No. S-148932
Vancouver Registry

In the Supreme Court of British Columbia

Between

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

Plaintiffs

and

NEVSUN RESOURCES LTD.

Defendant

WRITTEN SUBMISSIONS OF THE PLAINTIFFS RE: DISMISS, STAY OR STRIKE PLAINTIFFS' CLAIMS BASED ON THE ACT OF STATE DOCTRINE AND STATE IMMUNITY

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INTRODUCTION

1. Nevsun seeks to avoid judicial scrutiny of its actions or inactions in regard to the alleged human rights abuses and common law torts asserted in the plaintiffs' Notice of Civil Claim by arguing that the claims are barred under the common law act of state doctrine.

2. In its application to dismiss, stay or strike the plaintiffs' claims based on the act of state doctrine and state immunity, filed August 12, 2015, Nevsun further asserted that the claims were barred by the state immunity doctrine. It has since abandoned that argument, although in its Chambers Brief it continues to cite to and rely on a number of cases decided under the *State Immunity Act*, RSC 1985, c. S-18 ("*State Immunity Act*" or "*SIA*"), which confers a statutory immunity on foreign states and is separate and distinct from the act of state doctrine.

3. The plaintiffs submit that this application to dismiss, stay or strike the plaintiffs' claims based on the act of state doctrine should be dismissed. The plaintiffs advance two main arguments in support of this submission.

4. First, the act of state doctrine has never been applied by a Canadian court and should not be applied in this case.

5. Second, if the act of state doctrine is adopted by this court, the plaintiffs' claims fall within well-established limitations on the doctrine:

   (a) the public policy limitation in cases of grave infringements of human rights or breaches of international law;

   (b) the "*Kirkpatrick*" limitation; and

   (c) the commercial activity limitation.

6. In response to Nevsun's Chambers Brief, the plaintiffs submit that Nevsun's argument is fundamentally flawed for the following reasons:

   (a) its description of the inquiries and conclusions required to adjudicate the plaintiffs' claims are both factually and legally incorrect, and wildly exaggerated; and

   (b) it places undue reliance on Canadian cases decided under the *State Immunity Act* and conflates the two doctrines throughout its submissions.

7. Finally, Nevsun repeatedly references the plaintiffs' Application Response re Forum and alleges that certain of the plaintiffs' submissions in that unique context run counter to the act of state doctrine. An example of this is found at paragraph 77 of Nevsun's Chambers Brief, where it states that the plaintiffs claim Eritrea's laws are "incoherent, illegitimate and meaningless" (see also Nevsun's Chambers Brief, para 167). The Plaintiffs' submissions on the *forum non conveniens* motion are directed at establishing that Eritrea is not an adequate forum for the conduct of this action. The act of state doctrine does not apply to the *forum non conveniens* application – nor has Nevsun suggested in its Application re Forum Challenge that the act of state doctrine prevents the court from undertaking the *forum non conveniens* analysis.

FACTS

8. The plaintiffs are Eritrean refugees who allege that they and other Eritrean nationals were forced to provide labour during the construction of the Bisha mine, a gold and copper mine which is majority owned by the defendant, Vancouver based mining company Nevsun Resources.

   Notice of Civil Claim ("NCC"), paras 5-7.

9. The plaintiffs allege that they were conscripted into the Eritrean National Service Program and then forced to provide labour to two for-profit construction companies which were engaged by Nevsun and/or its Eritrean subsidiary, the Bisha Mining Share Company ("BMSC"), for the construction of the Bisha Mine.

NCC, paras 27, 36 – 41.

10. The Bisha mine is a large, high-grade gold, copper and zinc deposit located 150km west of Asmara, Eritrea. Nevsun and the State of Eritrea, through the Eritrean National Mining Corporation ("ENAMCO") are engaged in a commercial enterprise for the common purpose of developing and exploiting the Bisha mine.

NCC, paras 21-22.

11. Development of the Bisha mine commenced in early 2008. The mine was commissioned in the fourth quarter of 2010 and commercial production commenced in the first quarter of 2011. Since February 2011, the Bisha mine has produced revenues of approximately $1.6 billion and net income of approximately $645 million. Approximately $250 million of net income has been paid to ENAMCO.

NCC, paras 28-29.

12. The focus of the plaintiffs' claims is whether Nevsun is liable under customary international law as incorporated into the law of Canada, or domestic British Columbia law, for the use of slavery, forced labour and related abuses at the Bisha mine.

13. The plaintiffs advance claims based on both traditional torts and on the basis of customary international law as incorporated into the laws of Canada.

NCC, paras 76 – 98.

14. In particular, the plaintiffs allege that forced labour, slavery, torture, cruel, inhuman or degrading treatment and crimes against humanity are prohibited under international law. These prohibitions are *jus cogens* or peremptory norms

of customary international law which are incorporated into and form part of the law of Canada. The plaintiffs' seek damages from Nevsun for breach of customary international law and *jus cogens*.

NCC, para 76.

15. The plaintiffs further allege that:

(a) The conduct of Segen, Mereb and the Eritrean military amounts to conversion, battery, unlawful confinement and intentional infliction of mental distress.

(b) Nevsun is directly liable for expressly or implicitly condoning the use of forced labour and the system of enforcement through threats and abuse by Segen, Mereb, and the Eritrean military.

(c) Nevsun is directly liable for failing to stop the use of forced labour and the enforcement practices at its mine site, which amounts to aiding and abetting Segen and Mereb's conduct.

(d) BMSC expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military, Segen and Mereb, and Nevsun is liable for the conduct of BMSC.

(e) Nevsun is vicariously liable for the conduct of Segen, Mereb and the Eritrean military at the Bisha mine site in furtherance of Nevsun's commercial objectives.

NCC, paras 77-90.

16. The plaintiffs' assert a civil conspiracy claim against Nevsun, BMSC, Segen, Mereb and the Eritrean military, alleging that they entered into an unlawful agreement for the supply of forced labour to the Bisha mine.

NCC, paras 94-98.

17. In addition, the plaintiffs advance a claim in negligence against Nevsun, on the basis that Nevsun owed a duty of care to the plaintiffs and breached that duty of care.

NCC, paras 91-93.

18. In its Response to Civil Claim, Nevsun states that, at all material times, SENET (the main engineering, procurement and construction management contractor on the Bisha mine project) and all other contractors and subcontractors providing services to BMSC or SENET in connection with the Bisha mine were required to refrain from employing Eritrean National Service personnel on extended service. They were required from otherwise using forced labour to perform services. They were also required to refrain from violence, crime or abuse, and to comply with BMSC's corporate policies, which prohibited such conduct.

