

THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW: CANADA SUPREME COURT'S DECISION ON THE ABUSE OF ERITREA'S MINE WORKERS

RESEARCH ARTICLE

Esq. (LLM) Eronmwon Joyce IROGUE

Syracuse University

joyceirogue@yahoo.com

ORCID: 0000-0003-3065-2192

Gönderim Tarihi: 27.09.2020 Kabul Tarihi: 15.10.2020

Alıntı: IROGUE, E. J. (2020). The Domestic Application Of International Human Rights Law: Canada Supreme Court's Decision On The Abuse Of Eritrea's Mine Workers. *AHBV Akdeniz Havzası ve Afrika Medeniyetleri Dergisi*, 2(2),153-173.

ABSTRACT: On February 28, 2020, the Supreme Court of Canada gave a majority decision which may change the face of corporate liability for human rights violations perpetrated outside Canada. In the past, claimants had brought actions of human rights violations such as forced labor, slavery and torture against corporations using tort law but, with the recent decision which emanated from an appeal on a motion to dismiss by Nevsun Resources Limited in *Nevsun v Araya*, claimants now have a shot at bringing their actions under Customary International Law per the Supreme Court's decision that Customary International Law is a part of the Canadian Common Law so long as the law does not contradict the existing law in Canada. The plaintiffs in this case claimed several human rights violations against Nevsun including forced labor and slavery. While Nevsun sought for the matter to be struck out under the ground that the alleged acts occurred outside the jurisdiction of Canada therefore, Canada was not the proper forum to hear the case. The majority reasoned that the human rights norms said to have been violated belonged to the class of Customary International Law that permitted no derogation (*Jus Cogens*) hence; it was automatically incorporated into the law of Canada. But the dissenting opinion held that the acts alleged where acts of a foreign state (Eritrea) because, Nevsun was acting in agreement with the Eritrean government and Canada cannot sit over the act of another state. The facts, decision and argument of the case led this research to explore the mass exodus and trafficking of women including children whereby, women were subjected to sexual exploitation and torture both within Eritrea and on the road to a supposed promised land, as a result of the hostile political situation in Eritrea. Researching this case has not been without challenges as there were conflicting data on the state of women in the Eritrean due to state fed data provided by the Eritrean government or the lack of it therefore, this research is not conclusive in that aspect

Keywords: Human Rights, Trafficking, Forced Labor, Slavery, Torture

RESUME : L'Application Nationale du Droit International des Droits de l'homme: La Décision de la Cour Suprême du Canada Sur L' Abus des Travailleurs des Mines À Érythrée

Le 28 février 2020, la Cour suprême du Canada a rendu une décision majoritaire qui pourrait changer le visage de la responsabilité des entreprises pour les violations des droits de la personne perpétrées à l'extérieur du Canada. Dans le passé, les requérants avaient intenté des actions pour violations des droits de l'homme telles que le travail forcé, l'esclavage et la torture contre des entreprises utilisant le droit de la responsabilité délictuelle mais, avec la récente décision qui émanait d'un appel sur une requête en rejet par Nevsun Resources Limited dans *Nevsun v Araya*, les demandeurs ont maintenant une chance d'intenter leurs actions en vertu du droit international coutumier par la décision de la Cour suprême selon laquelle le droit international coutumier fait partie de la common law canadienne tant que la loi ne contredit pas le droit existant au Canada. Les plaignants dans cette affaire ont allégué plusieurs violations des droits de l'homme contre Nevsun, notamment le travail forcé et l'esclavage. Bien que Nevsun ait demandé la radiation de l'affaire au motif que les actes allégués se sont donc produits hors de la compétence du Canada, le Canada n'était donc pas l'instance appropriée pour entendre l'affaire. La majorité a estimé que les normes des droits de l'homme qui auraient été violées appartenaient à la classe du droit international coutumier qui n'autorisait donc aucune dérogation (*jus cogens*); il a été automatiquement incorporé dans la loi canadienne. Mais l'opinion dissidente a conclu que les actes allégués étaient des actes d'un État étranger (Érythrée) parce que Nevsun agissait en accord avec le gouvernement érythréen et le Canada ne peut pas siéger sur l'acte d'un autre État. Les faits, la décision et l'argumentation de l'affaire ont conduit cette recherche à explorer l'exode massif et la traite des femmes, y compris des enfants, les femmes étant soumises à l'exploitation sexuelle et à la torture à la fois en Érythrée et sur la route d'une prétendue terre promise, en raison de la situation politique hostile en Érythrée. L'étude de ce cas n'a pas été sans défis car il y avait des données contradictoires sur la situation des femmes en Érythrée en raison de données fournies par l'État fournies par le gouvernement érythréen ou de l'absence de données, cette recherche n'est donc pas concluante sur cet aspect.

Mots clés: Droits de l'homme, traite, travail forcé, esclavage, torture

Introduction

Justifying The Exercise of Jurisdiction Over Alleged Violations of Jus Cogens Norms Under Customary International Law. The term -“International law” coined by Jeremy Bentham,¹ is also referred to as public international law or the law of nations and defined “the laws, rules and norms which regulate the activities and relations amongst sovereign nations that have been legally recognized as International actors,”² from Intergovernmental organizations and multinational corporations. In its most recent modern form, human rights are a welcomed post World-War II innovation in international law which may, in some specific cases, directly apply to individuals as well as to states.³

International law is a unique aspect of the general design of international relations. In considering reactions to a specific international position, states normally contemplate applicable international laws. Despite the fact that substantial attention is regularly directed at violations of international law, states although acting mainly in self interest, are generally meticulous in ensuring that their behavior aligns with the rules and principles of international law, because behaving contrary to existing rules has consequences⁴in relation the international community.⁵

To that end, this research essay will examine a recent and critical instance of how international law may frame domestic law and influence relations between states. The essay examines this *Nevsun v Araya* case and how Canada integrated IL into its domestic law in ways that helped to shape the Supreme Court’s recent decision to allow the trying of *Nevsun v Araya* case in Canada despite the defendant’s argument that the actions giving rise to the case emanated in Eritrea and that international customary law does not apply to corporations but states. At issue in this case was whether the court has the authority to exercise jurisdiction over actions done by its national in another country and the decision was that by virtue of the incorporation of international customary law into Canada’s domestic law, the court in Canada can hear the case irrespective of whether the actions took place in Eritrea. The research question that this essay poses is whether this pro-IHRL decision will foster international relations between Canada and other relevant states like Eritrea or whether its latest decision will this jeopardize the relations between the government of Canada and the Canadian companies carrying out their business activities outside Canada?

The advancement of international law, its norms, principles and institutions, are undeniably shaped by international political events, from the end of World War II to the Cold War between the Soviet Union and the United States (U.S). Regional agreements organizations, such as the Warsaw Pact by the Soviet Union and the North Atlantic Treaty Organization (NATO) initiated by the U.S exhibit how international began to shape political events.⁶

Part of this political-events oriented dynamic includes the evolution of rules for protecting human rights. But IHRL has progressed unsteadily, often hindered by acute ideological differences, even while human rights have been shaped by political events.⁷ Starting from the 1980s, globalization has expanded the area of impact of international and regional organizations and necessitated the extension of international law over the rights and duties of states, non-states and even individual actors.⁸ Due to its complexity and the amount of actors it involved, international law is often established through methods that require an almost universal agreement. For example, in the case of green initiatives and the physical environment, bilateral agreements have been augmented and in certain instances exchanged with multilateral

¹ Malcolm Shaw, *International Law*, Encyclopedia Britannica (May 15, 2020, 10:20AM), <https://www.britannica.com/topic/international-law>

² *Id.*

³ Emily f. Carasco, *International Law*, The Canadian Encyclopedia,(May 15,2020, 10:25AM) <https://www.the-canadianencyclopedia.ca/en/article/international-law>

⁴ The consequences for breaching a jus cogens norms like those that arose in the *Nevsun v Araya*’s case includes third party states non-recognition, non assistance and co-operating to bring to an end such violations by the perpetrating state. Under International Humanitarian Law, this obligation on third party states is provided under Article one of the Geneva Convention. For example In 2011, the defiance of Libya under Muammar Gadaffi when it was asked by the UN Security Council to stop violence against peaceful protesters led to the imposition of a no-fly zone on Libya airspace, shutting it off from the world.

⁵ Shaw, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

agreements, remodeling the basic method for “individual state consent into [community](#) acceptance.”⁹ Although in doctrine, international law is “horizontal,” due to the concept of equality among states; however, in actuality, some states remain more influential than others in initiating and upholding international law.¹⁰

The acceptance of jurisdiction by the Canadian court in a matter alleging violations of jus cogens norms of customary international law against a Canadian Company, for acts done against a national of that other jurisdiction is the first decision of its kind in Canada. Since the decision was rendered by the highest court in Canada, it has set a precedent for other regional courts to follow. As well as placed Canadian companies dealing internationally especially in Africa, on their toes whenever there is a claim against them pertaining to human rights violations.

