A Long Struggle for Justice: Reflections on the Nevsun hearing at the Supreme Court

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The IHRP legal team at the Supreme Court of Canada. Left to right: Yolanda Song (JD 2017), Madeline Torrie (2L), Nicole Thompson (2L), Cory Wanless (JD 2008)

By Yolanda Song

The University of Toronto's International Human Rights Program spent the last semester preparing to intervene in a landmark corporate accountability case before the Supreme Court of Canada. In ***Nevsun Resources Ltd. v Araya et al.***, the plaintiffs Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle are Eritrean refugees who are bringing a claim for damages against a Vancouver-based company, Nevsun Resources Ltd., for the use of slavery, torture, and indefinite forced labour on a mine that it owns in Eritrea. The mining company has tried to have the claims against it dismissed on a number of grounds without success, leading to the appeal hearing on January 23, 2019.

For months, the IHRP legal team (composed of alumnus Cory Wanless, Professor Audrey Macklin, and clinic students Madeline Torrie and Nicole Thompson) grappled with the complex legal doctrine known as act of state and the alarming implications that it holds for transnational human rights litigation. Nevsun argued that the act of state doctrine would prevent Canadian courts from

judging whether the actions of foreign states in their own territories are wrongful or unlawful. In this case, that would mean dismissing claims against the corporation for its alleged complicity in serious human rights violations committed at the mine by the Eritrean state and military – a result that is clearly incompatible with international human rights law and with basic notions of justice.

On the day of the hearing, I entered the courtroom ready to engage again with the abstract legal principles in issue. Instead, I received a jarring reminder of how practically difficult it is for those who suffer rights violations abroad to obtain justice.

The plaintiffs began this litigation over four years ago and are still fighting simply to access the only adjudicative forum that can realistically hear their case. The battle over *forum non conveniens* is now over, with the lower courts deciding that the proceeding should be heard in British Columbia given the real risk of an unfair trial in Eritrea. Despite accepting this result, Nevsun continued to insist that the BC courts not be permitted to hear the case until a body such as the International Criminal Court[1] or the UN Security Council[2] takes action against Eritrea. Such a requirement would impose an insurmountable barrier and eliminate the plaintiffs' agency to vindicate their own fundamental right not to be enslaved. Joe Fiorante, counsel for the plaintiffs, summarized the problem clearly: "If this court bars this case because of the act of state doctrine, there is no other forum. This conduct will never be scrutinized by a truly independent judicial body."

But while the proposition that victims of slavery deserve access to a hearing in the only forum available to them seems obvious, not everyone was receptive. Supreme Court Justice Malcolm Rowe said: "What you're saying is an appeal to morality. 'This is a wrong that must be righted. It cannot be righted anywhere else, therefore it must be righted before the courts of B.C.' I do not accept that as a legal argument. That is a moral argument."

The answer is simple: it is *both*. The right to a remedy is an essential principle of international human rights law, and a core Charter value, as pointed out by the interveners Amnesty International Canada and the International Commission of Jurists. What is the purpose of our system of laws if it develops to block those who have suffered the worst of human rights violations from being heard?

Even if the plaintiffs win this first battle, the process of litigation in Canada is still far from ideal. This very hearing highlighted the disconnect that often exists between the courts and those seeking to obtain justice. With the plaintiffs present, I was conscious of how easily our discussions of sovereignty, comity, and hypothetical international fora could become detached from their own lived experiences – something inevitable at this preliminary stage of the proceedings, when the facts are not being adjudicated. In addition, as one of our students observed, the nature of our adversarial system can be demeaning to individuals who have already suffered horrifying trauma. These men who had been enslaved were made to listen to Nevsun's lawyer – who likely has no firsthand knowledge of the circumstances in Eritrea – repeatedly deny that their experiences were real. As the case moves forward, they will be made to listen to those denials again.

Yet, after more than four years and with a long road ahead, the plaintiffs are still fighting for justice. Their courage and perseverance are a gift to our legal system, which depends on survivors to come forward and stand fast through challenge after challenge in order to develop fairer laws and increased accountability. And those survivors benefit immensely from the dedication, compassion, and support of lawyers and organizations such as those working with the plaintiffs in this case. The IHRP's raison d'être is to train the next generation of human rights defenders, and our job is made easier when we can point our students to the examples set by these survivors and their supporters.

On behalf of myself and the IHRP, I would like to extend a huge thank you to:

- The plaintiffs, Mr. Araya, Mr. Fshazion, and Mr. Tekle;
- The lawyers and organizations working with the plaintiffs, **Joe Fiorante**, **Reidar Mogerman**, **James Yap**, **Jen Winstanley**, **Nicholas Baker**, **Matt Eisenbrandt**, **Amanda Ghahremani**, and **the Canadian Centre for International Justice**;
- Our fellow interveners and their counsel, **EarthRights International**, **the Global Justice Clinic** at New York University, **Tamara Morgenthau**, **Alison Latimer**, **Amnesty International Canada**, **the International Commission of Jurists**, **Paul Champ**, **Jennifer Klinck**, **Penelope Simons**, **MiningWatch Canada**, **Bruce W. Johnston**, **Andrew Cleland**, **Jean-Marc Lacoucière**, and **Clara Poissant-Lespérance**;
- And last but certainly not least, our own counsel, **Cory Wanless** and **Professor Audrey Macklin**.

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[1] There are a number of reasons why this is a fanciful suggestion, not least of which is that Eritrea has not even ratified the Rome Statute, and therefore has not accepted the jurisdiction of the International Criminal Court.

[2] Supreme Court Justice Brown scoffed at this proposition, noting that Nevsun had recently been purchased by a Chinese company and that China is a permanent member of the Security Council. “There go all your international human rights violations.” Herein lies another challenge: while the plaintiffs struggle to bring Nevsun to court, those at the helm of the company during the alleged rights violations were able to sell it off and make a tidy sum of money.