Response to Civil Claim filed February 13, 2015, para 12.

The factual inquiry required

19. A proper reading of the pleadings establishes that the focus of the plaintiffs' claims is Nevsun's liability for complicity in the human rights abuses alleged to have been perpetrated by Segen, Mereb, and the Eritrean military in the specific context of the use of slavery and forced labour at the Bisha mine.

20. In order to adjudicate the plaintiffs' claims, this court would be required to conduct a factual inquiry into what occurred at the Bisha mine. This inquiry would determine whether the alleged human rights abuses, particularly slavery and forced labour, occurred (and/or whether the torts of conversion, battery, unlawful confinement and intentional infliction of mental distress occurred). The conduct of BMSC, SENET, Segen and Mereb would be the primary focus of this inquiry, although the conduct of the Eritrean military will be relevant if it is established, as the plaintiffs allege, that the Eritrean military participated in the conduct alleged in the NCC.

21. If it is established that some or all of the human rights abuses and/or the alleged tortious conduct occurred, the inquiry would examine the conduct alleged in the NCC as the basis for Nevsun's liability.

NCC paras 76, 83-84, and 93.

22. The question of the validity of the Eritrean Labour Proclamation or the National Service Program is not a question that this court is required to consider in order to adjudicate the plaintiffs' claims.

23. If Nevsun chose to rely on the legislative and executive policy underlying Eritrea's National Service Program as a defence to the finding that forced labour occurred at the Bisha mine, the act of state doctrine does not prevent this court from declining to apply the Labour Proclamation as a matter of Canadian public policy. The application of the act of state doctrine in this manner would be contrary to binding Canadian authority.

***Hunt v. T&N, plc*, [1993] 4 S.C.R. 289; *Laane & Baltser v. Estonian S.S. Line*, [1949] S.C.R. 530; *Metaxas v Galaxias (The)*, [1989] 1 FC 386, para 46.**

24. Nevsun places significant emphasis on the plaintiffs' torture and crimes against humanity claims, stating that both claims require proof of some form of state conduct. This is not correct. Only torture requires state conduct.

Chambers Brief of the Defendant Nevsun Resources Ltd., to Dismiss or Stay Plaintiffs' Claims Based on the Act of State Doctrine ("Nevsun's Chambers Brief"), paras 26, 27-28, 149

25. Torture requires the intentional infliction of pain or suffering "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." The claim therefore requires, at a minimum, that the plaintiffs establish that an Eritrean official "acquiesced" in the torture.

26. Crimes against humanity require that the enumerated conduct, such as enslavement or torture, be committed as part of a widespread or systematic attack directed against a civilian population. Under the terms of the Rome Statute, an "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts against any civilian population,

pursuant to or in furtherance of a State or organizational policy to commit such attack. Non-state actors may be guilty of crimes against humanity.

***Kadic v Karadzic*, 70 F 3d 232 (2d Cir 1995)**

27. The plaintiffs' conspiracy claim would require proof that the State of Eritrea entered into an agreement for the supply of forced labour to the Bisha mine.

28. The conduct of the State of Eritrea as exercised through the Eritrean military at the Bisha mine site forms part of the basis of the plaintiffs' claims. The claims are consistent with the evidence provided by the plaintiffs and the plaintiffs do not intend to "disavow" the claims as pleaded. In the plaintiffs' submission, if this court adopts the act of state doctrine, this case falls squarely within the exception to the doctrine recognized in cases of grave infringements of human rights, the Kirkpatrick exception and the commercial activity exception.

29. This summary is intended to give the court an understanding of the nature and extent of the inquiry into the conduct of the State of Eritrea and the Eritrean military that will be required in order to adjudicate the plaintiffs' claims. The summary should be sharply contrasted with the inaccurate and exaggerated framing of the inquiry found in Nevsun's Chambers Brief.

Additional Facts

Canada's relations with Eritrea

30. The Embassy of Canada to Sudan, in a document titled "Canada-Eritrea Relations" states that: "Canada remains concerned about Eritrea's human rights situation, particularly with regard to the respect for democracy and the rule of law, the imprisonment or ill-treatment of political opposition and journalists, and the protection of civil liberties"

Affidavit #4 of Lise Carmichael-Yanish, made November 27, 2015, ("Carmichael-Yanish #4"), Exhibit "2", p. 6.

31. In testimony given in March 2015 before the House of Commons Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and

International Development, the Canadian Ambassador to Eritrea, Mr. Dominique Rossetti, stated:

> I would like to begin by underlining that the human rights situation in Eritrea remains a serious concern for Canada. As one of the most closed countries in the world, Eritrea remains resistant to external actors, which makes access and obtaining information a challenge. However, human rights violations in Eritrea have been widely reported and documented over the years, by the UN, Human Rights Watch, and Amnesty International, among others.
>
> Most commonly cited human rights transgressions include mandatory, and, in some cases indefinite, military conscription; forced labour; arbitrary arrest and detention, including of journalists and civil servants; lack of freedom of expression, conscience, and movement; and repression of religious belief and expression. Further, Eritrea lacks a functioning legislature, independent judiciary, and independent press. Non-governmental organizations are highly restricted, and as a result are very few in number. ...
>
> In light of the dire situation on the ground, including the economic situation, it is no surprise that many Eritreans risk their lives to escape the country. ...

Carmichael-Yanish #4, Exhibit "3", p.9.

32. Mr. Rossetti also noted that in 2014, during Eritrea's universal periodic review at the United Nations Human Rights Council, Canada called on Eritrea to "[i]mmediately end the practice of indefinitely extending military service, a system which amounts to forced labour."

Carmichael-Yanish #4, Exhibit "3", p. 10.

33. The House of Commons Subcommittee is conducting an investigation into Eritrea's human rights practices, and has conducting a number of hearings addressing the topic.

International investigation of human rights abuses in Eritrea

34. The investigations by the United Nations Special Rapporteur and the United Nations Commission of Inquiry are reviewed in detail in the Plaintiffs' submissions on *forum non conveniens* and will not be repeated here.

35. In summary, the United Nations Human Rights Council, through investigations conducted by the Special Rapporteur and the Commission of Inquiry found extensive evidence of widespread human rights abuses by the Eritrean state against its citizens.