This research work makes use of the British Columbia Court of Appeal (BCCA) case report and the Supreme Court of Canada case report on the *Nevsun v Araya* case. The facts and holdings from both courts are analyzed in relation to the Convention Against Slavery, Convention Against Torture and the convention Against Forced Labor. The judges from the BCCA are of the opinion that the case of the plaintiff can be allowed to go on because it involves human rights norms of which Canada has jurisdiction over. The decision is affirmed by the Supreme Court majority holding on the ground that Canada has adopted Customary International Law (CIL) into his domestic legal system therefore; it can try cases pertaining to its nationals that arose from the CIL claims. Meanwhile, the defendants are against this decision because they claim to have not been a party nor vicariously liable for the alleged human rights violations and if at all the matter must be tried, it should be tried by an Eritrean court because the actions giving rise to the case occurred in Eritrea. The defendant’s arguments are echoed in the decisions giving by the dissent at the Supreme Court. The dissent perspective is that although CIL is part of Canada Law, trying the case would be trying the actions of a State-Eritrea because the State is said to have played a key role through the actions of his senior military officials who contracted the plaintiffs out to the defendant for private work. Furthermore, according to Jolane, the *Nevsun v Araya* case is a landmark case as there has never been instance where a foreigner prevailed and proceeded to a merit stage¹¹ in an action against a Canadian Company. She also believed that this decision may affect the nature and manner of business dealings by Canadian companies in other countries if they knew they could be held accountable for their actions back home.

Some forms of IHRL is a part of CIL regarded as jus cogens, a norm for which no derogation is allowed. Although IL often concerns states, it is known to apply to international organizations and in some specific instances individuals but, as to whether it applies to corporations is still a grey area. The argument of the Supreme Court of Canada in *Nevsun v Araya* case is that it applies so long as such CIL especially a jus cogens norm has been adopted into the domestic law of the country. This argument is not however unanimous, there are dissents who argues that it would not apply to situations that directly or indirectly involves the actions another country. Therefore, this paper progresses from the underlying facts which gave rise to the main decisions and dissent at the Supreme Court, to the analysis of the CIL claims under the various international convention that established them.

Background

Understanding The Underlying Key Facts Leading Up To The Court’s Decision In *Nevsun V Araya*

In November 2017, the British Columbia Court of Appeal (BCCA) dismissed an appeal filed by *Nevsun Resources Ltd* a Mining company based in Canada but owns shares at the Bisha Mine in Eritrea (hereinafter Defendant) thereby, advancing the issue of whether there was a violation of human rights norm against *Araya &co* (hereinafter Plaintiffs) to the “merit stage”¹² of the process in *Araya v Nevsun*. It is noteworthy that prior to *Araya v Nevsun* case, the British Columbia Region of Canada has never moved a foreign plaintiff to the status of being able to litigate or take legal action against any Canadian mining company, to redress human rights wrongs for actions done outside Canada and one directly based on

⁹ *Id.*

¹⁰ *Id.*

¹¹ This a stage a matter proceeds to when it has been determined by the court, based on the facts and evidence to be worthy of adjudication/trial by the court.

¹² *Id.*

a CIL.¹³ All those who had tried to litigate their cases¹⁴ before were defeated at the “motion to dismiss stage” of the proceedings.¹⁵ This novelty is one of the many distinctions associated with this landmark case, as this is also the first time a claim for mass tort for modern slavery will go forward in a Canadian Court.¹⁶

The basic conflict of the *Nevsun v Araya* involves Eritrean Refugees in Canada who are suing a Canadian-based mining company known as *Nevsun Resources* for that company’s human rights violations in Eritrea, notably, slavery, torture, forced labor, Inhuman and degrading treatments. The Company in defending itself at the British Columbia Court relied on the fact that the actions leading up to the claim took place in another country-Eritrea, therefore, Eritrea was the proper place to try the case and also that the court does not have authority over another state’s action due to the fact that *Nevsun* was in partnership with the Eritrean government with respect to the Bisha Mines. The British Columbia court held that the case against the defendants was worthy of adjudication because the plaintiffs had potent claims and the underlying reason was that as escapees from the NSP, they could not return to Eritrea to try the case and also, from the facts and evidence adduced, it is clear that even if they do make it to the Eritrean court, they would not get fair judgment due to the autocratic nature of government. More of which will be explained later on in this paper. While, at the Supreme Court of Canada, the Court held that Canada could hear the case because it has adopted CIL into the domestic law of Canada.

The heart of *Nevsun* defense was procedural and jurisdictional: they claimed Canada did not have jurisdiction over trying the case because the actions in question occurred in Eritrea. In the preceding part of this paper, we will examine the application of International Law in Canada in order to understand while the Supreme Court ruled the way it did and to better understand the arguments of the plaintiffs and defendant, we will examine briefly the connection between Eritrea and the National Service Program and *Nevsun* and the Bisha Mines respectively. After which, we will discuss the facts, looking at it from the plaintiffs’ arguments and the defendant’s arguments and then a detailed exposition of the Courts holdings including the dissents.

Canada’s International Human Rights Law Role

Canada is a pioneer of international law and it is one of at least a hundred and eighty-four countries who have agreed to be bound by the rules, norms and principles of international law. Canada has been performing a leading role in upholding and advancing international law in the aspect of “peacekeeping, human rights, the law of the sea and international economic law” at the United Nations (UN) and other international conventions.¹⁷ Therefore, it is no surprise that Canada has adopted CIL into its domestic laws.

Canada’s international law practices thrive on treaties it has made with other states. It derives its international law practices, duties and rights mainly from treaties which is a binding agreement between Canada and another state or multiples states for example between Canada and the US there are around two hundred treaties. And, states practices than from others sources of international law.¹⁸ It is noteworthy that CIL that are contained in treaties are automatically binding on nonparties to the treaties as well as parties for example Canada assumed responsibilities under Vienna Convention on the Law of Treaties, prior to becoming a party to the treaty.¹⁹ It is important to note that treaty is one of the sources of international law named in the document establishing the International Court of Justice (ICJ).

¹³ Matt Eisenbrandt, *Canada: Land Mark Slavery Case Against Mining Company*, (April 14,2020, 11:25 AM) <https://www.antislavery.org/canada-slavery-case-mining/>

¹⁴ For example, Copper Mesa mining lawsuit in Re Ecuador, *Garcia v Tahoe* was dismissed at British Columbia Supreme Court under the ground of the defendant’s *forum non conveniens* defense but was overturned by the court of Appeal in 2017. See Andrew Findlay, *Canadaian Mining Companies Will Now Face Human Rights Charges in Canadian Courts*, (April 14, 2020, 11:39AM) <https://thenarwhal.ca/canadian-mining-companies-will-now-face-human-rights-charges-in-canadian-courts/>

¹⁵ Jolane T Lauzon, *Araya v Nevsun Resources: Remedies for victims of Human Rights Violations Committed By Canadian Mining Companies Abroad*, (2018) *Revue Quebecoise De Droit International*. 168 *CanLII Docs* 10660, <https://www.canlii.org/t/bx0> consulte le 16 March. 2020

¹⁶ Matt, *Supra* note 13

¹⁷ Carasco *supra* note 3

¹⁸ *Id.*

¹⁹ *Id.*

Canada like other advanced countries keeps track and organize all the treaties they are party to. Treaties to which Canada is a party are duly published in a Canada Treaty Series. CIL is born from the general practice of states conducting their international law affairs on the understanding that the practice is legally binding and CIL has been adopted by the Canadian court as a part of Canadian Law. However, many customs that are believed to be a source of international law are now integrated in multilateral conventions for example some very old CIL principles were codified in the 1961 Vienna Convention on Diplomatic Relations.²⁰ These binding treaties amongst states, reflects changes in the as well as preserve the international law system as time goes on.

