

Case Study: Eritrean Mining Industry¹



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I. Case Study Overview

Research Question

Mining is one of Eritrea's fastest-growing industries.² The Bisha gold mine alone has reportedly contributed US\$800 million to the Eritrean economy since it first opened in 2011,³ and the government hopes to have four additional mines in operation to produce gold, copper, zinc, and potash by 2018.⁴ Other minerals that may be contained in Eritrean soil include oil, natural gas, gypsum, granite, marble, limestone, and iron ore.⁵ Although the Eritrean government is generally unfriendly towards foreign direct investment (FDI), the Foreign Financed Special Investments (FFSI) Proclamation does not prohibit FDI in extractive industries and as such these are recognized by the U.S. Department of State as having the "most promising" investment opportunities.⁶ Currently, it is reported that around 16 mining companies currently operate in Eritrea, collectively operating around 34 exploration and mining projects.⁷

Both mining companies and the government have been widely criticized for the use of forced labor in Eritrean mining operations, under the aegis of the country's harsh, compulsory, and open-ended national service policy.⁸ This policy theoretically mandates Eritreans between the ages of 18 and 40 to complete 18 months of compulsory active national service; however, many people are not demobilized from government work at the end of their service period, and are forced to serve for an indefinite period of time under the threat of torture or reprisal against their families.⁹ In 2012, the government required fit adults up to the age of 70 who were not currently in service to "carry firearms and attend military training or participate in national development programs, such as soil

¹ The statements and analysis contained within this report are the work of the American Bar Association Rule of Law Initiative, which is solely responsible for its content. The views expressed herein should not be construed as representing the policy of the ABA. This report was funded by a grant from the United States Department of State. The opinions, findings and conclusions stated herein are those of the author[s] and do not necessarily reflect those of the United States Department of State.

² Edmund Blair, *Eritrea to Expand Mining Operations*, REUTERS (Feb. 26, 2017), available at <http://www.reuters.com/article/us-eritrea-mining-idUSKCN0VZ13S> (last visited Aug. 13, 2017).

³ *Id.*

⁴ *Id.*

⁵ *Mining in Eritrea*, ERITREAN EMBASSY TO THE NORDIC COUNTRIES, <http://eritrean-embassy.se/invest-in-eritrea/mining-in-eritrea/> (last visited Aug. 13, 2017).

⁶ U.S. DEP'T OF STATE, BUREAU OF ECONOMIC AND BUS. AFF., INVESTMENT CLIMATE STATEMENTS FOR 2016: ERITREA, <https://www.state.gov/e/eb/rls/othr/ics/2016investmentclimatestatements/index.htm#wrapper> (last visited Aug. 13, 2017).

⁷ See *Exploration and Mining Companies Operating in Eritrea*, TESFANEWS (Aug. 26, 2011), <https://www.tesfanews.net/exploration-and-mining-companies-operating-in-eritrea/> (last visited Aug. 13, 2017).

⁸ See, e.g., HUMAN RIGHTS WATCH, HEAR NO EVIL: FORCED LABOR AND CORPORATE RESPONSIBILITY IN ERITREA'S MINING SECTOR (Jan. 15, 2013), <https://www.hrw.org/report/2013/01/15/hear-no-evil/forced-labor-and-corporate-responsibility-eritreas-mining-sector> (last visited Aug. 13, 2017).

⁹ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016 164, available at <https://www.state.gov/documents/organization/258879.pdf> (last visited July 22, 2017) [hereinafter U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016].

and water conservation projects.”¹⁰ Furthermore, reports indicate that children under the age of 18 may be required to attend the brutal Sawa military and educational camp, and that high-school children have been assigned to work on public projects during their summer vacations.¹¹

National service conscripts assigned to work on mining projects are “assigned to state-owned construction companies who exercise a complete monopoly in the field.”¹² International mining operations face immense pressure to hire these contractors to develop their projects, and as such face criticism because of their failure to exercise due diligence to discover forced labor in their mining operations, and inability to implement safeguards against it.¹³

This case study explores the risks associated with the indirect use of forced labor by foreign mining companies who are forced to engage government-owned sub-contractors in the development of their mining facilities. It will also touch upon other factors that could exacerbate TIP risks in the mining sector, including labor shortages associated with Eritrea’s national service program, government monopoly over major economic sectors, and Eritrea’s generally-poor human rights record.

