which covers crimes against humanity. Under Article 7 crimes against humanity are defined to include enslavement,⁶⁸ rape, sexual slavery and enforced prostitution, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, 'pursuant to a state plan or organizational policy, and committed with a discriminatory intent.'⁶⁹

Thus, if the basic crime of trafficking provides us with three elements, the Rome Statute adds three more to trafficking crimes under its jurisdiction: (4) a widespread or systematic attack on a civilian population, (5) pursuant to a state plan or organizational policy, and (6) committed on a discriminatory basis.⁷⁰ As will be shown in the following section, there is a strong case to be made that government officials are responsible for crimes against humanity, specifically, human trafficking. It should be noted, however, that the judicial route is neither a panacea, nor a particularly accessible solution.

⁶⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, *see* note 61, *supra*.

⁶⁵ U.N.O.D.C., Human Trafficking, *available at* <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited May 9, 2010).

⁶⁶ U.N.O.D.C., What is Human Trafficking? *available at* <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited May 9, 2010).

⁶⁷ Rome Statute, U.N. Doc. A/CONF.183/9, *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>, (last visited May 9, 2010).

⁶⁸ Rome Statute, Art. 7(2)(c) (further defining enslavement 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.")

⁶⁹ Rome Statute, Art. 7.

⁷⁰ *Id.*

The following section seeks to address not only whether the conduct could be prosecuted at the I.C.C. from a legal perspective and warns against pursuing this course of action prematurely.

II. The ICC As a Tool for Combating Human Trafficking

The I.C.C. could theoretically proceed with charges against government officials in Eritrea, as it has done in Sudan and other African states. This section establishes the legal basis for prosecuting the government's human trafficking crimes as crimes against humanity under the Rome Statute by applying the facts to the six elements that were identified above as elements of human trafficking as a crime against humanity, and evaluates the feasibility of successful I.C.C. involvement in the current political climate.

A. Civilian and Military Personnel Recruit Victims for the N.S.P.

The government is responsible for recruiting its citizens into forced labor projects. It is efficient at recruiting its citizens for the national conscription program, and most are conscripted straight out of school.⁷¹ In general, conscription is managed at the local level by councils called *kebele* or *memehidar* that keep detailed records of all families to ensure that all eligible members are recruited.⁷² In larger cities, police and military round up evaders, in a process that H.R.W. describes as “modern press-ganging.”⁷³ Based on the available information, government agents are involved in channeling the citizens into the N.S.P. The next question that must be answered is whether the methods used are legitimate.

B. Victims are Compelled to Cooperate With the N.S.P. Through Illegitimate Means.

The government and army use force, abuse their power, and exploit the victims' vulnerability to co-opt them into the N.S.P.. The government is said to confiscate land belonging to the fleeing conscripts, which must be purchased back for 50,000 Nakfa, frequently impossible for the conscripts' family.⁷⁴ When a conscript escapes from a N.S.P., it is alleged that officers are instructed to go to his home and find him. Failing that, they sweep up his family for incarceration.⁷⁵ Nobody knows how many detention facilities there are in Eritrea but H.R.W. documented over thirty of them.⁷⁶ Detainees are routinely starved and forced to perform labor.⁷⁷ A division exists between military and civilian prisons, with conditions in military prisons for fleeing conscripts being

⁷¹ HUMAN RIGHTS WATCH, SERVICE FOR LIFE at 3 at 50, available at http://www.hrw.org/sites/default/files/reports/eritrea0409web_0.pdf (last visited Aug. 5, 2010).

⁷² *Id.* at 48.

⁷³ *Id.*

⁷⁴ *Id.* at 46.

⁷⁵ *Id.* at 45.

⁷⁶ *Id.*, see Annex A.

⁷⁷ *Id.* at 35.

significantly worse.⁷⁸ H.R.W. interviewed forty Eritrean refugees who all claimed they were jailed on multiple occasions in connection with the N.S.P. who described various methods of torture.⁷⁹

Another disturbing aspect of the abuse is that slaves are used to exploit other victims of the regime.⁸⁰ A 2009 U.S. Supreme Court case granting asylum to an Eritrean man provides an illustration of this phenomenon.⁸¹ In that case, Daniel Girmai Negusie was forced to work as a prison guard when he refused to fight against Ethiopia, his mother's homeland, in the 1998-2000 war.⁸² One of his responsibilities was to guard prisoners while they were forced to stay out in the sun as a form of punishment.⁸³ He saw at least one man die this way.⁸⁴

Based on current information, the Eritrean government appears to be abusing its authority over its citizens to ensure compliance with its national conscription policy through the use of torture, imprisonment, food deprivation, collective punishment, and confiscation of property.⁸⁵ Because these methods were at odds with Eritrea's own Constitution,⁸⁶ international legal instruments such as the Abolition of Forced Labor Convention,⁸⁷ Convention on the Rights of the Child,⁸⁸ and the internationally recognized prohibition of torture, they were illegal and should not have been used to induce compliance with the N.S.P..