Canada's journey in the international human rights area of international law can be said to have heightened in 1976 when it opened itself up to be bound and gave its citizens the opportunity to access the UN Human Rights Committee for redress, by assenting to the International Covenant on Civil and Political Rights, a significant multilateral human rights treaty and its Optional Protocol. Also, Canada has demonstrated its desire to effect changes in international law system by favoring policies that would benefit economically disadvantaged countries in the less developed part of the world by helping to maximize their world trade and foreign investment portfolio an example is the General Preferential Tariffs legislation, which is advantageous to poorer countries.²¹

At the national level, Canada's human rights law which draws strength from the Universal Declaration of Human Rights (UDHR) is secured through federal, provincial and territorial laws.²² The 1977 [Canadian Human Rights Act](#) protects the rights of persons in Canada against "the federal government, First Nations governments or private companies regulated by the federal government such as banks, trucking companies, broadcasters and telecommunications companies" in discrimination matters in employment, services, race, age and sexual orientation.²³ It is noteworthy that the Provincial and territorial human rights laws greatly resembles and adhere to same rules in the Canadian Human Rights Act.²⁴

Also, Canada's Constitution integrated a 1982 [Canadian Charter of Rights and Freedoms](#). The Charter secures the equal and fundamental rights of Canada's citizens to the freedom of expression, freedom of assembly and freedom of religion and protection from violation of their rights through laws, policies and government conducts. However, the charter only covers actions against government and not private businesses and individuals. Therefore it is impossible to rely on this charter in an action against a corporation or individual acting independently from the government.²⁵

Finally, in terms of international human rights law implementation, Canada can sign and then ratify a treaty or simply apply an accession, which has been described as being similar to a ratification but without the signature. After ratification or accession, Canada will be bound to abide by the treaty.²⁶ Also, Canada has a policy which mandates that international human rights treaties must satisfy its treaty requirement before it can become binding. To determine if it fulfills the policy requirements, the federal government and the provincial government (when it affects their jurisdiction) will carry out a comprehensive review of its domestic laws, practices, regulations, policies and the treaty, in order to, identify any disparity that may exist and proffer a means to resolve the disparity.²⁷

Furthermore, the review process is carried out by three federal departments: The Department of Foreign Affairs and International Trade, the Department of Justice and the Department of Canadian Heritage. However, the subject matter of the treaty will determine if other government departments may equally participate.²⁸

²⁰*Id.*

²¹ *Id.*

²² Canadian Human Rights Commission, *Human Rights In Canada*, (May 15,2020, 3:54PM) <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada#:~:text=>

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Department of Justice, *International Human Rights Treaty Adherence Process in Canada* (May 15, 2020, 3:45PM) <https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/ta-pa.html>

²⁷ Department of Justice, *Roles and Responsibilities-International Human Rights Treaty Law* (May 15, 2020, 4:15PM) <https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrl-didp/tl-dt.html>

²⁸ *Id.*

The steps in the federal review process include; the Department of Justice Consults with the department of Foreign Affairs and International Trade other affected federal department including non-governmental and civil society organizations to review federal regulations, policies and practices.²⁹ If there is an identified disparity then “consideration is given to whether legislation, regulations and/or policies must be enacted or amended, or whether, where allowed under the treaty, a reservation, which excludes or modifies the legal effect of a particular treaty provision, should be entered upon ratification or accession.”³⁰ Canada may give a declaration to interpret an unclear obligation in the treaty. As of January 28, 2008, where Canada decide to ratify or accede to a treaty, it will be table before the parliament to give their opinion where they so desire.³¹

Eritrea and the National Service Program

Going down history lane, Eritrea was colonized by Italy from 1890 to 1941 and after the Second World War Eritrea became a British Protectorate up to the time it was merged with Ethiopia, a neighboring country.³² Following a protracted thirty year war with Ethiopia, a referendum for Eritrea’s independence was accepted by Ethiopia in April 29, 1993 after the Eritrean People’s Liberation Front (EPLF) defeated the Ethiopian army in May 1991.³³

Eritrea after gaining independence became a member state of the United Nations and was recognized by countries of the world including Canada. Canadian and Eritrean government have direct diplomatic relations and the nationals of both countries require visa to enter the territory of the other. Permission is equally needed to move within Eritrea, including to the Bisha Mine where the act leading to the Nevsun case occurred.³⁴

Since gaining independence in 1993, Eritrea has been under the leadership of Isaias Afewerki as president and no elections have been conducted since gaining independence. The president’s party, the People’s Front for Democracy and Justice (“PFDJ”), is the only existing political party in Eritrea till date. It is noteworthy that Ethiopia and Eritrea fought a border war from 1998 to 2000 and even after the war ended, Ethiopian troops continued to occupy a portion of Eritrea.³⁵ This has been used as an excuse for the method of governance in Eritrea and the need for the Eritrean National Service Program (the “NSP”) which gave rise to the Nevsun case and has been condemned by organizations such as Human Rights Watch as a wanton violation of human rights.³⁶

According to court documents and expert testimonies of both the plaintiffs and Defendant, The NSP is a military and national service program conducted by the Ministry of Defense. Mr. Connell³⁷ and Prof. Andemariam³⁸ concur that the NSP comprises of six months of military training and a twelve month “military development service program”. The military development service program comprises either posting to government agencies or other jobsites for coaching and expertise development, or posting to the Eritrean military for “purely military service”. The plaintiffs in the case allege that genuine objection is not accepted.

Furthermore, around year 2002, the government commenced a bulk “demobilization and reintegration program” through which participants of the NSP went on engaging national development campaigns until they were demobilized. According to Prof. Andemariam’s and Mr. Connell’s report, the “military development service” part of the NSP prolong indefinitely until demobilization as against, the provided

²⁹ *Id.*

³⁰ *Supra* note 23

³¹ *Id.*

³² *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 (CanLII), <<http://canlii.ca/t/gv11z>>, retrieved on 2020-03-15. See also 408 DLR (4th) 383 — [2016] CarswellBC 2786 — [2016] BCJ No 2095 (QL)

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* Human Rights Watch reported in the mid-2000s that national service conscripts were used as labour on public works and farms belonging to party and military officials. Human Rights Watch reported in 2006 that individuals attempting to flee national service in Eritrea are frequently tortured.

³⁷ *Id.* Expert witness for the plaintiffs who wrote a book on Eritrea which was admitted by the court.

³⁸ *Id.* Expert witness for the defendants, a professor and journalist from Eritrea

eighteen months period. This is due to the fact that the initial demobilization program was aborted by the government and replaced a case-by-case demobilization on individual basis.³⁹

The plaintiffs allege that this program gives labour to senior military officers owned companies such as Segen Construction Company (“Segen”) and Mereb Construction Company (“Mereb”).⁴⁰ It is notable that related remarks are contained in a 2008 US Department of State report, a 2007 and 2009 Human Rights Watch report, and Mr. Connell’s reports. These reports states that members of the family of children who failed to report for the NSP were arrested while, those who attempted to escape the program or those caught escaping were jailed without charge or trial.⁴¹ Also, those who flee after being drafted and assigned on civilian development projects were taken as deserter and dealt with under the military law since their earnings was paid to the Ministry of Defense.⁴²

Nevsun and Eritrea’s Bisha Mine

Eritrea’s Bisha Mine is owned and managed by The Bisha Mining Share Company (“BMSC”) which is owned by Nevsun. The Bisha Mine is located in 150km west of Asmara in the Gash-Barka province in Eritrea and is the foremost working modern mine in Eritrea. The mine sits on a bulky, superior sulphide residue with superior base metal reserves- gold, copper and zinc.⁴³

In 2008, the construction of the Bisha Mine commenced and was completed in 2010. An Eritrean contractor became engaged with BMSC when it was subcontracted by SENET, a South African Company contracted by BMSC as the “Engineering, Procurement and Construction Manager (“EPCM”) for the construction of the Bisha Mine.”⁴⁴ Segen’s work is under the supervision of SENET. “Extraction of minerals has proceeded as follows: phase 1, commercial gold production commenced in February 2011; phase 2, copper production commenced in late 2013; and phase 3, consists of a zinc expansion project and is not yet complete.”⁴⁵

Nevsun is alleged to have entered into a commercial agreement with Eritrea in order to expand the Bisha Mine. In order to do this, Nevsun was alleged to have directly contracted Segen, the Eritrean military, and Mereb to construct infrastructure and mine facilities at the Bisha Mine. These contractors in turn used forced labor procured from the plaintiffs. On the other hand Nevsun refutes this claim on the ground that it was not in any way directly involved and that it was SENET that contracted Segen.⁴⁶

According to Mr. Connell’s report, Eritrea practices a command economy⁴⁷ and the Bisha Mine is, currently, the only largest revenue source for Eritrea as eighty percent of Eritreans still practice small scale agriculture. In 2013, gold exportation generated \$143 million, almost entirely from the Bisha Mine. Mr. Connell also reports that since independence, Eritrea has encountered several economic difficulties which have been intensified by limiting economic policies such as inadequate resources and protracted drought.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ This is an economy where the central government makes all economic decisions without recourse to the laws of supply and demand which exist in a market economy and customs that guide traditional economy. see Kimberly Amadeo, *Command Economy, Its Characteristics, Pros and Cons* (mar. 29, 2020, 2:00PM) <https://www.thebalance.com/command-economy-characteristics-pros-cons-and-examples-3305585>

Facts and Court Holdings in Araya v Nevsun Resources Ltd., 2016 BCSC 1856 (CanLII)⁴⁸*Plaintiff Arguments*

The plaintiffs named, Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle are Eritrean citizens who are currently refugees in Canada. They instituted this action on behalf of themselves and other Eritreans who were drafted on the NSP and made to work in the Bisha Mines from 2008 to this present day.⁴⁹

Plaintiffs claim to have been drafted into Eritrean NSP and then used by two private companies-Segen and Mereb, one of which is owned by Eritrean military- for force labour at the Bisha Mines.⁵⁰ They claim that these companies were contracted by Nevsun and/or its Eritrean subsidiary, BMSC, for building the Bisha Mine. Therefore, Nevsun is directly accountable for tolerating the acts perpetrated by Segen, Mereb, and the Eritrean military which were done in furtherance of Nevsun's commercial objectives.⁵¹