36. The Commission of Inquiry stated the following about the system of indefinite National Service and the use of giffas (sweeps) to round up conscripts:

> 1383. The Commission considers that the practices documented in the context of national service, starting with the enrolment of conscripts, conditions and treatment during military training and service, up to the lack of formal release from national service demonstrate patterns of systematic human rights violations. The Commission believes that these violations are imputable to the Government of Eritrea, which has established and endorsed these practices carried out by military officers of the Eritrean Armed Forces. In addition, the Commission considers that the lack of investigation, prosecution and punishment by the Government of Eritrea of those practices or violations that result from individual initiatives constitute a breach of its obligation of due diligence under international human rights law....
>
> 1386. The Commission considers that the widespread practice of giffas, which are conducted randomly, in an indiscriminate manner and often with excessive force, constitutes a violation the right to liberty [sic] and security of the person. Furthermore, persons who are forcibly taken during a giffa are denied their right to challenge the legality of their recruitment and related deprivation of liberty. The killing of a person in the context of giffa as a result of the excessive use of force constitutes a violation of the right to life, which is imputable to the Government of Eritrea, as giffas are carried out by State officials in their official capacity. When these giffas include the forced entrance and search of private homes, they also constitute a violation of the right to privacy.
>
> **Affidavit of Lise Carmichael-Yanish #3, p. 1708**

37. These findings are in stark contrast to Nevsun's description of the National Service Program at paragraphs 39 to 50 of its Chambers Brief. The vast majority of the description Nevsun provides is irrelevant, particularly on this application. If Nevsun intends to argue that the National Service Program is a legitimate exercise of Eritrea's legal and executive authority and therefore operates as a defence to the plaintiffs' claims, the plaintiffs will argue that a law or policy that purports to legalize slavery or forced labour will not be recognized by a Canadian

court. However, that argument has not been raised and it would be premature to address the issue in the context of this application.

Canadian court and tribunal findings regarding the conduct of the State of Eritrea

38. Canadian courts and tribunals are routinely called upon to assess country conditions in Eritrea and in so doing regularly make findings that the Eritrean regime has committed forced labour, slavery, torture, and crimes against humanity.

39. For instance, the Immigration and Refugee Board (IRB) is the federal administrative tribunal that is responsible for adjudicating, among other things, refugee protection claims filed in this country. Claimants have extensive procedural rights, including the right to an oral hearing, the right to counsel, and the right to appeal. The IRB also issues reasons for decision, many of which are published in reporting services such as CanLII, Westlaw, and QuickLaw.

40. The IRB adjudicates many claims from Eritrea. It frequently makes findings that the Eritrean regime is responsible for acts of forced labour. For instance:

    (a) The IRB decision in RPD File No. TB4-08209 makes the finding that: "Eritrea is known to be one of the most repressive regimes in the world where detention, torture and forced labour await anyone who disagrees with the government."

    Affidavit #1 of Jared Will, made October 12, 2015, ("Will #1") Exhibit D, p. 44

    (b) The IRB decision in RPD File No. TB4-06809 makes the finding that: "the documentary evidence before me on country conditions establishes that the government of Eritrea has been forcibly conscripting and detaining Eritrean citizens in national service which is essentially a form of forced labour without pay, for arbitrary indeterminate periods and that it has been regularly perpetrating serious human rights abuses against those detained in national service..."

    Will #1, Exhibit C, p. 38, para 33

(c) The IRB decision in RPD File No. TB4-12586 makes the finding that: "Citizenship is equated with indefinite national service. Any citizen from 18 to 50 years of age has the obligation of carrying out national service. It is reported that National Service keeps most young Eritreans in perpetual bondage. After a six-month training period, conscripts are assigned to a year of military or civil work as part of their national service. They must work in any position or location assigned to them. If they are mistreated during service, there is no recourse to any outside authority. The initial period of 18 months is frequently extended indefinitely on minimal salaries that are inadequate to meet families' essential needs. They are used as forced labour in state projects, including agricultural production, and in private companies owned by military or ruling party elites. Conscripts face harsh penalties for evasion, including arbitrary detention and ill-treatment."

Will #1, Exhibit J, p. 79, para 22

41. The IRB has also found that the Eritrean regime is responsible for acts of slavery. For instance:

(a) The IRB decision in RPD File No. TB5-05263 makes the finding that: "in Eritrea the claimant will be subjected to indefinite national service that is a form of slavery."

Will #1, Exhibit O, p. 113, para 17

(b) The IRB decision in RPD File No. TB4-08300 makes the finding that: "military service in Eritrea is an indefinite type of military service which at times has been compared to slavery."

Will #1, Exhibit H, p. 65, para 10

42. The IRB also frequently makes findings that the Eritrean regime is responsible for acts of torture. For instance:

(a) The IRB decision in RPD File No. TB5-01001 makes the findings that: "Forcibly-returned asylum seekers were tortured as a form of punishment for perceived criticism of the government" and "security forces committed

human rights abuses and other abuses including killings, torture and other cruel treatment and arbitrary arrest."

Will #1, Exhibit K, p. 88, 89, paras 14, 16

(b) The IRB decision in RPD File No. TB4-01177 makes the finding that: "Those who return face arrest, torture, detention and other abuses at the hands of the Eritrean authorities."

Will #1, Exhibit G, p. 59, para 13

(c) The IRB decision in RPD File No. TB2-10420 makes the finding that: "Should they try to escape, they could be killed and if captured, would be imprisoned and likely tortured."

Will #1, Exhibit M, p.100, para 11

(d) The IRB decision in RPD File No. TB5-05887 makes the finding that: "the Eritrean government beats and tortures detainees imprisoned in violation of freedom of religion."

Will #1, Exhibit P, p. 119

43. The IRB has also found that the Eritrean regime is responsible for crimes against humanity. For instance:

(a) The IRB decision in RPD File No. TB3-00711 makes the finding that: "the Eritrean military has systematically committed war crimes and crimes against humanity on a widespread basis."

(b) The IRB decision in RPD File No. VB5-01354 makes the finding that: "there are well-documented, systematic, widespread and gross human rights violations perpetrated by the authorities of the Government of Eritrea and that these violations do constitute crimes against humanity."

44. Courts and tribunals in other countries have made similar findings, including in countries where the act of state doctrine forms part of the common law.