Parameters

This case study is based primarily on desk research. It considers human rights reports issued by international non-governmental organizations (INGOs), United Nations (UN) publications, statements made to the U.S. Department of State, and news articles that touch upon the issues discussed here. Furthermore, it will discuss the case of *Araya v. Nevsun Resources Ltd.*, in which three Eritrean refugees to Canada brought a civil lawsuit against Nevsun, the Canadian firm that runs the Bisha gold mine, and its Eritrean subsidiary.¹⁴

ABA ROLI has been unable to independently confirm the contents of these secondary documents by reference to primary sources within Eritrea; however, the personal knowledge of the primary researchers has been brought to bear in some instances.

Definition of Trafficking in Persons (TIP)

“Trafficking in persons” is defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol) as the recruitment, transportation, transfer, harboring, or receipt of persons (i.e., the act), 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 (i.e., the means), for the purpose of exploitation.

¹⁰ *Id.*

¹¹ *Id.*

¹² HUMAN RIGHTS WATCH, *supra* note 8.

¹³ *Id.*

¹⁴ *Araya v Nevsun Resources Ltd.*, 2016 BCSC 1856, available at <https://business-humanrights.org/sites/default/files/documents/Judge%20Abrioux%2C%20re%20Araya%20v.%20Nevsun%20Resources%20Ltd.%2C%2010-06.pdf> (last visited Aug. 13, 2017).

Exploitation includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.¹⁵

Eritrean law does not prohibit trafficking in persons by way of specialized legislation. Conversely, TIP and TIP-related offenses are dealt with in broad strokes under the terms of the Constitution,¹⁶ the Penal Code,¹⁷ and the Labour Proclamation.¹⁸

The Labour Proclamation defines forced labor as:

any service which a person performed involuntarily due to the coercion of another person and includes the following: a. any work performed by a young person contrary to the provisions of this proclamation; and b. any work performed involuntarily merely because of someone's influence as a result of his holding a public office or traditional status of chieftaincy.

Compulsory national service, normal civic obligations, forced labour as a provided for in the Penal Code, communal services and services rendered during emergency may not, however, be regarded as a forced labour.¹⁹

Apart from this provision of the Labour Proclamation's definitions section, no other portion of this law further elaborates upon or defines TIP or TIP-related crimes.

The Penal Code of the State of Eritrea, however, does define enslavement and abetting traffic as follows:

A person who: (a) sells, alienates, pledges, buys, trades, traffics or otherwise enslaves another person; (b) keeps or maintains another person in a condition of slavery even in disguised form; or (c) knowingly transports whether by land, sea or air persons enslaved or aids and abets such traffic whether within Eritrean territory or otherwise, is guilty of enslavement and abetting traffic.²⁰

¹⁵ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crimes, 15 November 2000, Article 3.

¹⁶ Constitution of Eritrea (1997), art. 16, *available at* <http://confinder.richmond.edu/admin/docs/Eritrea1997English.pdf> (last visited Aug. 13, 2017) [hereinafter ERITREA CONST.].

¹⁷ *See* Penal Code of the State of Eritrea, art. 297, *available at* <http://www.refworld.org/pd/55a51ccc4.pdf> (last visited Aug. 13, 2017) [hereinafter Penal Code].

¹⁸ Labour Proclamation No. 118/2001, art. 3(17), *available at* <http://www.ilo.org/dyn/travail/docs/493/The%20Labour%20Proclamation%20of%20Eritrea%20No%20118%20of%202001.pdf> (last visited Aug. 13, 2017) [hereinafter Labor Proclamation].

¹⁹ *Id.*

²⁰ Penal Code, *supra* note 17, at art. 297.