The plaintiffs seek damages against Nevsun under CIL as adopted into Canada's domestic law for "forced labor; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity."⁵² They equally seek damages against Nevsun under British Columbia law for "the torts of conversion, battery, unlawful confinement, negligence, conspiracy, and negligent infliction of mental distress." However, this research will only concern itself with the claims under CIL.⁵³

In their respective affidavits, Kesete Tekle Fshazion, alleged to have been refused permission to leave the NSP after serving for six years and that he was sent by Segen to work at the Bisha Mine before his escape from the mine and Eritrea in 2012. Gize Yebeyo Araya also allege to have been refused permission to leave after completing his eighteen months training in the NSP and was equally sent off to work at the Bisha Mine by Segen until October 2010. Similarly, Mihretab Yemane Tekle, allege to have also been refused release after completing his eighteen months training and was sent off to work at the Bisha Mines until October 2010.⁵⁴

Furthermore, Mr. Tekle alleges that the temperature at the site where they worked was up to 47 degrees Celsius and they were completely subjected to working under the sun. Mr. Araya alleges that the heat burned and scared his face and he saw others being "punished beaten, being made to roll or run in hot sand, and being bound with their hands and feet tied together behind their back and left in the hot sun, often for hours."⁵⁵

Mr. Araya and Mr. Tekle both allege they were forced to work six days a week and usually woke up at 4:00am, working twelve hours each day including a two hour lunch break. He claims they and other draftees were provided little food- bread, lentil soup, and tea- for the whole day.⁵⁶ They were sheltered in huts without beds or electricity. In addition, Mr. Tekle claimed "he was always very hungry, weak, and often sick" and he once saw a worker collapse while working in the hot sun. While Mr. Fshazion states he was made to work seven days a week, out of which he worked ten hours for six days and the seventh day, he worked eight hours in the field, testing soil density.⁵⁷

The Defense Arguments

In response to the Plaintiff's claims, Nevsun brought a motion to strike the pleadings on the basis of the act of state doctrine, which precludes domestic courts from assessing the sovereign acts of a foreign government. Nevsun also took the position that the claims based on CIL should be struck out because they have no reasonable prospect of success.

⁴⁸Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 , Supra note 29

⁴⁹ Id.

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id.

The attorney's defending Nevsun relied on three defenses- first, the forum non conveniens doctrine-a discretionary power of a court to refuse to exercise its jurisdiction where another court may well be suited to handle the case⁵⁸. Second, the Act of State doctrine- a domestic court of a state could not sit in judgment of an act done in the territory of another state. Third, the absence of private law cause of action against corporation for the infringement of customary international law rules.⁵⁹

Nevsun sought permission to appeal to the supreme court of Canada in January 2018 and on 14 June 2018, the Supreme Court approved the leave to appeal. This matter is one of the fifth cases where foreign plaintiff's suit against a Canadian Mining Company has made it to the "motion to dismiss stage" of a Canadian court proceedings. According to Jolane, some of the implications is the perception that holding in Nevsun can open the door way for Canadian courts to get involve in Corporate Social Responsibility (CSR). Also, it may be an opportunity for the Canadian court to respond to new legal issues for example "corporate liability for violations of Customary International Law (CIL) or the scope and applicability of the Act of State doctrine."⁶⁰

Court Holdings

The BCCA held that the defendant Forum Application was dismissed because Nevsun did not establish that Eritrea was the proper forum to handle the matter. Accordingly, the action would proceed in the Court; and the defendant Act of State defense and CIL Applications were dismissed. The chambers judge dismissed Nevsun's motion to strike, and the Court of Appeal agreed.⁶¹

Now coming to the extant decision of the Supreme Court of Canada⁶² which is the basis of this research, the Supreme Court reasoned that since time immemorial, Canada has steadily abide by the practice of "automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the law of Canada." Embedded within CIL is the *jus cogens* norm that is, a peremptory norm from which there can be no derogation. In the instant case the plaintiffs claim to violation of not just any CIL but one that falls with the *jus cogens* norm. As it has been confirmed that the "prohibitions against slavery, forced labour and cruel, inhuman and degrading treatment have attained the status of *jus cogens*." Therefore, customary international law is instantly accepted into the Canadian domestic law without a need for any legislative process.⁶³

In addition, the majority held that CIL as part of the Canadian law must be treated like every other domestic law in Canada. Therefore a violation by a Canadian company can supposedly be resolved. Also, considering "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun."⁶⁴

Since the customary international law norms alleged by the Eritrean workers make up part of the common law of Canada, and since Nevsun is a Canadian company subject to Canadian law, the claims of the Plaintiff for breaches of customary international law was allowed to proceed. It is noteworthy that the court refused to address whether or not Nevsun has violated CIL stating "The Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law." but merely addressed the fact that Canada could hear the claim against Nevsun under CIL.⁶⁵

However, there was a partly dissenting opinion and a fully dissenting opinion. In the Partly dissenting opinion, the judges agree that "there are prohibitions at international law against crimes against humanity, slavery, the use of forced labor, and cruel, inhuman, and degrading treatment; these prohibitions

⁵⁸ Cornell Law School, Legal Information Institute (Mar.28, 2020, 4:00PM) https://www.law.cornell.edu/wex/forum_non_conveniens

⁵⁹ Jolane, supra note 5, at 143, 2018

⁶⁰ Jolane, supra note 5, at 145

⁶¹ Id.

⁶² Nevsun Resources Ltd. v. Araya, 2020 SCC 5,(May 17,2020) <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html?resultIndex=14>

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

have the status of *jus cogens*; individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions; and individuals are beneficiaries of these prohibitions.” Also, an established CIL can become a source of Canadian domestic law except it contradicts an existing law. ⁶⁶

However, there is disagreement as to the civil liability of a corporation in Canada for a violation of CIL. In their words, “It is plain and obvious that corporations are excluded from direct liability at customary international law.⁶⁷ Corporate liability for human rights violations has not been recognized under customary international law; at most, the proposition that such liability has been recognized is equivocal. Customary international law is not binding if it is equivocal. Absent a binding norm, the workers’ cause of action is clearly doomed to fail.”⁶⁸

Moreover, the workers did not plead the necessary facts of state practice and *opinio juris* to support the proposition that a prohibition of customary international law requires states to provide domestic civil liability rules. The workers also did not plead the necessary facts to support the proposition that a prohibition of customary international law itself contains a liability rule.⁶⁹ Furthermore, it is within the domain of the legislature to determine if there would be a change and the court is merely overstepping its boundaries in ruling the way it did. ⁷⁰

On the other hand, in the full dissenting opinion, it is the judges’ view that the application of CIL to corporations poses a serious deviation from this field of law. In their words, “the widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations.”⁷¹

Therefore, they do not share the majority’s view with respect to the “existence and applicability” of the act of state doctrine. As such, it is their view that the plaintiffs do not have a claim within the Canadian Legal System but, can look towards “the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.”⁷²

Furthermore, they reasoned that the claim touches on the lawful act of the Eritrean government and to hear it would mean that the court is “overstepping the limits of its proper institutional role.” and therefore interfering in the “conduct by the executive of Canada’s international relations.”⁷³ This is because “questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on judicial or manageable standards. Nevsun can be liable only if the acts of the actual alleged perpetrators — Eritrea and its agents — were unlawful as a matter of public international law.” Therefore the Plaintiff’s claim must fail because it requires a determination on whether Eritrea has breached international law.⁷⁴

Analyzing in the Context of International Human Rights Norms:

Universal Declaration of Human Rights

The UDHR⁷⁵ is a core international human rights instrument drafted by representatives from different legal and cultural backgrounds from all parts of the world including, John Humphrey, a Canadian lawyer who played an important role.⁷⁶ The Declaration was proclaimed by the UN General Assembly in Paris

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

⁷² Id.

⁷³ Id.

⁷⁴ Id.

⁷⁵ United Nations, Universal Declaration of Human Rights, (Mar.17, 2020, 5:00pm) <https://www.un.org/en/universal-declaration-human-rights/>

⁷⁶ Canadian Human Rights Commission, Human Rights In Canada,(May 15, 2020, 6:30PM) <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada#:~:text=>

on December 10, 1948⁷⁷, in its attempt to secure international peace just after its establishment in 1945. The UDHR lists out “basic rights and fundamental freedoms” in 30 articles and “it has been suggested that the resulting influence of the declaration as well as repeated invocation of the declaration has made it a part of customary international law.”⁷⁸

The first two articles are about equality and freedom from discrimination, the foundation of the Canadian Human Rights Act.⁷⁹ Article 4 of the UDHR provides that “No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.”⁸⁰ Article 5 provides “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”⁸¹ and Article 23 provides for free choice of employment and to just and favorable conditions of employment.⁸²

Whereas in the Nevsun case, Plaintiffs were subjected to torture and had to no say in the kind of jobs they were contracted to perform. They were forcefully conscripted under the NSP program without pay for an indefinite period of time. All the peculiarities of this case go against the very tenets and provisions of the UDHR. However, since the UDHR is a mere declaration, it is a soft law which has no binding effect. But, it is the foundation on which convention against slavery and convention against torture and forced labor was built.