45. In *Nuru v. Gonzales,* the United States Court of Appeals for the Ninth Circuit makes the finding that: "Nuru was beaten and whipped "almost daily," bound nude in the desert sun in a most painful position, and deprived of adequate food and water, for 25 consecutive days, thereby causing him severe physical pain and suffering. The flesh on his back and the soles of his feet was ripped open. His urinary system was damaged and he had so many injuries that he could not move without assistance. The severe form of cruel and inhuman treatment to which Nuru was subjected by the Eritrean army falls well within the definition of torture set forth in the Convention." (Emphasis added)

***Nuru v. Gonzales*, 404 F.3d 1207 (9th Cir. 2005)**

46. In *Milat v. Holder*, the United States Court of Appeals for the Fifth Circuit makes the finding that: "the Eritrean National Service is a hybrid of traditional military conscription and a system of forced labor akin to slavery."

***Milat v. Holder,* 2014 WL 2782229 (5th Cir.)**

47. Similar decisions are found in the other jurisdictions: *NM (Draft evaders – evidence of risk) Eritrea*, [2005] UKIAT 00073 at para. 12; *MA (Female draft evader) Eritrea* [2004] UKIAT 00098 at paras. 23-24; *1103210* [2011] RRTA 382 at paras. 50, 54; and *0907135* [2009] RRTA 1082 at paras. 61-62, 66-67.

ARGUMENT

Rule 21-8(1) applications

48. Nevsun has brought this application under Rule 21-8(1) of the *Supreme Court Civil Rules*. As the act of state doctrine has never been applied by a Canadian court, it is not clear that this is the rule that would govern the application. Further, the authorities cited by Nevsun provide no guidance as to the admissibility of evidence or the burden of proof if this application proceeds under Rule 21-8.

49. The act of state doctrine "has been described variously as a doctrine of judicial prudence or deference, judicial restraint, judicial abstention, issue preclusion, conflicts of law and choice of law". It is no wonder then that "as a result of all this confusion, courts habitually misapply the doctrine".

Matthew Alderton, The Act of State Doctrine: Questions of Validity and Abstention from 'Underhill to Habib' (2011), 12:1 Melbourne J of Int'l L at page 2.

50. The proper characterization of the doctrine has implications for this motion. If it is not a rule of subject matter jurisdiction, the motion should not heard under Rule 21-8.

51. Nevsun's characterization of the act of state doctrine in its Chambers Brief further confuses the matter. It describes the doctrine as "a rule of non-interference", "a common law rule of subject matter competence", an "immunity", and a "prohibition on adjudication".

Nevsun Chambers Brief, paras 66, 67, 102.

52. Nevsun also refers to the "principle of non-intervention" at paragraph 4 of its Chambers Brief, and asserts that the Supreme Court of Canada has referred to the act of state doctrine as such. This is incorrect. The Supreme Court of Canada in *R v Hape* may have been referring to an international law principle but it was certainly not referring to the common law act of state doctrine. ***R v Hape*, [2007] 2 S.C.R. 297, 2007 SCC 26 [*Hape*].**

53. In the United States, the doctrine does not go to subject matter jurisdiction: "The act of state defense does not address the jurisdiction of the court and does not have to be considered by the court on its own motion."

Beth Stephens, International Human Rights Litigation in U.S. Courts, 2nd ed. (2008), at p. 349.

54. In both the UK and Australia, applications raising the act of state doctrine are decided on the pleadings, although some evidence appears to be admissible.

***Belhaj* v. *Straw*, [2014] EWCA Civ 1394 [*Belhaj*] para 7 and 103-113; *Habib v. Commonwealth of Australia*, [2010] FCAFC 12 [*Habib*], para 58.**

55. The general rule in Canada regarding statutes which seek to limit the jurisdiction of provincial superior courts is that "any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language." The Australian High Court has said, in reference to the act of state doctrine, that "[b]eyond the certainty that the doctrine exists there is little clarity as to what constitutes it". The plaintiffs submit that a common law doctrine which has "been almost universally regarded as one of uncertain content and application" cannot operate to deprive this Court of subject matter competency.

***Canada (Attorney General) v Telezone Inc.*, 2010 SCC 62, para 42; *Habib*, para 38; Alderton, p. 2**

56. The plaintiffs submit that the motion is properly considered under Rule 9-5 and not Rule 21-8. If Rule 9-5 governs this application is bound to fail as the act of state doctrine has never been recognized in Canada. It follows then that it cannot be plain and obvious that the plaintiffs' claims are bound to fail.

57. The balance of these submissions are directed to meeting the application as framed by Nevsun.

58. Nevsun relies on two lines of authority for its assertions regarding the admissibility of evidence and the burden of proof on its application under Rule 21-8 to stay the proceeding due to the operation of the act of state doctrine.

59. The first line of authority consists of two cases which are cited for the proposition that "proof of facts is necessary to determine whether the court has subject matter competence. While evidence is admissible, it is not appropriate for a litigant to attempt to turn a jurisdictional challenge into a mini-trial on a disputed, central question of fact on which jurisdiction turns." Nevsun clarifies that, "[t]hat, however, is not this case."

Nevsun Chambers Brief, para 63.

60. In *Goudie v Ottawa City*, the Supreme Court of Canada affirmed the Ontario Court of Appeal decision finding that the jurisdictional issue could not be dealt

with by way of a preliminary motion: "While it is the practice in Ontario for the motions court to receive limited evidence pertinent to the jurisdictional issue, it was not appropriate for the City to attempt to turn a jurisdictional challenge under clause 21.01(3)(a) into a mini-trial on a disputed, central question of fact."

***Goudie v Ottawa City*, [2003] 1 S.C.R. 141, 2003 SCC 13, p.154-155.**

61. In *Conor Pacific Group Inc v Canada (Attorney General)*, 2011 BCCA 403, the courts states that "[w]here there is an evidentiary conflict concerning jurisdictional facts, affidavit evidence is admissible to amplify the pleadings. The plaintiff bears the burden of proving that it has a good arguable case that the court has jurisdiction."

***Conor Pacific Group Inc. v Canada (Attorney General)*, 2011 BCCA 403, para 7.**

62. The application of this reasoning to this case is problematic for two reasons. First, it is not clear that there is an evidentiary conflict concerning jurisdictional facts. Second, Nevsun refers to the act of state doctrine as an immunity that "[l]ike all immunities.. operates to remove the subject of the immunity from the jurisdiction of the courts." This court has not held that the act of state doctrine applies to this case, therefore it has not operated to remove the "subject of the immunity" from this court's jurisdiction such that the burden would shift to the plaintiffs to prove that they have a good arguable case that the court has jurisdiction.

Nevsun Chambers Brief, para 67.