It additionally defines the traffic in women, infants, and young persons for the purposes of sex or prostitution as follows:

A person who for gain or to gratify the passions of others: (a) traffics in women or infants and young persons, whether by seducing them, by enticing them, or by procuring them or otherwise inducing them to engage in prostitution or the production of pornography or for pornographic performances, even with their consent; or (b) keeps such a persons in a disorderly house or to let them out to prostitution, is guilty of traffic in women, infants and young persons.²¹

Other provisions of the Penal Code address TIP-related offenses including kidnapping, homicide, false imprisonment, assault, and a variety of financial crimes.²² While these definitions are generally consistent with the terms of the Palermo Protocol, the lack of available protections and remedies for trafficking victims fails to meet international standards.

²¹ *Id.* at art. 315.

²² *See, e.g., id.* at arts. 275, 284, 288, 289, 349, 351, 352, 355, 356.

II. Background and Context

Industry Background

Eritrea is one of the least developed countries in the world; 65% of the country's population lives in rural areas, and 80% depend on subsistence agriculture.²³ As of 2003, the date of the World Bank's most recent household survey and Participatory Poverty Assessment, around two-thirds of the population lived below the poverty line.²⁴ The government's human rights record has been much criticized; Eritrea has not had a national election since independence in 1993,²⁵ and President Afwerki has ruled the country ever since.²⁶ The People's Front for Democracy and Justice (PFDJ) is the only political party that is allowed in the country,²⁷ and the legislature is all but non-existent.²⁸ The U.S. Department of State reported in 2016 that human rights abuses in the country include:

killings and disappearances; torture and other cruel, inhuman, and degrading treatment; arbitrary arrest; executive interference in the judiciary; lack of due process and excessively long pretrial detention; politically motivated detentions; evictions without due process; infringement on privacy rights; restrictions on freedom of speech and press; restrictions on academic freedom and cultural events; restrictions on freedom of assembly, association, and religion; limits on freedom of internal movement and foreign travel; corruption and lack of transparency; violence against women and girls; and discrimination against ethnic minorities.²⁹

It is against this background that the Eritrean government has attempted to improve its extractive industry. Although the government has permitted FDI in the mining sector, it tightly controls foreign companies' access to mining resources. In 2004, the Eritrean government terminated all foreign mining contracts, and created the Eritrean National Mining Company (ENAMCO) to manage all mining claims.³⁰ Around 2008, the government began to promote FDI in the mining sector again, and granted the Canadian firm Nevsun to begin constructing a gold mine in Bisha that same year.³¹ Today, a number of mining companies from countries around the world, including China, Australia,

²³ *The World Bank in Eritrea: Overview*, WORLD BANK GROUP, (Dec. 7, 2016) <http://www.worldbank.org/en/country/eritrea/overview> (last visited Aug. 13, 2017).

²⁴ *Id.*

²⁵ *Eritrea*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/er.html> (last visited Aug. 13, 2017) [hereinafter *Eritrea*, CIA WORLD FACTBOOK].

²⁶ *Id.*

²⁷ *Id.*

²⁸ Luwam Dirar & Kibrom Tesfagabir, *UPDATE: Introduction to Eritrean Legal System and Research*, 2.2, GLOBALEX (Sep. 2015), available at <http://www.nyulawglobal.org/globalex/Eritrea1.html> (last visited Aug. 13, 2017).

²⁹ U.S. DEP'T OF STATE, 2016 HUMAN RIGHTS REPORT: ERITREA 1, <https://www.state.gov/documents/organization/265464.pdf> (last visited Aug. 13, 2017).

³⁰ Kevin Hempstead, *The Hidden Costs of the Bisha Mine: Human Rights Abuses in Eritrea*, NATO ASSOC. CANADA (June 19, 2015), <http://natoassociation.ca/the-hidden-costs-of-the-bisha-mine-human-rights-abuses-in-eritrea/> (last visited Aug. 13, 2017).