Forced Labor Convention of 1930⁸³

Canada ratified the convention in 2011. Under article 2, forced or compulsory Labor is defined as all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. However, the competent authority shall not impose or permit the imposition of forced or compulsory labor for the benefit of private individuals, companies or associations.⁸⁴ No concession granted to private individuals, companies or associations shall involve any form of forced or compulsory labor for the production or the collection of products which such private individuals, companies or associations utilize or in which they trade.⁸⁵ Officials of the administration, even when they have the duty of encouraging the populations under their charge to engage in some form of labor, shall not put constraint upon the said populations or upon any individual members thereof to work for private individuals, companies or associations.⁸⁶ Furthermore, under the Abolition of Forced Labor Convention 1957, all states are to take steps to suppress any form of forced or compulsory labor as a method of mobilizing and using labor for purposes of economic development.⁸⁷ Canada ratified this Convention 14 July 1959 and Eritrea ratified it 22nd February 2000.

Convention Against Torture⁸⁸

The Convention came into force in 1987 provides that each state shall ensure that all acts of torture are offences under its criminal law, including an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.⁸⁹ Each state are to take measures to establish its jurisdiction over the offences in cases When the alleged offender is a national of that State⁹⁰; When the

⁷⁷ General Assembly Resolution 217A, (Mar. 17, 2020, 6:00PM)

[https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217\(III\)](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/217(III))

⁷⁸ Carasco supra note 3

⁷⁹ Supra note 70

⁸⁰ Supra note 69

⁸¹ Id.

⁸² Id.

⁸³ Forced Labor Convention 1930(Mar.19, 2020, 7:30PM)

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029,

⁸⁴ Id. article 4

⁸⁵ Id. article 5

⁸⁶ Id. article 6

⁸⁷ United Nations Human Rights Office of the High Commissioner, Abolition of Forced Labour Convention, 1957 (No. 105) (Mar.24, 2020, %:30PM) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/AbolitionOf-ForcedLabourConvention.aspx>. See Article 1(b)

⁸⁸ United Nations Human Rights Office of the High Commissioner, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Mar.24, 2020, 6:00PM), <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

⁸⁹ Id. Article 4

⁹⁰ Id. Article 5(b)

victim is a national of that State if that State considers it appropriate.⁹¹ In addition, under Article 14, Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

The Convention to suppress Slave Trade and Slavery⁹²

Slavery is defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”⁹³ While slave trade is defined to include all acts involved in “the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.”⁹⁴

In the instant case, a breach of this covenant is one of the claims alleged by the plaintiffs and it is supported by facts of such acts taking place in Eritrea especially with regard to the autocratic nature of government currently in place. According to the records of the court and the expert testimonies of Mr. Dan Cornell and Professor Senai Wolde-Ab Andemariam for the plaintiff and defendant respectively, the NSP has been going on for long. The NSP has been likened to a modern day slavery where youths are drafted and sent off to work for indefinite period of time for private companies like Nevsun, under the guise of serving the country’s economic purpose for the greater good. In turn, these workers are subject to torture, degrading and inhuman acts by these companies against without recourse from the government. Now, let us briefly look at modern day slavery in Eritrea.

Africa has been considered as the continent with the highest rate of modern day slavery in the world⁹⁶, with Eritrea listed just after North Korea as the second country in the world with the highest prevalence of modern day slavery. Slavery is mainly prevalent in Eritrea and Mauritania and has been at times taken as an institutionalized practice due to a one-party system of government and the NSP.⁹⁷ According to a 2018 Global Slavery Index, some of the factors that have contributed to the increase in modern day slavery include “conflicts prone or war given the disruptions to the rule of law, damage of infrastructure and restricted access to education, health care, food and water as a result of conflict.”⁹⁸ For instance, President Isaias Afewerki for twenty years has relied on the war with Ethiopia to justify his autocratic government, the utilization of forced conscription into the NSP and, eventual indefinite extension despite, a prior decree limiting service to eighteen months.

Furthermore, journalists, activists and opponents of the system imposed by the president’s government are jailed indefinitely without trial, often isolated. Independent media political parties (other than the president’s party) and nongovernmental organizations are prohibited. Also, elections, a legislature, and an independent judiciary are all not permitted because the president believes they would undermine

⁹¹ Id. Article 5(c)

⁹² The Convention on the Suppression of Slave Trade and Slavery and Supplementary Convention on the Abolition of Slavery (1926), <https://www.refworld.org/docid/58c156dc4.html>, accessed 19 March 2020. The Convention to Suppress the Slave Trade and Slavery known as the Slavery Convention, signed on September 25, 1926 and entered in to force on 7 March 1927. This convention was created under the auspices of the League of Nations and serves as the foundation for the prevention and suppression of the slave trade. With the 1926 Slavery Convention, concrete rules and articles were decided upon, and slavery and slave trade were banned. The definition of slavery is further refined and extended by the 1956 Supplementary Convention (1956), <https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>, accessed 19 March 2020. Eritrea is not a party to the Original Convention Against Slavery but the Supplementary Convention.

⁹³ Id. at Article 1(1)

⁹⁴ Id. at Article 1(2)

⁹⁶ Global Slavery Index (Apr. 1, 2020, 6:00PM) <https://www.globallslaveryindex.org/2018/findings/global-findings/>

⁹⁷ Abdi Latif Dahir, *Africa is Again the World Epicenter of Modern-Day Slavery*(Apr. 1, 2020, 8:00PM) <https://qz.com/africa/1333946/global-slavery-index-africa-has-the-highest-rate-of-modern-day-slavery-in-the-world/>

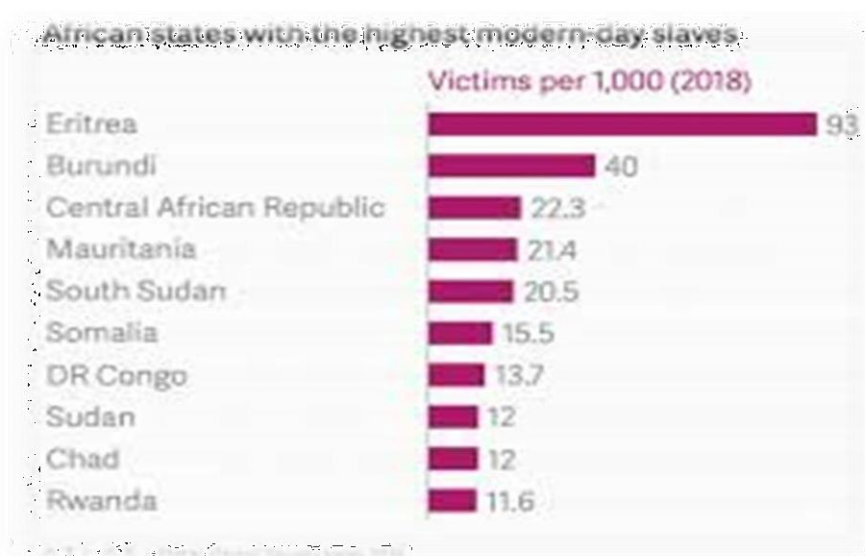
⁹⁸ Id.

Eritrea's defenses.⁹⁹ Some religious groups are forbidden altogether, and others strictly regulated by government appointees. Implementation of a constitution approved by a constituent assembly in 1997, before the war, was deferred indefinitely.¹⁰⁰ The rights of all Eritrean citizens remain severely restricted, but younger generations conscripted into the NSP are especially impacted.

In 2016, a UN commission of inquiry on human rights in Eritrea described the NSP as "enslavement." And that despite its agreement with Ethiopia, the government has not released any long-term NSP conscripts.¹⁰¹ However, the NSP is not the only reason thousands of Eritreans including minors leave Eritrea monthly but, it remains a main cause and almost 15 percent of the population has fled since the 1998 war. After the Eritrea-Ethiopia border opened, the number of fleeing Eritreans, especially unaccompanied minors, increased significantly, according to the United Nations High Commissioner for Refugees (UNHCR).¹⁰²

Conscripts have long been subject to inhuman and degrading punishment, including torture, without recourse. Although pay was increased in recent years, it remains nominal and insufficient to support a family; especially as such increases are offset by higher deductions for food. Eritrea's information ministers acknowledged in a 2018 interview that less than one-fifth of conscripts have military roles. The rest are farm laborers, teachers, construction workers, civil servants, lower-level judges, and other civilian laborers. Conscripts assigned to government-owned construction firms work on building infrastructure at foreign-owned mineral mines.¹⁰³ Meanwhile, under Article 4 of the Convention Against Slavery, contracting Parties shall give to one another every assistance with the object of securing the abolition of slavery and the slave trade and article 5 provides not to allow forced labor which as a grave consequence could degenerate to slavery.¹⁰⁴

However, this act is not without implications as it was discovered that governments that capitalized on forced labor "have lower quality policy regulations, perform below the global average in ensuring access to necessities such as food and water and health care and typically do not protect the rights of highly discriminated groups in the broader population." in other words, the overall development of the country is severely hampered.¹⁰⁵



Source: Abdi Latif Dahir, 'Africa is Again the World Epicenter of Modern-Day Slavery'

⁹⁹ Id.