63. A related difficulty arises in trying to define the "subject of the immunity". Nevsun is certainly not the "subject of the immunity". The State of Eritrea is also not the "subject of the immunity" as it is not a defendant in this case. The subject of the immunity is potentially the facts in the pleading that require the court to investigate conduct alleged to have been committed by the Eritrean military, in which case the plaintiffs submit that even if that conduct is removed from the jurisdiction of the courts, the plaintiffs' claims against Nevsun in negligence and

arising from the acts of BMSC, Segen and Mereb are still properly within the jurisdiction of this court.

64. The second line of authority relied on by Nevsun consists of an Ontario case in which the court, applying the *State Immunity Act*, states that s.3(1) of that Act "creates a presumption that a foreign state is immune from the jurisdiction of Canadian courts. A court is obliged to give effect to that immunity, even where it has not been raised by the state." [Emphasis added]

***Bombardier Inc v AS Estonian Air*, 2014 ONCA 41, para 2 [*Bombardier*].**

65. Therefore, because of the presumption of immunity conferred on a foreign state by the *SIA*, a "party seeking to bring a foreign state before the court" by invoking an exception to the *SIA*, "cannot simply plead facts constituting a cause of action and then plead that those facts are commercial activity... It must provide an evidentiary record to enable a court to perform the necessary contextual analysis to determine that the state has engaged in commercial activity and that the proceedings relate to that activity." The party seeking to overcome the presumption of sovereign immunity bears the burden of proof.

***Bombardier, supra*, paras 5-7.**

66. Nevsun has framed these cases as cases where "the question of the court's subject matter competence is engaged by an immunity" and asserted that they are therefore applicable to this application.

Nevsun's Chambers Brief, para 64.

67. The case cited is better described as a case where the *State Immunity Act* conferred a "presumption that a foreign state is immune from the jurisdiction of Canadian courts."

***Bombardier, supra*, para 2.**

68. Nevsun is not a foreign state, and the act of state doctrine (if it is applied by this court) does not create a presumption that Nevsun is immune from the jurisdiction of the Canadian courts. In the absence of the presumption of immunity created

by the *SIA*, there is no basis on which to shift the burden of proof to the plaintiffs and it would be inappropriate to do so.

69. In *Equustek Solutions v Google Inc*, a case cited by Nevsun, Groberman J. states that "because provincial superior courts are courts of inherent jurisdiction, concerns of subject matter competence will arise in respect of them only when valid legislation serves to limit the inherent jurisdiction that would otherwise exists."

***Equustek Solutions v Google Inc.*, 2015 BCCA 265, para 58 [*Equustek*].**

70. Nevsun comments that the Court of Appeal clearly did not have in mind the present circumstances.The plaintiffs accept that this is probably true, although as Groberman J. was on the panel in the *United Mexican States* appeal, a decision released only six months prior, he was certainly aware of the act of state doctrine.

Nevsun Chambers Brief, para 103.

71. Groberman J.'s statement in *Equustek* is consistent with the Supreme Court of Canada in *Telezone*, where the court states that: "What is required at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language."

***Canada (Attorney General) v Telezone Inc.*, [2010] 3 S.C.R. 585, 2010 SCC 62, para 42.**

72. In this case, there is no clear and express statutory language. The plaintiffs submit that if this court adopts the act of state doctrine, and concludes that is it properly considered in an application under Rule 21-8(1), the burden is on Nevsun to establish that it clearly and expressly applies to the plaintiffs' claims.

The act of state doctrine in Canada

73. No Canadian court has applied the act of state doctrine.

***Crown Resources Corporation v National Iranian Oil Company*, 2006 CanLII 28334 (ONCA)[*Crown Resources Appeal*], para 31.**

74. In *Crown Resources*, the plaintiffs sought damages against the defendants as subsequent transferees of property located in Iran, which the plaintiffs said was confiscated in Iran by Iranian police. The defendants took the position that the act of state doctrine precluded Ontario from assuming jurisdiction over such claims.

***Crown Resources Corp SA v National Iranian Drilling Co* [2005] OJ No 3871 [*Crown Resources*], para 6.**

75. The plaintiffs argued that the defendants' reliance on the act of state doctrine was wholly misplaced and that no Canadian court has ever adopted the doctrine. The plaintiffs cited *Laane and Balster v The Estonian State Cargo & Passenger Steamship Line*, where the court declined to invoke the act of state doctrine, and argued that the court should decline to apply the act of state doctrine.

Crown Resources, supra*, para 82; *Laane and Balster, supra.

76. Greer J. of the Ontario Superior Court of Justice agreed with the plaintiffs and held that the act of state doctrine did not apply in the circumstances. In her view, it was appropriate to "look at what actually took place in the context of modern commercial business dealings, where parties expect that their commercial agreements will be abided by all parties, and not interfered with by any government authorities." The Court of Appeal held that based on its conclusions regarding the effect of a forum selection clause, the doctrines need not be considered.

***Crown Resources,supra*, paras 83-84; *Crown Resources Appeal, supra*,, para 31.**

77. In *United Mexican States v British Columbia (Labour Relations Board)*, the Court of Appeal case that Nevsun relies on for the proposition that the act of state doctrine forms part of the common law of British Columbia, the court states:

> [5] As I will explain, the doctrine of act of state may confer a subject matter immunity that will lead a court to decline to adjudicate matters involving the sovereign acts of foreign states even in circumstances where there is no state immunity under the [*State Immunity Act*].

***United Mexican States v British Columbia (Labour Relations Board)*, 2015 BCCA 32 [*United*], para 5.**

78. At paragraphs 38 to 48, the court refers to the analysis in the English Court of Appeal decision in *Belhaj v Straw*, *supra*, to reject Mexico's submission that the principle of indirect impleading under the *SIA* should be extended to incorporate principles drawn from the act of state doctrine.

***United, supra*, at paras 38-48.**

79. In its concluding remarks on the act of state doctrine, the court states:

> [50] This is not a case in which it is necessary to consider the scope or content of the act of state doctrine. I would say only this: I am not persuaded that the act of state doctrine has any application to the facts of this case.

***United, supra*, at para 50.**

80. In a recent case in PEI, *Dash 224 LLC v Vector Aerospace Engine Services-Atlantic Inc*, 2015 PESC 27, Campbell J considered the act of state doctrine in the context of a case involving the seizure of property in Colombia by the government of Colombia. Expressly confining his analysis on the act of state doctrine to cases involving the seizure of private property, he cites the rationale for the doctrine and folds it into an analysis of the *lex situs* rule (i.e. the law governing ownership of property is the law where the property is situated) before ultimately basing his finding on the *State Immunity Act*: "I conclude that the *State Immunity Act* immunizes the NPC and its property from the jurisdiction of this court unless the actions of the Government of Colombia or its agencies violate Canadian public policy."