³¹ HUMAN RIGHTS WATCH, *supra* note 8.

and the United Kingdom, have been granted mining exploration licenses.³² These firms have by and large entered into joint ventures with ENAMCO, with the government taking a substantial stake in the subsidiary firms; for example, Nevsun holds a 60% stake in the Bisha mine, and ENAMCO holds the other 40%.³³ This gives the government substantial influence on mining operations; indeed, Human Rights Watch reports that “[i]nternational mining firms operating in the country face intense government pressure to engage [state-owned contracting companies] to develop some of their project infrastructure.”³⁴ In the case of Bisha, the Eritrean government insisted that Nevsun engage the Segen Construction Company as a local contractor, despite the fact that Segen is itself owned by the PFJD.³⁵

Legal Context

Eritrea’s primary piece of mining legislation is the Proclamation to Promote the Development of Mineral Resources (Mineral Resources Proclamation).³⁶ With respect to mining, the Proclamation states that, with certain limits, no person may prospect, explore, or mine without a license, although any Eritrean may prospect without a license as long as the land is not subject to an existing license or application.³⁷ The Proclamation also provides that an individual or business may need to fulfill certain financial and human resource requirements before obtaining a license for mining or exploration.³⁸ Furthermore, mining companies are urged to give employment preferences to Eritrean nationals, though in the absence of qualified citizens the law permits the employment of expert expatriates.³⁹

The Mineral Resources Proclamation does not appear to impose any TIP-related conditions or limitations on issuance of mining, oil, or gas licenses. Furthermore, because the Labour Proclamation specifically excludes national service from its definition of forced labor,⁴⁰ there appears to be a lacuna in labor protections for work in the Eritrean mining industry.

³² See, e.g., Thomas R. Yager, The Mineral Industry of Eritrea (Nov. 2015), in U.S. Geological Survey, 2013 Minerals Yearbook: Advance Release, available at <https://minerals.usgs.gov/minerals/pubs/country/2013/myb3-2013-er.pdf> (last visited Aug. 13, 2017).

³³ Home, Bisha Mining Share Company, <http://www.bishamining.com/> (last visited Aug. 13, 2017).

³⁴ HUMAN RIGHTS WATCH, *supra* note 8.

³⁵ *Id.*

³⁶ Proclamation to Promote the Development of Mineral Resources, Proclamation No. 68/1995, available at <http://www.eritrean-embassy.se/wp-content/uploads/Mining-Proclamation.pdf> (last visited Aug. 13, 2017).

³⁷ *Id.* at arts. 4-5.

³⁸ *Id.* at arts. 8-11.

³⁹ *Id.* at art. 25.

⁴⁰ See *supra* note 19 and accompanying text.

III. Analysis

Anti-TIP Legal Framework

International Law

While Eritrea has acceded to the United Nations Convention against Transnational Organized Crime (UNTOC) and the Palermo Protocol,⁴¹ there is a question as to whether these instruments have binding effect in the country. Though the ratified Constitution of Eritrea states that the National Assembly does have the power to ratify international conventions and agreements,⁴² Eritrea has no functional National Assembly,⁴³ and in practice the Ministry of Foreign Affairs accedes to or ratifies international treaties. However, the process by which these treaties—and indeed, any of the other major conventions that Eritrea has ratified or acceded to—are specifically incorporated into international law is not clear.

Domestic Labor Law

As noted above, the principal law that governs labor relations in the private sector is the Labor Proclamation of 2001.⁴⁴ The law lays out working hours requirements,⁴⁵ leave requirements,⁴⁶ and standards for overtime remuneration.⁴⁷ Labor-related conflicts are to be referred to the Labor Relations Board;⁴⁸ however, decisions of the Labor Relations Board are final and unappealable.⁴⁹ It is likely that the Labor Relations Board has jurisdiction over forced labor offenses; certainly there are no other known task forces or departments in the Ministry of Labour and Human Welfare that carry specific TIP-related mandates. As a result, the extent to which victims of forced labor have access to administrative justice appears insufficient to protect their rights and needs.