¹⁰⁰ Id.

¹⁰¹ Human Rights Watch, '2019 World Report' (Mar.18, 2020, 7:00PM), <https://www.hrw.org/world-report/2019/country-chapters/eritrea>,

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Supra note 77

¹⁰⁵ Id.

Digital Age and Women Trafficking in Eritrea

Due to the NSP program and other acts of human rights violations perpetrated by the Eritrean government, a lot of Eritreans have found themselves fleeing and seeking refuge in neighboring countries such as Ethiopia and Uganda. Meanwhile, there are those who have turned to the Sinai route in Egypt hoping for a safe passage to Israel. But, unfortunately, the journey has not been smooth so far as many of them fall in the hands of traffickers, placed in camps where they are tortured for ransoms. Therefore, this subsection will examine the plight of Eritrean women in human trafficking through the Sinai route located in Egypt's Hinterland. The main literature is the *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*¹⁰⁶ among other sources. Although, the literature focuses on Human Trafficking in general that is, men, women and children. This subsection will focus on the case of the women being trafficked, peculiar trauma and possible solutions through digital strategies.

History

Human trafficking through Sinai¹⁰⁷ was brought to light in 2008 but, till date, the perpetrators have never been brought to justice.¹⁰⁸ Meanwhile, this illicit trade in humans has continued to spread its tentacles across North Africa and Horn of Africa, specifically targeting Eritreans due to their susceptibility to traffickers and smugglers.¹⁰⁹

According to interviews conducted by the authors, the smuggling and trafficking of persons is one of the informal cross border trades in Eritrea and it is booming with the support and control of the president, government officials and military. This is also promoted due to the crippling of the official economy as a result of the ban on imports and the NSP.¹¹⁰

A connecting point between the Nevsun case and this subsection is the alleged involvement of the Eritrean government (acting through government officials) in the violation of core human rights norms against slavery, torture and forced labor. In 2011, the United Nations Monitoring group on Somalia and Eritrea discovered evidence which made it opine that the massive scale¹¹¹ of the trafficking could only be possible with the involvement of government officials.¹¹²

Trafficking of Eritrean Women

Eritrean women's plight in the face of illegal emigration out of Eritrea inspired by the NSP and its resultant effect is not widely covered. The perspective of the authors is formed by the interview of Eritrean women refugees in Uganda but it is said that that it covers the general experiences of Eritrean women in other states although more research is needed in those states to bring the experiences to light.¹¹³

All Eritrean children are normally required to do their last year of high school at Sawa Military Training Center.¹¹⁴ The women are said to encounter many problems due to the mandatory and indefinite NSP as they encounter sexual abuse from the military commanders and counterparts, imprisonment, torture

¹⁰⁶ Mirjan Van Reisen and Munyaradzi Mawere et. al, *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*, Langa RPCIG, (Apr. 8, 2020, 9:00PM) <file:///C:/Users/PC/Downloads/MawerevanReisen-Humantraffickinginthedigitalera-2017-compressed.pdf>

¹⁰⁷ Sinai is a desert peninsula in the northeastern end of Egypt. It connects Israel and the Gaza Strip on the East. The peninsula was once occupied by Israel in 1967 during a six day war but, was given back to Egypt in 1982 after a peace treaty was reached by both countries. <https://www.britannica.com/place/Sinai-Peninsula> accessed 8 April, 2020

¹⁰⁸ Reisen and Mawere, supra note 106, at 19

¹⁰⁹ Id.

¹¹⁰ Id. at 26

¹¹¹ There was an estimated trafficking of 30,000 persons between 2009 and 2013 at an estimated rate of over USD 600 million, at 20

¹¹² Id. at 20

¹¹³ Id. 221

¹¹⁴ Id. 225

among others. The women get married or pregnant at very young age in a bid to escape being conscripted for the NSP or as a result of rape. Some families give out their daughters under the age of 18 in a bid to spare her from the NSP.¹¹⁵

Even after release from the program, for marriage or due to pregnancy, these women are not spared the circumstances of the NSP as their children and husbands are still affected. In a bid to spare their kids or reunite with their husbands who have fled Eritrea due to the NSP or as a result of imprisonment and mistreatment for the escape of family members,¹¹⁶ they are therefore forced to find a way out of the strong grasp of Eritrea amidst its strict emigration policy(exit visa and “shoot to kill” at the border) and that of the neighboring countries. The only way they envisage is to surrender themselves into the hands of smugglers and eventually traffickers. If they succeed in making it out of Eritrea, they are then forced to live in refugee camps and cities with little or no means of survival therefore, making them more vulnerable to abuses (especially sexual abuse) than their male counterparts.¹¹⁷

Root Causes

Impoverishment as a result of the NSP and creation of Black Market

The government of Eritrea is deemed to be involved in practicing a contraband economy whereby, the economy is managed without a budget, a central Bank and a statistics bureau. Therefore, the economy is firmly under the control of the president and his party who oversees the various companies that are involved in construction and other areas operating firmly within the framework of the government and his allies.¹¹⁸

Furthermore, in a deliberate policy to promote the impoverishment and indirectly the NSP, the Eritrean government under the auspices of its president does not allow the citizens of Eritrea to earn income by their own means so that, everyone is doing national service under the NSP. In addition, family members of children who escape the country are fined. Those who work under the NSP earn meager salaries that they can barely survive on thereby, being dependent on the government and having no recourse to oppose the government. Technically, it is a planned system set to rub the youths and individuals of free will and ambition as their hopes tends only toward making it through the day.¹¹⁹

As a consequence of the low earnings of government officials and under the NSP, there is room for corruption and control as these officials and other citizens engage in illegal activities including smuggling and human trafficking while the government and the judiciary turns a blind eye. Another consequence is that the complete ban on import has fostered “illegal cross- border trade carried out with the full knowledge and participation of the government, its officials and the military.”¹²⁰

Lastly, It is illegal to have small businesses or farms and the thriving businesses have been monopolized by the government resulting in the creation of black markets as any business survival is determinate on the backing of the government due to “continuous intervention and monopolization of import and export channels.”¹²¹

Trafficking Facilitated By Information and Communication Technologies

Eritreans are not allowed to travel out of the country without permit meanwhile it is extremely difficult to officially obtain such a permit. Therefore people resort to smugglers to be able to get out of Eritrea through the borders and Refugees in this border are greatly tortured.¹²²

¹¹⁵ Id. 226

¹¹⁶ Id.226-227. In one instance, a girl of 16 was imprisoned and tortured to the point of death for information on the whereabouts of her father. In another instance, the woman was beaten to an extent she was later confirmed by a doctor to be unable to bear children as a result of damage to her womb for the severe beatings she got while imprisoned.

¹¹⁷ Id. 222-223

¹¹⁸ Id at 21

¹¹⁹ Id. 22,23

¹²⁰ Id. 26

¹²¹ Id.

¹²² Id. 28,29

The smugglers engaged in this illegal trade are mainly Eritreans who are struggling to survive and have a good knowledge of the Eritrean-Ethiopian border well. There are also smugglers from Eritrea to Sudan who are more refined, operating through family networks, utilizing information and communication technologies (ICTs). The traffickers give their victims numbers and these numbers are used in smuggling in them and also for demanding ransoms when they are abducted.¹²³

The Sinai trafficking organization is deemed to have specific agents throughout the world, operating from different locations; Khartoum, Asmara, Libya, Cairo, Israel etc, through their embassies and agents.¹²⁴

Mass Detention and Torture of Youths

The genesis of human trafficking resulting from illegal migration through smuggling can be traced back to the Eritrean-Ethiopia War of 1998-2000¹²⁵ as, this war led to the application of the mandatory NSP policy which has been in place since 1994, by the Eritrean government. In 2001, the situation deteriorated as certain government officials were targeted and detained in prisons for criticizing the government, also, five thousand university students were equally arrested after they demanded for an increase in the amount allocated for a summer work program which was not sufficient for their sustenance. They were instead accused of siding with the earlier arrested government officials and detained in notorious military prisons where they lived for two months in "iron sheet barracks,"¹²⁶ subjected to harsh temperatures of an average of 38 degrees centigrade and two students died from sudden change in temperature as they were taken to stream to cool off after a day also, they had nothing to eat but canned food. As punishments, they were made to walk for two hours to collect stones to fill up a "1 by 2 by 6 meter-long rectangular tubes."¹²⁷ Some of these torture methods used in the detention camps brutal beatings, tying up prisoners in suspended positions till their limbs are paralyzed, electric shock to genital torture, rape and sex slavery and hard labor.¹²⁸