***Dash 224 LLC v Vector Aerospace Engine Services-Atlantic Inc*, 2015 PESC 27 [*Dash SC*], para 30.**

81. The decision is ultimately based on the *State Immunity Act*: "No public policy reason has been shown for Canada to call into question the acts of the foreign state of Colombia taken within its own territory. The factual circumstances of this case fall clearly within the parameters of matters intended to be governed by the *State Immunity Act*."

***Dash SC, supra*, para 35.**

82. Leave to appeal has been granted in *Dash*. One of the arguments on appeal is that the *State Immunity Act* is a complete code which governs other issues such as the act of state doctrine.

***Dash 224 LLC v Vector Aerospace Engine Services-Atlantic Inc*, 2015 PECA 12 [*Dash CA*], para 10.**

83. The three cases cited above are the only Canadian cases that the plaintiffs have found that discuss the act of state doctrine. None of them apply the doctrine, and none of them consider the scope of the doctrine in Canada.

84. Nevsun refers to four Supreme Court of Canada cases as "adverting to" the act of state doctrine. The passages referenced by Nevsun are as follows:

(a) In order to preserve sovereignty and equality, the rights and powers of all states carry correlative duties, at the apex of which sits the principle of non-intervention.

Hape, supra, para 45.

(b) Issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process.

***Canada (Justice) v Khadr*, [2008] 2 S.C.R. 125, 2008 SCC 28 [*Khadr SCC*], para 21.**

(c) The passages cited in *Kazemi* are in the context of the court's interpretation of s.6(a) of the *SIA*. At paragraph 72, in support of its finding that the exception to state immunity in s.6(a) requires the tort causing injury or death to have occurred in Canada, the court states (in part): "It accords with the theory of sovereign equality to allow foreign states to be sued in Canada for torts allegedly committed by them within Canadian boundaries. As explored above, sovereignty is intimately tied to

independence. State independence relates to the exclusive competence of the State in regard to its own territory".

***Kazemi Estate v Iran,* [2014] 3 S.C.R. 176, 2014 SCC 62 [Kazemi], para 72.**

(d) It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did.

***Tolofson v Jensen*, [1994] 3 S.C.R. 1022 [*Tolofson*], p. 1052.**

85. The earliest of these cases, *Tolofson*, was decided in 1994. The act of state doctrine had existed in American and UK jurisprudence for decades prior to the decision. If the Supreme Court of Canada had intended to reference the doctrine, it would have done so by name. In any event, the Supreme Court of Canada in *Tolofson* was clearly concerned about a choice of law rule, and not a rule of subject-matter jurisdiction. Even in this context, the Court made clear that a breach of overriding norms of international law justifies a departure from notions of comity and territoriality:

> On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. [emphasis added]

Tolofson, supra.

86. *Hape* and *Kazemi* reference the international law principles which some courts have found to inform the act of state doctrine but the Supreme Court of Canada's consideration of those principles was in a completely different context.

87. Finally, *Khadr* notes only that "issues may arise" as to whether a Canadian court may "pronounce on the legality of the process" at Guantanamo Bay. The decision does not suggest, on any possible interpretation, that the court has even

contemplated the act of state doctrine, let alone concluded that it would prevent a Canadian court from doing so.

***Khadr, supra* at para 21.**

The State Immunity Act and the Act of State Doctrine

88. Nevsun refers to the principle of sovereign immunity throughout its argument, stating that the two doctrines are closely aligned and share common rationales. Sovereign immunity is a principle of international law that has been recognized in Canada and codified in the *State Immunity Act*. The *SIA* reflects Parliament's choices as to the scope of sovereign immunity in Canada.

89. The Federal Court has recently considered the *State Immunity Act* in *Khadr v Canada*. In that case, the applicant was a former Guantanamo Bay detainee who was seeking to expand his claim against the government to include a claim that Canada had conspired with the US to torture him and otherwise breach his rights. The Canadian government argued that the claim indirectly impleaded the US and thus the amendment should not be allowed because it was barred by the doctrine of state immunity.

***Khadr v Canada*, 2014 FC 1001 [*Khadr 2014*], para 29.**

90. The Federal Court rejected this argument, holding that a State would only be "impleaded" where "the resulting judgment could affect the foreign state's legal interests."

***Khadr 2014, supra*, paras 32, 35.**

91. Canada argued that the claim affected the US's legal interests. The Federal Court did not agree:

> [38] The Defendant fails to show how a potential judgment of this Court holding Canada liable in conspiracy might affect any legal interest of the U.S. government. There is no indication that such a judgment might impose any liability on the United States – a non-party to the action – and lead to enforcement against its assets. The ability of the United States to freely perform its sovereign functions would not be hindered in any way. While the Defendant suggests that a judgment rendered by this Court would influence judicial bodies in the United States, it does not explain

> how this might occur. Quite plainly, the Plaintiff could not ask any American court to enforce a judgment imposing liability on Canada against the United States. Nor could he present such a judgment as definitive proof of misconduct perpetrated by the American government before any U.S. court. If an American court were ever to rely on a finding made by this Court, it would be by choice. There is no way for this Court to usurp the jurisdiction of its American counterparts and impose binding conclusions upon them. [Emphasis added]

***Khadr 2014, supra*, para 38.**

92. The Federal Court continued:

> [39] The Defendant is correct that this Court would have to deem the conduct of U.S. officials unlawful in order to hold Canada liable under unlawful means conspiracy. However, it is well accepted that a court may evaluate the behaviour of a foreign state for purposes that do not affect its legal interests. Lord Denning explicitly held that this is permissible in Hammer No 2, above. Moreover, this Court routinely scrutinizes the behaviour of foreign states in refugee cases. To determine whether claimants are at risk of persecution or torture upon return, Federal Court judges often assess the likelihood that state agents might commit some of the most egregious international crimes against them, often by investigating the past behaviour of those states. [Emphasis added]

***Khadr 2014, supra*, para 39.**

93. The Federal Court's reasoning is applicable in this case. No legal interest of the Eritrean government will be affected and the ability of the Eritrean government to freely perform its sovereign functions will not be hindered in any way.