C. The Government is Responsible for Sexual Exploitation, Forced Labor or Services, Slavery or Similar

The exploitation that that allegedly occurs at the behest of Eritrea's governing elite runs the gamut of the international definition of human trafficking.⁸⁹ To begin with,

⁷⁸ *Id.* at 33.

⁷⁹ *Id.* at 28-30.

⁸⁰ *Negusie v. Holder*, 129 S. Ct. 1159, 1162 (2009).

⁸¹ *Id.*

⁸² *Negusie*, 129 at 1162; *See also* SERVICE FOR LIFE at 34 (documenting a case where guards fled from prison along side the inmates to avoid having to carry out the appalling acts their superiors ordered of them).

⁸³ 129 S. Ct. at 1163.

⁸⁴ *Id.*

⁸⁵ SERVICE FOR LIFE at 24-65.

⁸⁶ Available at <http://www.kituoachakatiba.co.ug/Constitution%20of%20Eritrea.pdf> (last visited May 9, 2010).

⁸⁷ List of I.L.O. Ratification of Conventions: Eritrea, available at <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=en&CTYCHOICE=2100> (last visited May 9, 2010).

⁸⁸ Eritrea: International Treaties Adherence, available at http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=61 (last visited May 9, 2010).

⁸⁹ Protocol, *see* note 61, *supra*.

there is commonly a sexually exploitative side to female service.⁹⁰ One interviewee in the H.R.W. project told them that “the military leaders can ask you for anything and if you refuse their demands then you can be punished. Almost every woman in the military experiences this kind of problem.”⁹¹ The choice is to submit to their demands, or face imprisonment, forced labor without breaks, or worse.⁹² While sexual slavery does not seem to be the primary purpose of recruiting women, the inherently exploitative nature of the program appears to facilitate it.

Conscripts are said to have been used in many areas of the economy including the judicial system, professional sports, state-owned mines and farms, and on road and bridge construction projects.⁹³ Conscripts as already mentioned have also been sent abroad to the U.A.E. to work on hotels.⁹⁴ Typical compensation rates run at about U.S.\$3 per month, meaning that for most, the program does not provide a living wage.⁹⁵

Recently, allegations have emerged that slaves are being used to run Western-owned gold mining companies within Eritrea.⁹⁶ Specifically it is alleged that they have subcontracted operations to government-owned corporations with at least constructive if not actual knowledge that slavery is almost inevitable.⁹⁷ If this is true, it could have serious legal consequences for any company that possesses assets or maintains other ties with the United States, which allows civil tort claims to be brought by aliens.⁹⁸ This possibility is explored in greater depth in Section IV-B below.

D. The Crimes Are Committed With Discriminatory Intent.

The government cracks down hard on any political opposition⁹⁹ but there is increasing evidence that specific groups are being targeted on religious grounds.¹⁰⁰ As Eritrea scholar Mekonnen observes, “fear and retribution for independent political and

⁹⁰ SERVICE FOR LIFE, *see note 1, supra*, at t 46-47; Yosief Ghebrehiwet, *Western Mining Companies and Slave Labor in Eritrea*, Apr. 20, 2010, available at <http://www.asmarino.com/articles/644-western-mining-companies-and-slave-labor-in-eritrea> (last visited May 9, 2010)

⁹¹ SERVICE FOR LIFE, at 46.

⁹² *Id.* at 38, 47.

⁹³ *Id.* at 51-52.

⁹⁴ T.I.P. REPORT: 2009 at 129.

⁹⁵ SERVICE FOR LIFE at 52.

⁹⁶ Ghebrehiwet, *Western Mining Companies and Slave Labor in Eritrea*, Apr. 20, 2010, *see note 90, supra*.

⁹⁷ *Id.*

⁹⁸ 28 U.S.C. § 1350 (2006).

⁹⁹ *See, e.g.*, SERVICE FOR LIFE at 58, 75, 78; Daniel Rezene Mekonnen, Thesis for Degree of Doctor of Laws, *Transitional Justice: Framing a Model for Eritrea*, at 152, 161-62, 165.

May 2008, available at <http://www.uovs.ac.za/> (last visited Apr. 22, 2010).