Domestic Criminal Law and Procedure

All crimes in Eritrea are investigated and prosecuted by the Eritrean Police Force (EPF) and the Attorney General, each of which maintains special units to address organized crime and sexual/gender-based violence. There is no avenue for private prosecution; only the state may bring criminal charges.⁵⁰ The High Court of Eritrea is charged with hearing serious criminal cases,⁵¹ and

⁴¹ *Ratifications for Eritrea*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103282 (last visited Aug. 13, 2017).

⁴² ERITREA CONST., *supra* note 16, at art. 32(4).

⁴³ *Eritrea*, CIA WORLD FACTBOOK, *supra* note 25.

⁴⁴ Labor Proclamation, *supra* note 18.

⁴⁵ *Id.* at art. 48.

⁴⁶ *Id.* at art. 56.

⁴⁷ *Id.* at arts. 52-53.

⁴⁸ *Id.* at arts. 144-45.

⁴⁹ *Id.* at art. 145.

⁵⁰ Criminal Procedure Code of the State of Eritrea, art. 86, *available at* <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101053/121589/F-308052584/ERI101053%20Eng.pdf> (last visited Aug. 13, 2017).

⁵¹ Dirar & Tesfagabir, *supra* note 28.

the military courts exercise personal jurisdiction over members of the Eritrean Defense Forces, the Police Force, militia units, the national reserve army, prison wardens, and national service members.⁵² Owing to Eritrea's national service policies,⁵³ this theoretically allows the Military Courts to exercise jurisdiction over vast swathes of the population. However, there is a possibility that the Criminal Procedure Code does away with the military court system; ABA ROLI has been unable to confirm whether this is the case.⁵⁴

However, if the military courts do still exist, and do exercise jurisdiction over national service members, this poses an enormous problem with respect to Eritrea's TIP framework. As noted above, neither the Penal Code nor the Labour Proclamation specifically provide protections for TIP victims, and the Labour Proclamation specifically excludes national service from the definition of forced labor. As a result, it is possible that members of Eritrea's national service who work under forced labor conditions in the country's mining industry run the risk of incurring legal penalties for attempting to avoid the conditions of forced labor imposed by their voluntary or involuntary participation in the national service.⁵⁵

Trafficking in Persons Risks

Risk 1: Exploitation of National Service Conscripts

Eritrea's national service policy was first introduced in 1991, and required all Eritreans between the ages of 18 and 40 to take part in 18 months of national service; in 1995, the upper age limit was extended to 50.⁵⁶ Under both laws, national service comprises of six months of military training, followed by one year of active military and/or national development work.⁵⁷

The national service program was officially launched in 1994; each group of annual trainees is referred to as a 'round'. The most recent group of trainees to enter the Eritrean Defense Forces Training Center (EDFTC) is the 29th since the launch of the program; however, the system has undergone several changes since its inception. For instance, the government has introduced a number of amendments to the program that are intended to increase the number of young people in the national service. Starting in the 16th round, all students have been required to attend the Sawa military camp to complete their final year of high school and sit the national final examinations before immediately beginning their national service training.⁵⁸ Those who pass the

⁵² *Id.* at 3.2.4.

⁵³ See U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016 165, *available at* <https://www.state.gov/documents/organization/258879.pdf> (last visited July 22, 2017) [hereinafter U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016].

⁵⁴ See Dirar & Tesfagabir, *supra* note **Error! Bookmark not defined.**, at 3.2.4.

⁵⁵ See generally U.N. Human Rights Council, Report of the commission of inquiry on human rights in Eritrea, May 9, 2016, U.N. DOC A/HRC/32/47, *available at* http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/47 (last visited Aug. 13, 2017) [hereinafter U.N. Human Rights Council, Commission of Inquiry Report].

⁵⁶ See Proclamation No. 11/1991; Proclamation of National Service, No. 82/1995, *available at* <http://www.refworld.org/docid/3dd8d3af4.html> (last visited Aug. 13, 2017) [hereinafter 1995 National Service Proclamation].

⁵⁷ 1995 National Service Proclamation, *supra* note 56, at art. 8.