94. What Nevsun is asking this court to do, on the basis of a common law doctrine that has never been applied in a Canadian court, is to extend sovereign immunity beyond the scope of the *State Immunity Act*.

The act of state doctrine in the United Kingdom, Australia, and the US

95. The act of state doctrine, if applied in this case, would be applied on the basis of the articulation of the doctrine in the United Kingdom, Australia, and the United States.

96. The act of state doctrine has been described by legal commentators as "almost universally regarded as one of uncertain content and application, and criticised due to the inconsistent results it produces".

Matthew Alderton, The Act of State Doctrine: Questions of Validity and Abstention from 'Underhill to Habib' (2011), 12:1 Melbourne J of Int'l L at page 2.

97. Similarly, the Federal Court of Australia has commented that "[b]eyond the certainty that the doctrine exists there is little clarity as to what constitutes it."

***Habib, supra*, para 38.**

98. The law is far clearer as to the exceptions to the doctrine than the content of the doctrine itself: in the UK, Australia and the United States the act of state doctrine does not apply to claims against a corporation for complicity in human rights abuses.

Overview of the act of state doctrine

99. According to the English Court of Appeal, an act of state principle became firmly established in English law as of the House of Lords decision in *Buttes Gas and Oil Co v Hammer (No. 3),* [1982] AC 888, "it having been suggested that the earlier authorities in this jurisdiction were explicable on other grounds."

***Belhaj, supra*, para 52.**

100. In *Buttes Gas*, the House of Lords held that one version of the act of state doctrine consists "of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property."

***Buttes Gas, supra*, p. 931.**

101. Lord Wilberforce considered whether "there exists in English law a more general principle that courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of 'act of state' but

one for judicial restraint or abstention." He concluded that there was such a general principle.

***Buttes Gas, supra*, p. 931.**

102. In *Yukos Capital Sarl v OJSC Rosneft Oil Co (No. 2)*, , the court surveyed all of the cases on act of state in the House of Lords, Supreme Court and Privy Council since *Buttes Gas*, and concluded:

> [66] ... In sum, it seems to us that Lord Wilberforce's principle of "non-justiciability" has, on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle. It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances, such as in *Buttes Gas* itself, may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable.

***Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)*, [2012] EWCA Civ 855, para 66.**

103. The court stated that although the doctrine is often expressed in wide terms, it has its limitations, including:

(a) the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights, and

(b) the doctrine will not apply where the conduct of the foreign state is of a commercial as opposed to a sovereign character.

Belhaj, supra*, para 54, citing *Yukos Capital

104. The court in *Yukos* also held that in the modern world the act of state doctrine is defined by its "limitations" rather than "occupying the whole ground save to the extent that an exception can be imposed":

> [115] The important thing is to recognise that increasingly in the modem world the doctrine is being defined, like a silhouette, by its limitations,

> rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly commonplace to adjudicate or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters mentioned by Lord Steyn. That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law. The idea that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era.[Emphasis Added]
>
> ***Yukos*, supra, para 115.**

105. The Plaintiffs' submissions in this section will focus on:

(a) the rationale and scope of the public policy limitation on the act of state doctrine in the case of grave violations of human rights;

(b) the rationale and scope of the Kirkpatrick limitation on the act of state doctrine; and

(c) the rationale and scope of the commercial activity limitation on the act of state doctrine.

The public policy limitation

106. The act of state doctrine is not an absolute rule. It is established that the doctrine will not apply, on grounds of public policy, where there is a violation of international law or a grave infringement of fundamental human rights.

***Belhaj*, *supra*, para 81.**

107. *Oppenheimer v Cattermole* provides the initial formulation of the limitation on the act of state doctrine where there is a grave infringement of human rights. In a speech addressing the effect to be given to a Nazi law which deprived Jewish emigres of their status as German nationals, Lord Cross stated:

> A judge should, of course, be very slow to refuse to give effect to the legislation of a foreign state in any sphere in which, according to accepted principles of international law, the foreign state has jurisdiction. He may well have an inadequate understanding of the circumstances in which the legislation was passed and his refusal to recognise it may be embarrassing to the branch of the executive which is concerned to maintain friendly relations between this country and the foreign country in question. But I think - as Upjohn J. thought (see *In re Claim by Helbert Wagg & Co. Ltd.* [1956] Ch. 323, 334) - that it is part of the public policy of this country that our courts should give effect to clearly established rules of international law. Of course on some points it may be by no means clear what the rule of international law is. Whether, for example, legislation of a particular type is contrary to international law because it is "confiscatory" is a question upon which there may well be wide differences of opinion between communist and capitalist countries. But what we are concerned with here is legislation which takes away without compensation from a section of the citizen body singled out on racial grounds all their property on which the state passing the legislation can lay its hands and, in addition, deprives them of their citizenship. To my mind a law of this sort constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all. [Emphasis added]
>
> ***Oppenheimer*, [1976] AC 249 pp. 277H – 278C.**

108. In *Kuwait Airways Corp v Iraqi Airways Co (Nos. 4 and 5)* the House of Lords extended the exception in *Oppenheimer* beyond cases involving grave infringement of human rights to include cases of violations of international law.

> ***Kuwait Airways Corp. v Iraqi Airways Co (Nos. 4 and 5)*, [2002] AC 883 [*Kuwait Airways*].**

109. The facts in *Kuwait Airways* were as follows: Following the Iraqi invasion of Kuwait in August 1990, Iraq passed resolutions proclaiming the integration of Kuwait into Iraq. The Iraqi Government ordered the defendant, which was owned by the Iraqi state, to fly the claimants' aircraft to Iraq. In September 1990, an act of the Revolutionary Command Council of Iraq (Resolution 369) dissolved the claimant and transferred all of its property worldwide, including the ten aircraft, to the defendant. Lord Nicholls held that English courts may have regard to the content of international law in deciding whether to recognize a foreign law:

> In appropriate circumstances it is legitimate for an English court to have regard to the content of international law in deciding whether to recognize a foreign law. Lord Wilberforce himself accepted this in the *Buttes* case, at

p 931D. Nor does the "non-justiciable" principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain and, indeed, acknowledged.