¹⁰⁰ U.S. DEP'T. OF STATE, INT'L RELIGIOUS FREEDOM REPORT: 2008, available at

<http://www.state.gov/g/drl/rls/irf/2008/108367.htm>, (last visited May 8, 2010); Eritrea:

Information on the Persecution of Evangelical Christians in Asmara, Eritrea, available at

[www.unhcr.org.refworld/](http://www.unhcr.org/refworld/) (last visited May 9, 2010); Jonah Fisher, *Religious Persecution in Eritrea*, B.B.C., 17 Sept. 2004.

religious thought is part of daily life in Eritrea.”¹⁰¹ Both types of persecution are criminalized under the I.C.C. statute.¹⁰²

Eritrea has four principal religions: Orthodox Christian, Muslim, Catholic, and Evangelical Christians.¹⁰³ Since 2002, the government has pursued a discriminatory policy against religious minorities, closing down places of worship and harassing and detaining members of such groups.¹⁰⁴ Amnesty International estimates that 3,000 people are imprisoned on the basis of their religion.¹⁰⁵ One account tells of soldiers being thrown in prison after being caught in the act of prayer and later forced to serve on the front line against their will.¹⁰⁶ This evidences a link between exploitative labor practices and a discriminatory intent on behalf of government actors.

E. The Crimes are Committed in the Context of a Widespread or Systematic Pattern.

The widespread existence of the *kebele* and the efficiency with which they keep lists of potential conscripts suggests that the crimes are being committed on a widespread *and* systematic basis. The I.C.C. Pre-Trial chamber has instructed that widespread means that the attack is large-scale and involves a high number of victims, while systematic means organized and unlikely to be random events.¹⁰⁷ As stated above, Amnesty International estimates that 3,000 members of religious minority groups alone are being detained in Eritrea.¹⁰⁸ One source estimates that there are as many as 300,000 slave laborers in Eritrea at present.¹⁰⁹ H.R.W. has documented the existence of over thirty detention centers throughout the country where human rights abuses are occurring, based on interviews with refugees.¹¹⁰ Until investigators are permitted access to Eritrea, the precise extent of the human rights abuse and the context in which it is occurring will not be known for certain. The most that can be said at present is that a *prima facie* case exists that the crimes are sufficiently widespread and systematic to give rise to a presumption that the government is responsible for crimes against humanity.

F. The Crimes are Committed Pursuant to a State Plan or Organizational Policy.

Both the individual stories and the evidence that has been amassed of systemic abuse shows the government’s hand in these crimes. Negusie, for instance, who was compelled to torture other prisoners, was originally abducted by state officials and forced

¹⁰¹ Mekonnen at 16, *see* note 99, *supra*.

¹⁰² Rome Statute, Art. 7.

¹⁰³ INT’L RELIGIOUS FREEDOM REPORT: 2008, *see* note 100, *supra*.

¹⁰⁴ Eritrea: Information on the Persecution of Evangelical Christians in Asmara, Eritrea, *available at* www.unhcr.org.refworld/ (last visited May 9, 2010).

¹⁰⁵ Amnesty Int’l Submission to the U.N. Universal Periodic Review on Eritrea (2009), AI Index AFR 64/001/2009.

¹⁰⁶ *Eritrea Arrests Soldiers for Their Faith*, Ethiocross, Apr. 6, 2010.

¹⁰⁷ I.C.C. Pre-Trial Decision to Arrest Omar Al-Bashir, ¶ 81 (March 7, 2009).

¹⁰⁸ AI Index AFR 64/001/2009.

¹⁰⁹ Ghebrehiwet, *see* note 90, *supra*.

¹¹⁰ SERVICE FOR LIFE at 93-95.

to perform hard labor.¹¹¹ Nothing suggests his case was atypical. Furthermore, the use of police and military in urban areas to round up unwilling conscripts, often through violence, and the pervasiveness of the phenomenon strongly indicates that the government condones the exploitative treatment its people face when forced into national service.¹¹²

G. The Conflict with Ethiopia Does Not Justify the Government's Actions

Faced with these accusations, the Eritrean government will undoubtedly respond that their N.S.P. is a legitimate means of harnessing the power they need to defend the national interests. In response to such a defense, two points need to be made. First, national service programs like Eritrea's are only permitted in cases of emergency.¹¹³ In Eritrea, conscripts are being used for projects that have nothing to do with the border conflict with Ethiopia, or the national good – for instance, hotels in the U.A.E.¹¹⁴ Second, the state of emergency which underwrote the expansion of the N.S.P. is artificial: the border situation, though tense, is essentially a stalemate, yet the government exploits it in order to keep thousands of its citizens in conditions of forced labor and slavery.