⁵⁸ U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2016, *supra* note 9, at 164.

national exam (with a grade of approximately 30% in the 2015 rounds) are granted a temporary release from the service in order to continue their education.

In 2002, the Eritrean government announced the *Warsai Yikealo* Development campaign; this resulted in a general mobilization order that extended the duration of the national service from 18 months to an open-ended term.⁵⁹ Each round of conscripts is therefore still serving their term, without prospect for release, salary, or promotion.⁶⁰ This policy gives rise to a number of TIP and forced labor issues.

Labor Shortages

Most of Eritrea's skilled and unskilled manpower already participates in the national service or the national militia, on account of the policies noted above. Because national service members are not allowed to work elsewhere for additional money, it is difficult to locate a local labor force outside the confines of the national service.

Furthermore, firms—whether foreign or national—are forbidden from hiring national servicemembers. Candidates who wish to work in private industry must be officially released from service before they are hired elsewhere; foreign companies in particular must send a list of their hires, along with proof of release documentation, to the Ministry of Labor. However, getting a release from national service is not easy.

The only individuals who may be exempted from the national service obligation are those who have visible disabilities (blindness, mental disability or other disability),⁶¹ those who have been declared medically unfit by the health board,⁶² and students who have been temporarily released from service to register at recognized government programs.⁶³ Notably, the Proclamation only addresses release from the 18-month period laid out in the National Service Proclamation, but not from the lifelong commitment that has been mandated since 2002. Thus, save married women, those who have been exempted, and those who have deserted without papers, the majority of Eritreans who have entered the labor force since 1994 still remain in the national service—and many of these individuals, particularly deserters, are ineligible to be hired by international mining firms.

As a result, foreign and domestic mining companies that wish to avoid participating in the TIP and TIP-related practices associated with Eritrea's national service cannot easily do so by recruiting domestic workers from outside the national service work force. Even firms that wish to hire deserters may be forced to do so illegally; the uncertainty associated with this form of employment may increase such workers' vulnerability to exploitation.

⁵⁹ U.N. Human Rights Council, Commission of Inquiry Report, *supra* note 55, at 341.

⁶⁰ Gaim Kibreab, *The Open-Ended National Service: The Driver of Forced Migration*, European Asylum Support Office Cooperation Meeting on Eritrea (Oct. 15-16, 2014), http://www.ecoi.net/file_upload/90_1416473628_gaim-kibreab-the-open-ended-eritrean-national-service-the-driver-of-forced-migration.pdf (last visited Aug. 13, 2017) [hereinafter Kibreab, *The Open-Ended National Service*].

⁶¹ Article 15 of National Service Proclamation 82/1995

⁶² Article 14(1) in *Ibid*

⁶³ Article 14(2) in *Ibid*

Dependency on National Sub-Contractors

Since 2006, when the government shut down all privately-owned construction companies, the Eritrean construction sector has been monopolized by government- and PFJD-owned firms.⁶⁴ Thus, all development projects, whether they are initiated by the government or private institutions, depend upon the services of these state-affiliated construction companies to meet their needs.

These construction companies fulfill their needs for manpower by leaning heavily upon the free services of national service recruits, who work in various kinds of road-building, dam-building, and agricultural initiatives.⁶⁵ The use of conscripts in these national development projects has been widely condemned internationally as “akin to slavery”;⁶⁶ conscripts are not provided with favorable work environments, are not entitled to a salary for the duration of their service save an allowance of less than US\$10/month, and are obliged to work under extremely harsh conditions for extended periods of time.⁶⁷

The Eritrean government justifies the use of conscripts in development projects by claiming that human rights protections do not apply to labor provided during the course of compulsory national service. Certainly under the terms of the International Covenant on Civil and Political Rights, the definition of forced labor does not extend to service of a military character;⁶⁸ similarly, the Forced Labor Convention of 1930 specifically states that “the term ‘forced or compulsory labor’ shall not include any work or service exacted in virtue of compulsory military service laws for work of a purely military character.”⁶⁹ In this case, however, the terms of these international instruments do not seem to directly apply—the work performed by Eritrean national service conscripts can often be better characterized not as military work, but rather as work of a developmental or commercial nature. To the extent that international law specifically prohibits the use of forced or compulsory labor “as a method of mobilizing and using labour for purposes of economic development”,⁷⁰ Eritrea’s use of forced labor in the construction industry likely violates this principle. Given the “considerable evidence that these firms use conscript labor across their operations,”⁷¹ in effect any construction project in Eritrea is more or less likely to involve the use of forced labor.