Children were not left out of the mass migration/human trafficking as a result of the NSP program. Minors are being detained for trying to escape Eritrea and the NSP. These minors are motivated to embark on this dangerous journey through Ethiopia, Libya, Sudan and Egypt as result of their parents, siblings or relatives being drafted into the NSP indefinitely or detained and also reported cases of minors being forcefully conscripted especially those caught trying to leave the country. These minors do not want to join the military hence they flee.¹²⁹

As the journey on the Sinai progressed from Eritrea, Sudan to Egypt, an erstwhile safe passage can gradually metamorphose into abduction and eventual trafficking.¹³⁰ These victims of circumstances seeking safe passage to refugee camps in Ethiopia or Sudan soon find themselves being sold into a journey to the Sinai and ultimately Israel, a journey they never bargained for.¹³¹ They are traded like mere commodities whose price increase as more efforts such as protection money, logistics, transport are put in to get them to the destination. The authors noted that this trend did not occur with other trafficked victims from Ethiopia or Sudan but rather only to Eritreans which gave away the suspicion that the Eritrean government is a participant in this illicit trade.¹³²

In an instance when 72 two escapees from the their torturer and abductors were crossing the border, they were spotted by the Egyptian border military who shot at them but unfortunately, 2 did not make it as they were women and one was pregnant at the time and could not jump the face. The whereabouts of the women are not known till date. They are claimed to either be imprisoned or killed during the shooting.¹³³

¹²³ Id.30

¹²⁴ Id.

¹²⁵ Id.98,99

¹²⁶ Id.100

¹²⁷ Id.110

¹²⁸ Id.113,114

¹²⁹ Id. 197

¹³⁰ Id. 39

¹³¹ Id. 39-42

¹³² Id. 55-59

¹³³ Id. 72-73

Sexual Violence Against Eritrean Women

Eritrean law provides that women from age eighteen to forty-seven engage in the NSP and some of the women were subjected to sexual abuse and harassment. Female conscripts are used as sex objects and forced to perform sexual services for military commanders through “threats of heavy military duties, harsh postings, and denial of home leave.”¹³⁴ Refusal to submit to sexual exploitation and abuse is allegedly punished by detention, torture and ill-treatment, including exposure to extreme heat and limitation of food rations. No effective mechanism for redress or protection exists within or outside the military, and perpetrators generally go unpunished.¹³⁵ When they become pregnant, they are discharged from the military and then have no other option but to embark on illegal journey from Eritrea with no means of support.¹³⁶ Also, some women have been jailed with their children-age 3-5 or younger for not having anyone to look after the children so they can join the NSP. Girls below 18 have been held in the camps without being posted to any unit/department or ministry and some of these women have spent more than a year in the camps under inhuman and degrading conditions.¹³⁷

Forced to engage in an illegal journey out of Eritrea, either through Sudan to Uganda or Libya to Egypt, Eritrean women and girls find it more difficult as they have to take safety measures-condoms and birth control shots because sexual violence is an expected occurrence and it was indeed experienced along the way either from the smugglers, traffickers or fellow travelers.¹³⁸

For those that journey through Libya, they were abducted and sold by ISIS fighters. The authors’ noted that it is difficult to find many cases on women abductees by ISIS because they are difficult to contact and even when they are contacted, they find it hard to relate their experiences due to trauma. These women are abducted and bought in large numbers (as high as 68), for the purpose of marrying and rendering sexual services to ISIS fighters but first, they are forced to convert from their orthodox Christian religion (common in Eritrea) to Islam.¹³⁹

For those that journeyed through Sudan to Uganda, they were equally faced with sexual abuse along the way and in one instance; the Eritrean woman was raped in the forest by her Eritrean companion while proceeding on foot to Kassala in Sudan with the ultimate goal of getting to Uganda.¹⁴⁰

One would expect the plight of this women to have reached conclusion on getting to their desired destination but that is not to be as in one instance, on going through and surviving a tortuous and traumatic journey to Israel, she was deceived by a doctor who told her she had colon disease and needed to take injections for seven days but later discovered after the arrest that those injections were to purposely Eritrean women sterile and she was indeed diagnosed among other 17 women to be unable to have children.¹⁴¹

Eritrea’s Laws For the Protection of Women

Eritrea ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1995 and afterwards, translated it into the local language.¹⁴² However, Eritrea is not a party to the Optional Protocol, which grants individuals the right to submit complaints to and for the Committee on

¹³⁴ US Department of State, Eritrea: Sexual Abuse of Women In the Military, Supplemental List of Supporting Documents, (Apr.18,2020,04:04) http://www.makeeverywomancount.org/images/stories/documents/USDepartmentofState_EritreaAbuseOfWomenInTheMilitary_2009.pdf, at 2

¹³⁵ Id. at 3

¹³⁶ Reisen and Mawere, supra note 106 at 196,

¹³⁷ Id. 197

¹³⁸ Id. 180

¹³⁹ Id. 182

¹⁴⁰ Id. 233

¹⁴¹ Id. 263

¹⁴² United Nations, Eritrea: The Implementation of the Beijing Platform for Action and the Outcome of the twenty-third Special Session of the General Assembly (April 18, 2020, 09:58PM) <https://www.un.org/women-watch/daw/Review/responses/ERITREA-ENGLISH.pdf>, at 3

the Elimination of Discrimination against Women to hear such complaints, and to “conduct inquiries into grave systematic violations of women’s rights.”¹⁴³

Also, the Eritrean government has failed to sign the Convention Against Torture even though it has ratified the International Covenant on Economic, Social and Cultural Rights (April 2001), the International Covenant on Civil and Political Rights (January 2002), and the International Convention on the Elimination of All Forms of Racial Discrimination (August 2001).¹⁴⁴

Furthermore, the Eritrean Constitution, ratified in 1997, guarantees equal rights for women and men through the interpretation of its constitutional language in Article 5, the protection of women’s rights in Article 7, Sub-article 7.2 which proclaims: “Any act that violates the human rights of women or limits or otherwise thwarts their role and participation is prohibited”¹⁴⁵ and the prohibition of discrimination on the basis of sex under article 14, and equality in family life in Article 22. However, despite these strong de jure protections, “the government applies these laws in an unbalanced way, resulting in inadequate protection of women’s rights, because of deeply entrenched cultural attitude towards women and an ineffective judicial system.”¹⁴⁶

Meanwhile, the constitution also makes it obligatory for every citizen to “complete one’s duty in the National Service” and the National Service Proclamation affirms that military service is compulsory for both males and females between the ages of 18 and 40. It is further reported that about 35% of the armed forces in Eritrea is female.¹⁴⁷

In addition, under the 2001 Labor Proclamation, the legal protection of women in employment was provided for and it states equal employment opportunity and maternity protection benefits for women. Article 65 concerning general protection measures provide: “Women may not be discriminated against as regards opportunity or treatment in employment and remuneration, on the basis of their sex. The Minister may, where a woman complains against discrimination pursuant to sub-Article hereof, decide whether there is discrimination on the basis of her sex. The Minister may, where he/she decides there is discrimination, order the employer concerned to rectify the situation. The woman or the employer may appeal against the decision of the Minister to the high court within fifteen days from the day they receive a copy of the decision.”¹⁴⁸

Lastly, with the drafting of most men into national service, more women had to step into the position of provider for the family, creating an increase in female-headed households. This situation made it more difficult to figure out ways to assist even more female-headed households to be self-supporting and with the government ban on independent NGOs from operating within Eritrea; the situation has become even more difficult for women to obtain the support that they need.¹⁴⁹

Therefore, one can see that existing laws do not help Eritrean women despite being beautifully coupled with the fact that government officials are often perpetrators of these abuses, most cases go unreported. An example is the peace processes with Ethiopia in June 2018 were all parties in the Eritrean delegation were men. According to Helen, this shows the extent to which women have disappeared from the social, economic and political scene of Eritrean society.¹⁵⁰

Digital Solutions To Eritrean Women Trafficking

Today, technology has been become so advanced and wide spread in the global arena that, it can no longer be considered a luxury but a necessity even in the poorest parts of the world. Mobile phones and

¹⁴³ Violence Against Girls in Eritrea: A Report to The Committee on the Rights of the Child (Apr.18, 2020, 10:22AM) https://www.omct.org/files/2004/07/2409/eng_2003_05_eritrea.pdf, at 200