On the face of the evidence, the Eritrean government engages in acts that are tantamount to human trafficking. It vigorously and systematically recruits its citizens through illegal means including torture, collective punishment, and starvation, and forces them to perform various kinds of manual labor, services, and sexual acts for their superiors' personal gratification.¹¹⁵ This suggests that crimes are being committed that would fall within the I.C.C.'s jurisdiction. As I argue here, prosecution might be ultimately desirable but it will be subjected to extensive critique that will attempt to undermine the I.C.C., and could disrupt the political situation in Eritrea even further.

H. The Pitfalls of I.C.C. Involvement.

The impunity in Eritrea must end and if the government refuses to guarantee domestic legal action, then there is a strong argument that I.C.C. should step up to fill the void.¹¹⁶ However, no one really believes that President Afwerki and his associates would come willingly, given that he so publicly flouted the I.C.C. by hosting Sudan's President, Omar Al-Bashir, only weeks after the I.C.C. issued an arrest warrant for him in March 2009.¹¹⁷ Eritrea has also yet to ratify the Rome Statute.¹¹⁸ Under the circumstances, the only way to obtain jurisdiction would be if the Security Council referred the situation to

¹¹¹ *Negusie v. Holder*, 129 S. Ct. at 1160.

¹¹² *See generally*, SERVICE FOR LIFE.

¹¹³ *Id.* at 83.

¹¹⁴ T.I.P. REPORT: 2009 at 129.

¹¹⁵ SERVICE FOR LIFE at 24-65; *See also*, Ghebrehiwet, *see note 90, supra*.

¹¹⁶ For a comprehensive analysis of I.C.C. jurisdiction over Eritrea, *see* Mekonnen, *Transitional Justice: Framing a Model for Eritrea*, May 2008, *available at* <http://www.uovs.ac.za/> (last visited Apr. 22, 2010).

¹¹⁷ Mohammed Osman, *Al-Bashir Visits Eritrea, Defies I.C.C. Warrant*, Huffington Post, March 23 2009.

¹¹⁸ Coalition for the International Criminal Court, *World Signatures and Ratifications*, *available at* <http://www.iccnw.org/?mod=romesignatures> (last visited May 9, 2010).

the Court, as per Article 13 of the Statute. This would leave the decision unavoidably vulnerable to the criticism that greater powers like the United States were abusing political influence to impose their own agenda upon a small African nation.

The I.C.C. is frequently characterized as a neocolonial institution,¹¹⁹ and not without some basis: to date, the prosecutor has initiated proceedings against thirteen individuals, all of whom are African.¹²⁰ Adding Eritrea to the ever-growing list of African prosecutions would only add more fuel to that fire. When the I.C.C. deputy Prosecutor Fatou Bensouda was recently challenged on the court's preoccupation with Africa she merely responded that there was good cause to investigate the cases they did.¹²¹ Her response misses the point entirely. The suggestion is not that allegations of human rights abuses in African states are spurious: the point is that atrocities in other parts of the world committed by a whole range of actors have almost uniformly been ignored. If the I.C.C. is to establish the kind of authority necessary to carry out its work effectively, it must start meeting these critics with more thoughtful responses. To this end, a spokesperson for the prosecutor recently indicated that his office would very soon be releasing a memorandum outlining the prosecutor's protocol for investigation, which would shed some light on why certain situations are selected for investigation over others.¹²² Almost six months later, a draft policy document was uploaded to the prosecutor's web page, stating that it required a "reasonable basis" to believe crimes had been or were being committed.¹²³

Even if the process begins now, an I.C.C. arrest warrant is a long way off. In Sudan, for instance, indictments were not issued until two years after the Commission of Experts was first authorized to investigate allegations of atrocity crimes in the country.¹²⁴

¹¹⁹ See, e.g., Great Lakes Policy Forum, Debate, *The ICC in Africa: Impartial Judge or Neo-Colonial Project*, available at <http://www.enoughproject.org/blogs/icc-africa-impartial-judge-or-neo-colonial-project> (last visited Apr. 11, 2010).

¹²⁰ I.C.C. Situations and Cases, available at <http://www.I.C.C.-cpi.int/Menus/I.C.C./Situations+and+Cases/> (last visited, May 9, 2010).

¹²¹ Fatou Bensouda and Courtenay Griffiths, Remarks at Northwestern University School of Law, Conference, Atrocity Crimes Litigation Year in Review (2009) (recording of the conference is forthcoming at <http://www.law.northwestern.edu/humanrights/>).