Foreign companies seeking mining concessions thus put themselves in a very difficult position with respect to avoiding or mitigating TIP risks. Eritrea’s mining industry is relatively new; thus, firms engaging in mining operations must actively develop new mines in order to facilitate their operations, a process that necessitates the use of construction. Owing to the restrictiveness of

⁶⁴ Gaim Kibreab, *Forced Labor in Eritrea*, 47 J. MODERN AFR. S. 41 (2009), <http://www.ehrea.org/force.pdf> (last visited Aug. 13, 2017).

⁶⁵ AMNESTY INTERNATIONAL, *ERITREA: 20 YEARS OF INDEPENDENCE, BUT STILL NO FREEDOM* 13 (2013), <https://www.amnestyusa.org/files/afr640012013.pdf> (last visited Aug. 13, 2017).

⁶⁶ *Milat v. Holder*, 755 F.3d 354, 365 (2014).

⁶⁷ U.N. Human Rights Council, Commission of Inquiry Report, *supra* note 55, at 13.

⁶⁸ International Covenant on Civil and Political Rights, art. 8(3)(ii), Dec. 16, 1966, 999 U.N.T.S. 171.

⁶⁹ International Labor Organization, Convention No. 29 (concerning Forced or Compulsory Labor), art. 2(2), *entered into force* May 1, 1932.

⁷⁰ International Labor Organization, Convention No. 105 (concerning the Abolition of Forced Labor), art. 1(b), *entered into force* Jan. 17, 1959.

⁷¹ HUMAN RIGHTS WATCH, *supra* note 8.

Eritrea's FDI scheme, firms may find it difficult to engage in such operations without using domestic, state-affiliated contractors and sub-contractors that rely on TIP.⁷²

Risk 2: Lack of TIP Institutional Framework

International human rights law, imposes duties on states to respect, protect, and fulfill human rights.⁷³ The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. However, not only does the Eritrean government fail to protect citizens from TIP committed by individuals and private actors, it is in fact the main perpetrator of TIP in the country.

The government is a major shareholder in Eritrea's mining companies, given the number of them that have entered into joint ventures with ENAMCO. As the primary beneficiary of construction contracts between mining companies and construction contractors, the government has no interest in recognizing or addressing the usage of forced labor in the mining sector; indeed, given how much of Eritrea's revenue currently comes from its mining sector,⁷⁴ it is unlikely that the government will be incentivized to improve its labor standards any time soon, and equally unlikely that Eritrean courts will hold companies that use forced labor in their operations liable for violations of the labor law.

However, this does not necessarily mean that foreign firms can operate with impunity in Eritrea, as demonstrated by the case of *Araya v. Nevsun Resources Ltd.*

In the *Araya* case, three Eritrean refugees sued the Vancouver-based mining firm Nevsun Resources in the courts of British Columbia, Canada, asserting as grounds for their complaint that Nevsun had violated international law in their development of the Bisha gold mine.⁷⁵ In their complaint, plaintiffs alleged specifically that Nevsun engaged state-owned construction firms and the Eritrean military to build the infrastructure and facilities at the Bisha mine site, that these entities deployed the plaintiffs' forced labor to carry out the work, and that Nevsun was directly liable for condoning the actions of their contractors, and for failing to stop the occurrence of forced labor at their mine site.⁷⁶ In particular, the plaintiffs noted that these violations constituted breaches of customary international law that could be deemed justiciable in the courts of Canada, in spite of the fact that none of the causes of action arose in Canada.⁷⁷ The case in the Supreme Court of British Columbia turned on the procedural question of whether the case ought to be allowed to proceed as a class action suit; in certifying the class, the Canadian court's holding at minimum affirms that Canadian resource companies cannot be held affirmatively not liable for human rights abuses committed

⁷² *See id.*

⁷³ *See, e.g.*, U.N. Committee for the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 19, ¶ 9 (July 29, 1994), U.N. DOC HRI/GEN/1/Rev.1/.