¹⁴⁴ Id. 200

¹⁴⁵ United Nations, Supra note 140 at 2

¹⁴⁶ Violence Against Girls in Eritrea, Supra note 141 at 202

¹⁴⁷ Violence Against Girls in Eritrea, Supra note 141 at 213

¹⁴⁸ United Nations, Supra note 140, at 15

¹⁴⁹ Id.19

¹⁵⁰ Helen Kidan, From Empowerment During War, Eritrean Women Must Fight Gender Discrimination in a New Peace,(Apr.18, 2020, 10:48PM) <https://reliefweb.int/report/eritrea/empowerment-during-war-eritrean-women-must-fight-gender-discrimination-new-peace>

internet are necessary to stay in touch with people and stay informed of current happenings around the world, even for refugees and people migrating across borders.¹⁵¹

As in most parts of Africa, there are areas in Eritrea where ICT is largely absent and the use of technology devices is limited therefore, forming what is called a black hole meaning, people living in communities disconnected from the rest of the world.¹⁵²

Journalists in Eritrea have been forced into exile by the government and they set up networks in which news and information about happenings in Eritrea are spread. However, this does not go well for the Eritrean government which continues to crack down on these diaspora networks making sure to filter any information it deems improper. Therefore, ICT and interacting via mobile phones and internet is weak within Eritrea.¹⁵³

One of the resultant effects of living in a black hole is that when these Eritreans finally makes it into Ethiopia or any other neighboring countries and discover they have unrestricted access to ICT, they become triggered and motivated to keep on moving in search of a better place.¹⁵⁴

The solution is therefore creating awareness on how to get the proper information while utilizing ICT as it is easy for the few who are able to obtain a mobile phone for the first time to be easily misled by social media contents. Awareness cannot be accomplished without a change in the administration tactics of the current government. Trafficking in humans including that of women and children can be reduced if the women especially those in the black hole communities are well informed through social media, online seminars and conferences by neutral organizations not affiliated with the Eritrean government. Lastly, improvement in communication between the government and the people regarding the situation of things may help to stop the mass exodus and eventual human trafficking as a communication gap breeds mistrust and ICT is the perfect tool to build the perfect communication.

Implications and Conclusion

The Nevsun's case has ushered in a modern trend where corporate organizations can be held responsible for acts committed outside their home state. Whereas in the past, such actions were brought in using tort law, the Nevsun case came through the angle of public international law. This angle is likened to the *Alien Tort Statute* action under the US law except that Canada does not have a similar statute. Also, there is no precedent in Canada or in any other state in the world where a corporation has been held liable under civil law for acts committed against CIL.

The implications of the Supreme Court's decision in this case is the fear that due to the undefined nature of CIL- it is born from the usual practice of states and not encoded like treaties- if, it begets its own rule on business practices and human rights adherence, some fear it may put the emerging business and human rights practices into disarray.¹⁵⁵ However, the author of this research believes if there would be any disarray, it will be a positive one. Furthermore, due to the Nevsun case, corporations will give more thoughts and exert more effort in conducting human rights due diligence, making sure to cover all areas of international law including CIL.¹⁵⁶

Lastly, Nevsun case could usher in a legislation on mandatory human rights due diligence for corporations which has been enacted by France and is currently being considered by the EU. However, the ultimate implication of this case is that now claimants can bring actions against corporations for acts committed and falling under CIL.

¹⁵¹ Mirjam Van Reisen, Munyaradzi Mawere, Kinfe Abraha Gebre-Egziabher, Mobile Africa: Human Trafficking and the Digital Divide(Apr.18, 2020, 19:42) at 159

¹⁵² Id. at 161

¹⁵³ Id. at 163

¹⁵⁴ Id. at 164

¹⁵⁵ Atelier Aftab, "The Radical Implications of Nevsun: Corporate Responsibility and Liability under Customary International Law" https://atelieraftab.com/insight/the-radical-implications-of-nevsun-corporate-responsibility-and-liability-under-customary-international-law#_ftn2 accessed 10 May, 2020

¹⁵⁶ Ibid

References

- Abdi Latif Dahir, *Africa is Again the World Epicenter of Modern-Day Slavery*, <https://qz.com/africa/1333946/global-slavery-index-africa-has-the-highest-rate-of-modern-day-slavery-in-the-world/>
- Andrew Findlay, Canadian Mining Companies Will Now Face Human Rights Charges in Canadian Courts, <https://thenarwhal.ca/canadian-mining-companies-will-now-face-human-rights-charges-in-canadian-courts/>
- Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 (CanLII), <<http://canlii.ca/t/gv11z>>, retrieved on 2020-03-15. See also 408 DLR (4th) 383 — [2016] CarswellBC 2786 — [2016] BCJ No 2095 (QL).
- Atelier Aftab, “The Radical Implications of Nevsun: Corporate Responsibility and Liability under Customary International Law” https://atelieraftab.com/insight/the-radical-implications-of-nevsun-corporate-responsibility-and-liability-under-customary-international-law#_ftn2 accessed 10 May, 2020
- Canadian Human Rights Commission, *Human Rights In Canada*, <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada#:~:text=>
- Canadian Human Rights Commission, *Human Rights In Canada*, <https://www.chrc-ccdp.gc.ca/eng/content/human-rights-in-canada#:~:text=>
- Cornell Law School, Legal Information Institute, https://www.law.cornell.edu/wex/forum_non_conveniens
- Department of Justice, *International Human Rights Treaty Adherence Process in Canada*, <https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrd-didp/ta-pa.html>
- Department of Justice, *Roles and Responsibilities-International Human Rights Treaty Law*, <https://www.justice.gc.ca/eng/abt-apd/icg-gci/ihrd-didp/tl-dt.html>
- Emily f. Carasco, *International Law*, The Canadian Encyclopedia, <https://www.thecanadianencyclopedia.ca/en/article/international-law>
- Forced Labor Convention 1930, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEX-PUB:12100:0::NO::P12100_ILO_CODE:C029,
- General Assembly Resolution 217A,
- Global Slavery Index, <https://www.globalslaveryindex.org/2018/findings/global-findings/>
- Helen Kidan, From Empowerment During War, Eritrean Women Must Fight Gender Discrimination in a New Peace, <https://reliefweb.int/report/eritrea/empowerment-during-war-eritrean-women-must-fight-gender-discrimination-new-peace>
- Human Rights Watch, ‘2019 World Report’, <https://www.hrw.org/world-report/2019/country-chapters/eritrea>
- Jolane T Lauzon, *Araya v Nevsun Resources: Remedies for victims of Human Rights Violations Committed By Canadian Mining Companies Abroad*, (2018) *Revue Quebecoise De Droit International*. 168 CanLII Docs 10660, <https://www.canlii.org/t/xbx0> consulte le 16 March. 2020
- Kimberly Amadeo, *Command Economy, Its Characteristics, Pros and Cons*, <https://www.the-balance.com/command-economy-characteristics-pros-cons-and-examples-3305585>
- Malcolm Shaw, *International Law*, Encyclopedia Britannica, <https://www.britannica.com/topic/international-law>
- Matt Eisenbrandt, *Canada: Land Mark Slavery Case Against Mining Company*, <https://www.antislavery.org/canada-slavery-case-mining/>

Mirjam Van Reisen, Munyaradzi Mawere, Kinfe Abraha Gebre-Egziabher, *Mobile Africa: Human Trafficking and the Digital Divide*(Apr.18, 2020, 19:42) at 159

Mirjam Van Reisen and Munyaradzi Mawere et. al, *Human Trafficking and Trauma in the Digital Era: The Ongoing Tragedy of the Trade in Refugees from Eritrea*, Langa RPCIG, <file:///C:/Users/PC/Downloads/MawerevanReisen-HumantraffickingintheDigitalEra-2017-compressed.pdf>

Nevsun Resources Ltd. v. Araya, 2020 SCC 5, <https://www.canlii.org/en/ca/scc/doc/2020/2020scc5/2020scc5.html?resultIndex=14>

The Convention on the Suppression of Slave Trade and Slavery and Supplementary Convention on the Abolition of Slavery (1926), <https://www.refworld.org/docid/58c156dc4.html> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>, accessed 19 March 2020.

United Nations Human Rights Office of the High Commissioner, *Abolition of Forced Labour Convention, 1957* (No. 105) <https://www.ohchr.org/EN/ProfessionalInterest/Pages/AbolitionOfForcedLabourConvention.aspx>.

United Nations Human Rights Office of the High Commissioner, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

United Nations, *Eritrea: The Implementation of the Beijing Platform for Action and the Outcome of the twenty-third Special Session of the General Assembly*, <https://www.un.org/womenwatch/daw/Review/responses/ERITREA-ENGLISH.pdf>, at 3

United Nations, *Universal Declaration of Human Rights*, <https://www.un.org/en/universal-declaration-human-rights/>

US Department of State, *Eritrea: Sexual Abuse of Women In the Military*, Supplemental List of Supporting Documents, http://www.makeeverywomancount.org/images/stories/documents/USDepartmentofState_EritreaAbuseOfWomenInTheMilitary_2009.pdf, at 2

Violence Against Girls in Eritrea: A Report to The Committee on the Rights of the Child, https://www.omct.org/files/2004/07/2409/eng_2003_05_eritrea.pdf, at 2000