¹²² Rod Raston, Remarks at John Marshall School of Law Symposium (Apr. 23, 2010) in response to

¹²³ Policy Paper on Preliminary Examinations DRAFT, October 4, 2010, available at http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf (last visited Nov. 25, 2010).

¹²⁴ S.C. Res. 1591 Reports of the Secretary-General on the Sudan, U.N. Doc. S/RES/1591 (March 29, 2005); Arrest Warrant for Foreign Minister Ahmad Mohammad Harun, February 27, 2007, available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> (last visited May 9, 2010).

To obtain an arrest warrant for the President took a further two years.¹²⁵ So far, the international community has largely reserved its interest in Eritrea to its relations with other states and has not concerned itself with Eritrea's internal affairs.¹²⁶ The I.C.C. could be effective in drawing international attention to the abuse of the N.S.P., and it would help to fill the accountability void left by Eritrea's defunct judicial system. But on its own, it will not bring an end to the abuse. To date, the actor that has done the most to combat human trafficking in Eritrea is the United States. With that in mind, the analysis now turns to an evaluation of U.S. action with respect to Eritrea.

III. The Role of the United States

The U.S. has been referred to as the “global sheriff” of human trafficking, with good reason.¹²⁷ The U.S. has probably the most expansive legislative framework on human trafficking, and is the only transnational actor that has taken punitive action against Eritrea for its human trafficking problem. So far, it has done so by imposing unilateral economic sanctions. It may also be possible to use U.S. courts to sue former government officials and, possibly, foreign corporations for their participation in human trafficking related crimes under the Alien Torts Claims Act. This section discusses both the existing sanction scheme and inquires into the possibility of bringing civil suits in American courts against those responsible for human trafficking related crimes committed in Eritrea.

A. TIP Reports and Sanctioning Scheme

The Department of State T.I.P. (Trafficking In Persons) Reports - although widely regarded as politically slanted to reflect U.S. interests - are a widely used comprehensive annual survey of the global trans-border trafficking situation.¹²⁸ The tiered system stratifies countries into four tiers: Tier 1 -fully complaint, Tier 2 - making significant efforts but not fully compliant, Tier 3 - not making significant efforts and not fully compliant, and the Tier 2 watch list – Tier 2 countries that have failed to live up to statements of intent.¹²⁹ The President is authorized to withhold non-humanitarian aid from Tier 3 countries on the basis of the State Department's findings, and may also advise the World Bank and other international financial institutions not to distribute loans to such countries.¹³⁰

¹²⁵ Arrest Warrant for President Omar Al-Bashir, March 4, 2009, *available at* <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> (last visited May 9, 2010).

¹²⁶ See S.C. Res. 1907, Preambles, ¶3, U.N.Doc. S/RES/1907 (December 23, 2009).

¹²⁷ Janie Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 MICH. J. INT'L L. 437 (2005-2006).

¹²⁸ Mohamed Y. Mattar, Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings, 41 VAND. J. TRANSNAT'L LAW, 1355, 1375-83 (2008).

¹²⁹ T.I.P. REPORT: 2009 at 11-15.

¹³⁰ *Id.* at 13.

The 2009 Report marked Eritrea's first appearance in the U.S. State Department's TIP report, and it was ranked as a Tier 3 country, the lowest rank on the anti-human trafficking ladder.¹³¹ It should be noted that prior to 2008, the U.S. State Department carried a "significant number" requirement, which meant that only countries with more than one hundred victims appeared in the report.¹³² In 2008, Congress did away with this requirement, which explains Eritrea's debut in the 2009 T.I.P. report: while Eritrea's internal trafficking problem is seemingly endemic, trafficking across borders seems to be a relatively infrequent - or perhaps a less visible - phenomenon.

Eritrea was ultimately sanctioned as a result of the TIP Report but funding for educational and cultural exchange was not withheld.¹³³ Interestingly, the memorandum on the decision to sanction Eritrea refers also to the U.S. arms embargo previously imposed on Eritrea for failure to cooperate on anti-terrorism measures.¹³⁴ This gives the impression that the human trafficking sanctions are but a part of a broader U.S. policy towards Eritrea, aimed at compelling the government to live up to its obligations to protect international peace and security. Eritrea has picked up on the link too, and publicly dismisses the human trafficking sanctions as just another incident in the U.S.'s ongoing attempts to manipulate East African affairs for its own ends.¹³⁵ This raises a difficult question: is the U.S. entitled to impose trafficking sanctions selectively, depending on whether the government in question is a potential threat to international community? The short answer is yes. Nothing precludes the U.S. from acting in this way. But in doing so, it might be argued that the U.S. undermines its fragile authority to lead the way in the fight against human trafficking.¹³⁶ And if this is not the basis of the President's decision to authorize sanctions pursuant to the Trafficking Act, then the government should make this abundantly clear, instead of fudging the two issues in its public statements thereby exposing the government to allegations of disingenuousness.