⁷⁴ *See Blair, supra* note 2.

⁷⁵ *Araya v Nevsun Resources Ltd.*, 2016 BCSC 1856, ¶ 4.

⁷⁶ *Id.* at ¶ 43.

⁷⁷ *Id.* at ¶ 444.

abroad.⁷⁸

Risk 3: Lack of Protection for Trafficking Victims

The provision of protection and assistance to victims is integral to mitigating TIP risks, and preventing TIP revictimization. Effective victim protection measures may include:

- effective and proactive victim identification;
- safeguarding victims' rights (including rights to privacy, confidentiality, dignity, liberty, and security of person) from the outset;
- physical removal from the trafficking situation;
- protection from criminalization and re-victimization by state and non-state actors;
- access to essential services and commodities (e.g., material and medical assistance, psychological counseling, safe accommodation, livelihood resources, essential medicine);
- access to information, legal aid, and assistance in legal proceedings (immigration, civil, criminal, administrative, other);
- provision of employment, educational, and training opportunities; and
- access to justice (e.g., in the form of restitution and/or compensation).⁷⁹

In the case of Eritrea, there is no law that provides for victim protection or assistance; in fact, to the extent that the labor and criminal laws touch upon the subject, they deal only with the prosecution of TIP offenses. As noted above, where the state is the agent of TIP victimization, the likelihood that victims will be able to obtain any of the necessary protections or assistance noted here is low. While TIP victims who manage to gain access to legal systems in other countries—such as the three plaintiffs in the *Araya* case discussed above—may have recourse to the legal system in order to compel international mining firms to engage in more responsible industrial practices, such victims are in the minority, and a single case may not be enough to ultimately ensure that victims of TIP receive adequate assistance.

⁷⁸ Robyn Gifford & Miranda Lam, *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856: British Columbia Supreme Court refuses to allow a “common law class action” alleging human rights violations at Eritrean mine, Canadian Class Action Monitor (Nov. 2, 2016), <http://www.canadianclassactionsmonitor.com/2016/11/araya-v-nevsun-resources-ltd-2016-bcsc-1856-british-columbia-supreme-court-refuses-to-allow-a-common-law-class-action-alleging-human-rights-violations-at-eritrean-mine/> (last visited Aug. 13, 2017).

⁷⁹ See U.S. Dep’t of State, The 3Ps: Prevention, Protection, and Prosecution, *available at* <https://2009-2017.state.gov/documents/organization/194932.pdf> (last visited Aug. 13, 2017).

IV. Conclusions

Eritrea's mining sector carries substantial TIP risks. The country lacks a legal and institutional framework designed to prevent, protect, and prosecute TIP, and indeed the government of Eritrea is the primary perpetrator of forced labor in the country under the aegis of its national service scheme. The government also contributes to the proliferation of TIP in the mining sector by way of its construction monopolies and restrictive FDI regime. International mining companies that seek to take advantage of Eritrea's growing mining sector must exercise a great degree of care in order to avoid becoming complicit in the forced labor practices associated with the Eritrean government's national service system.

Given the government of Eritrea's dependence upon foreign investment to improve the country's mining sector, it is possible that foreign firms may be in a good position to dictate labor-friendly terms at the negotiation stage. If so, investors could attempt to work with foreign construction firms to begin their mining operations (although migrant labor carries its own TIP and forced labor risks as well). Most importantly, firms should bear in mind the need to track trafficking risks in their supply chains, and exercise a high level of corporate social responsibility in order to avoid such risks.