Another potential problem for the U.S. is that while its government is busy imposing sanctions on Eritrea for political reasons, private U.S. corporations are providing funds to gold mining corporations based in Eritrea that are allegedly run on slave labor. If the U.S. government refuses to deal with this issue, then perhaps the U.S. court system can do so. The law in this area is constantly changing, however, and at the time of writing, it was possible to bring suit against foreign corporations and former government officials for injurious conduct abroad.

¹³¹ *Id.* at 129.

¹³² PL 110-457, Section 110 (Dec. 23, 2008).

¹³³ Memorandum of Justification Consistent With the Trafficking Victims Protection Act of 2000, Regarding Determinations With Respect to "Tier 3" Countries, Sept. 14, 2009, *available at*: <http://www.state.gov/g/tip/rls/other/2009/129593.htm>, (last visited May 8, 2010).

¹³⁴ *Id.*

¹³⁵ *See* note 37, *supra*.

¹³⁶ Chuang, *see* note 127, *supra*, at 465-66.

B. Alien Torts Claims Act

1. *Responsibility of Commercial Actors*

Mining companies such as Nevsun, operating in Eritrea, could be held legally responsible for the government's exploitation of workers under the A.T.C.A.¹³⁷ The A.T.C.A. provides for federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."¹³⁸ In a Ninth Circuit case called *Doe v. Unocal*, workers in Burma (Myanmar) won a legal battle permitting them to file suit against a California-based oil company for aiding and abetting the military in forced labor crimes.¹³⁹ However, in *Kiobel v. Royal Dutch Petroleum Co.*, the Second Circuit held that the corporations could not be held liable for aiding and abetting violations of international law.¹⁴⁰ At the time of writing, the Supreme Court had not resolved this split.

If the Supreme Court resolves the issue in favor of the Ninth Circuit rule in *Unocal*, it might be possible to bring suit over the conduct of corporations operating in Eritrea, like Nevsun. The plaintiffs in *Unocal* were forced to work on the company's construction of pipelines and in the military bases. Villagers who refused to participate in the forced labor program were executed.¹⁴¹ The court held for the plaintiffs on the basis that the company had provided "knowing practical assistance" by using the military to guard the pipeline and providing them with maps of the area, in spite of a risk consultancy group having informed the company that the government habitually used forced labor to fulfill their projects.¹⁴²

The situation in Eritrea is very similar to the situation in Burma. In Burma, Unocal subcontracted the military to safeguard the pipeline. In Eritrea, Nevisun, which is 75% American owned, subcontracted the government to carry out the mining.¹⁴³ In Burma, Control Risk Group and the American Embassy noted the government's reliance on forced labor.¹⁴⁴ H.R.W., the BBC and the U.S.D.O.S. have published accounts on the Eritrean government's involvement in forced labor.¹⁴⁵ In both cases, therefore, there were widespread allegations, supported by the findings of reputable agencies, that the military and the government relied on slave labor to fulfill industrial projects. In Burma, representatives met with military representatives on a regular basis.¹⁴⁶ In Eritrea, Nevsun must work closely with the government companies because the company provides a wide range of services such as developing the necessary infrastructure, transporting materials,

¹³⁷ 28 U.S.C. § 1350 (2006).

¹³⁸ *Id.*

¹³⁹ *Doe v. Unocal*, 395 F.3d 932, 937-38 (9th Cir. 2002).

¹⁴⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2010).

¹⁴¹ *Id.* at 940.

¹⁴² *Id.* at 951-52.

¹⁴³ Ghebrehiwet, *see* note 90, *supra*.

¹⁴⁴ *Unocal*, 395 F.3d at 940.

¹⁴⁵ SERVICE FOR LIFE; T.I.P. REPORT: 2009; *Religious Persecution in Eritrea*, B.B.C., 17 Sept. 2004.

¹⁴⁶ *Unocal*, 395 F.3d at 952.

and extracting the gold.¹⁴⁷ In both cases, Western companies with a high percentage of U.S. shareholders have engaged governments with horrendous human rights records for a pure and simple profit motive. Because such conduct was found sufficient for an alien torts claim to proceed in the Burmese case, a similar suit could be successful with respect to Nevsun's conduct in Eritrea.

2. *Responsibility of Foreign Sovereigns*

It may also be possible to hold former Eritrean government officials responsible for human trafficking crimes. A circuit split presented itself on this issue in 2009, when the Fourth Circuit announced that former government officials were not immune from suit under the Foreign Sovereign Immunity Act, an outcome that conflicted with the D.C. circuit's holding on the same issue in 2008.¹⁴⁸ The Supreme Court later upheld the Fourth Circuit's decision, allowing former government officials to be sued.¹⁴⁹ In theory at least, a great number of officials from regimes including Eritrea are no longer able to visit the U.S. without risking suit.¹⁵⁰ This re-defines the limits of sovereignty in U.S. law and it sends a strong message to the rest of the world that such abuses of state power are unacceptable. It was a somewhat surprising decision, given that the Court has traditionally deferred to the Executive on matters implicating the President's foreign relations powers.¹⁵¹ Interestingly, the decision avoids any such discussion altogether.

The U.S. has the capacity to help bring about an end to the Eritrean government's exploitation of its people through forced labor and other forms of human trafficking, but its impact remains unclear. As of yet, no reports have been issued that suggest Eritrea is more compliant with U.S. minimum standards since the 2010 report was issued, but given the sensitive nature of the diplomatic relations between the two, it is possible that talks are being held behind closed doors.¹⁵²

In this section, I have argued that the A.T.C.A. is another tool that the U.S. could use to help achieve a measure of accountability and, importantly, visibility, to the human trafficking problem in Eritrea. By holding American-backed corporations fiscally responsible for their involvement, it would also improve the U.S.'s reputation as a fair-minded adjudicator of human rights abuses. Permitting former government officials to be sued for human trafficking related offenses would be another landmark in the fight against human trafficking that now seems possible under the Supreme Court decision in *Samantar*.

¹⁴⁷ Ghebrehiwet, *see* note 90.

¹⁴⁸ *Yousuf v. Samantar*, 552 F.3d 371 (4th Cir. 2009); *Belhas v. Ya'alon*, 380 U.S. App. D.C. 56 (D.C. Cir. 2008).

¹⁴⁹ *Yousuf v. Samantar*, 130 S. Ct. 2278, 2292 (2010).

¹⁵⁰ *Yousuf*, 552 F.3d at 372.

¹⁵¹ *See, e.g., Ex Parte Quirin*, 317 U.S. 1 (1942) (upholding the President's authority to order German saboteurs to be tried by military commission).

¹⁵²

The United States has a role in combating human trafficking, but it is a limited one: the real burden of responsibility ought to fall to the international community. The final section of this paper explores the role of the international community in Eritrea's affairs, asking where it should go from here.

IV. A Way Forward: The Role of the International Community and the Need for Better Data.

There is no straightforward way of combating human trafficking in Eritrea. Any attempt to compel the Eritrean government into reforms is likely to create backlash. President Afwerki maintains a tight grip on the country and is highly sensitive to international criticism.¹⁵³ For instance, when the 2009 T.I.P. Report was released, its ambassador in the U.S. accused the State Department of using the human trafficking issue to “fuel illicit political agendas,” referring to the U.S. propping up the transitional federal government in Mogadishu, Somalia.¹⁵⁴ And when the U.N. imposed sanctions on Eritrea, the government again lashed out at the U.S., accusing it of using its political clout to “ram through unjustifiable sanctions against a small country.”¹⁵⁵

It is important to remember that Eritrea has been at war, one way or another, for about fifty years and this probably has a lot to do with why the government is so quick to adopt a hardline approach with respect to outsiders.¹⁵⁶ While the international community must not be held hostage by this reality, it is important that proposals emphasize both parts of the equation: minimizing backlash while maximizing reform. Because of Isaias's preeminence in Eritrea, it will be difficult to have any impact on combating human trafficking without his cooperation – unless of course the international community chooses to put itself in direct opposition to it by way of military intervention. Unless solid information of links to Islamic extremists in Somalia emerge, this seems unlikely. The alternative cannot be to do nothing: as I.C.G. points out, Eritrea is a state on the verge of collapse.¹⁵⁷ The international community must search for ways to bring Eritrea into the fold. So far, the United Nations has not taken any action against Eritrea with respect to its human trafficking problem. It could resolve to expand the base of its

¹⁵³ Columbia International Affairs Online (CIAO), *Eritrea: Country Outlook*, available at http://www.ciaonet.org/atlas/ER/Economy/Outlook/20080501_15595.html (last visited Apr. 11, 2010); see also, THE SIEGE STATE, see note 1, *supra*, at 6 (“...Eritrea is run by an amorphous, continually shifting group of people surrounding Isaias whose actual rank is irrelevant, because their authority stems from whatever personal favour he chooses to bestow upon them.”).

¹⁵⁴ Embassy of Eritrea, Press Release, June 18, 2009, available at <http://www.eastafricaforum.net/2009/06/19/eritrea-rejects-us-country-report-on-human-trafficking/> (last visited Apr. 11, 2010).

¹⁵⁵ Ministry of Foreign Affairs, Press Release, Dec. 23, 2009, available at <http://www.capitaleritrea.com/category/insight/> (last visited Apr. 11, 2010).

¹⁵⁶ See note 5, *supra*.

¹⁵⁷ ERITREA: THE SIEGE STATE, see note 1, *supra* at 26.

sanctions to cover human trafficking, subject to the government permitting observers into Eritrea to monitor the situation.¹⁵⁸

The information that is currently available comes primarily from H.R.W. and the U.S. D.O.S.. While those reports are a good start, both exhibit weaknesses. The T.I.P. Report methodology is far from clear, and it appears to vary from country to country.¹⁵⁹ In most instances, the sources on which the reports are based are not cited.¹⁶⁰ H.R.W. methodology is relatively transparent (*Service for Life*, the report discussed in this paper, was based almost exclusively on interviews with refugees in Italy and other places¹⁶¹) but it appears that neither the T.I.P. nor the H.R.W. authors provided the government with an opportunity to respond to the allegations – at least, there is no mention of their response anywhere in the report.

In the case of the D.O.S., no doubt some discussions do take place through private diplomatic channels, out of the public eye, and that is understandable. After all, the T.I.P. reports are essentially political instruments. But H.R.W. is a non-governmental body that stakes its reputation on transparency and objectivity.¹⁶² If researchers did approach the government, that should have been included in the report. Such a showing of good faith would have increased the report's credibility to a degree.

One agency that has adopted this approach with great success is the U.S. government watchdog, the Government Accountability Office (G.A.O.).¹⁶³ The G.A.O. not only gives agencies an opportunity to respond to its criticism, it also publishes their objections in annexes to its reports.¹⁶⁴ This protocol lends the reports a great deal of credibility. There does not seem to be anything preventing H.R.W. from adopting the same approach. If the government then chooses not to respond, so be it. But at least the international community is somewhat reassured that they are getting the most balanced picture of events available.

Conclusion

Eritrea appears to be sinking deeper and deeper into crisis. It is under increasing international pressure to comply with anti-terrorism measures and to withdraw from its border with Djibouti. Internally, its citizens are suffering terribly under the yoke of President Afwerki's regime. By some accounts emerging from the country, it appears that the government is attempting to enslave the nation. Refugees are flooding out of the

¹⁵⁸ For an appropriate model, see S.C. Res.1519_S-RES-1519 (2003), establishing a Monitoring Group for Somalia.

¹⁵⁹ GAO-07-1034 (2007) at 17.

¹⁶⁰ See, e.g., T.I.P. Report, 2009, Eritrea, pp 129-30.

¹⁶¹ H.R.W. pp 6-8.

¹⁶² About Us, <http://www.hrw.org/en/about/> (last visited May 9, 2010).

¹⁶³ See, e.g., GAO-06-825.

¹⁶⁴ *Id.* at 38-40.

country and experiencing further abuses in their destination countries due to their vulnerability. The international community – the U.S. in particular - must start thinking about how Eritrea is ‘a threat to international peace and security’ and ‘a human rights violator’ and about what a coherent policy to deal with these problems would look like before stepping up the pressure any further. At the international level, policy-makers need to know what is going on in Eritrea, and therefore an international monitoring mission would be desirable. If upon entering Eritrea it was found that the labor abuses were tantamount to crimes against humanity in the form of human trafficking, as is widely suspected, then an I.C.C. prosecution might become warranted. But a monitoring mission should not be tasked with gathering evidence for indictments. In the meantime, countries like the United States should continue to put pressure on Eritrea through sanctions. As previously stated, the U.S. government should now work on a coherent policy towards Eritrea that integrates the human rights and security aspects into a coherent whole. Finally, more information-gathering by N.G.O.s should be encouraged. In order to preserve the credibility of these organizations, researchers must provide the government the opportunity to respond to the allegations contained therein. Doing so will promote dialogue and help uncover the facts necessary to fashion an appropriate response.