***Kuwait Airways, supra,* para 26**

110. He then turned to the question of whether, as a matter of public policy, an English court should decline to recognize Resolution 369:

> [28] The acceptability of a provision of foreign law must be judged by contemporary standards. Lord Wilberforce, in a different context, noted that conceptions of public policy should move with the times: see *Blathwayt v Baron Cawley* [1976] AC 397, 426. In *Oppenheimer v Cattermole* [1976] AC 249, 278, Lord Cross said that the courts of this country should give effect to clearly established rules of international law. This is increasingly true today. As nations become ever more interdependent, the need to recognise and adhere to standards of conduct set by international law becomes ever more important. RCC Resolution 369 was not simply a governmental expropriation of property within its territory. Having forcibly invaded Kuwait, seized its assets, and taken KAC's aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait's existence as a separate state. An expropriatory decree made in these circumstances and for this purpose is simply not acceptable today. [Emphasis Added].

***Kuwait Airways, supra*, at para 28.**

111. As the English Court of Appeal noted in *Belhaj*, in *Oppenheimer* and *Kuwait Airways*, the violations of human rights and of international law were established beyond doubt. As a result, it was not necessary in either case for the court to conduct an investigation into the conduct of the foreign state.

***Belhaj, supra*, para 88.**

The public policy limitation in the United Kingdom

112. The English Court of Appeal recently engaged in a comprehensive review of the rationale and scope of the public policy limitation. In *Belhaj*, the court was concerned with allegations of violations of international law and human rights. The facts were not established and if the matter were to proceed to trial the facts would have to be investigated and determined by the court.

***Belhaj, supra*, para 89.**

113. At the outset of its analysis on the application of the public policy exception the Court of Appeal in *Belhaj* noted that public policy is not a constant. The court found that a striking shift in attitude had taken place in that jurisdiction towards judicial examination of the conduct of foreign states and their agents. The court listed a number of examples in support of this conclusion, including:

(a) Judges hearing asylum and deportation cases are daily called upon, as part of the process of assessing the risk to individuals, to determine whether foreign governments have violated human rights standards. Country guidance cases are replete with findings of human rights breaches by certain foreign states. Judges sitting in that jurisdiction are also frequently required to rule on whether other states have complied with their obligations of non-refoulement under international conventions.

(b) In cases concerning selection of forum, enforcement of foreign judgments or security for costs, judges often have to decide issues relating to the independence and integrity of the judiciary of foreign states.

(c) Section 134 of the *Criminal Justice Act* 1988 establishes a criminal offence of torture triable in this jurisdiction which may be committed by an official of a foreign state outside this jurisdiction. The section enabled the United Kingdom to become a party to the United Nations Convention against Torture. It is significant that Parliament has declared torture to be a crime contrary to the law of England and Wales wherever in the world it is committed and has no objection to the investigation and determination of such issues in criminal proceedings in this jurisdiction.

***Belhaj, supra*, para 91.**

114. The court also referred to a line of authority that demonstrates that when it is necessary to do so for the vindication of justiciable rights, courts will be under an obligation to decide issues of public international law. In *R (Abassi) v Secretary of State for Foreign and Commonwealth Affairs*, the court considered whether the legitimacy of executive action taken by a foreign state was justiciable. The

claimant, who was detained in Guantanamo Bay without access to a court or to legal advice, sought by judicial review to compel the Foreign Office to make representations on his behalf to the US Government or take other appropriate action.

***R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 [*Abbasi*].**

115. Lord Phillips M.R., delivering the judgment of the court, referred to the observations of Lord Cross in *Oppenheimer v. Cattermole* and continued:

> This passage lends support to Mr. Blake's thesis that, where fundamental human rights are in play, the courts of this country will not abstain from reviewing the legitimacy of the actions of a foreign sovereign state. A more typical support for this proposition can be derived from the exercise that the court has to undertake in asylum cases, where the issue is often whether the applicant for asylum has a well-founded fear of persecution if removed to a third country. In such circumstances consideration of the claim for asylum frequently involves ruling on allegations that a foreign state is acting in breach of international law or human rights. [emphasis added]

***Abbasi, supra*, at para 53.**

116. Having referred to *R. v. Home Secretary ex parte Adan* [2002] 2 WLR 143, Lord Phillips concluded:

> Although the statutory context in which *Adan* was decided was highly material, the passage from Lord Cross' speech in *Cattermole* supports the view that, albeit that caution must be exercised by this court when faced with an allegation that a foreign state is in breach of its international obligations, this court does not need the statutory context in order to be free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights.

***Abbasi*, *supra* at para 57.**

117. On the facts of *Abbasi* the Court declined relief, observing that it would not be appropriate to make the Secretary of State make any specific representations to the United States.

***Abbasi*, supra, para 107.**

118. The court in *Belhaj* continued its analysis with a review of the authorities in other common law jurisdictions. In relation to US law, the court cited the following passage in the American Law Institute, Restatement of the Foreign Relations Law of the United States (1987), Vol. 1, para. 444c:

> Applicability of act of state doctrine to cases not involving expropriation. The Sabbatino case involved a taking of private property, and the act of state doctrine has been applied predominantly to such acts, whether challenged by claims to title to the property taken or claims for compensation for taking. Challenges in United States courts to other types of acts by foreign states may also bring the doctrine into play. ... In general, whether a particular act of a foreign state not involving expropriation comes under the act of state doctrine depends on the extent to which adjudication of the challenge would require the United States court to consider the propriety of the acts and policies, or probe the motives, of the foreign government. A claim arising out of an alleged violation of fundamental human rights – for instance, a claim on behalf of a victim of torture or genocide – would (if otherwise sustainable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and contemplates external scrutiny of such acts. ...[Emphasis added]

***Belhaj, supra*, para 94.**

119. The court then discussed at length the decision of the Australian Federal Court of Appeal in *Habib v Commonwealth of Australia*, [2010] FCAFC 12 (discussed below).

120. The court concluded its analysis of the decision in *Habib* by noting:

> In this way a senior court in another common law jurisdiction has concluded, on facts which bear a striking resemblance to those in the present case, that this limitation to the act of state doctrine may be applied notwithstanding the need to investigate the conduct and to rule on the legality of the conduct of foreign states. [Emphasis added]

***Belhaj, supra*, para 102.**

121. In *Belhaj*, the respondents had filed a witness statement from Dr. Bristow, a senior member of the Diplomatic Service and current National Security Director within the Foreign and Commonwealth Office, in support of their contention that

the exercise of jurisdiction would "cause substantial damage to the international relations and the national security interests of the United Kingdom".

***Belhaj*, supra, para 103.**

122. This statement from Dr. Bristow was held to be an authoritative statement on behalf of the executive which has the conduct of foreign relations, and as such it was entitled to respect. The court set to one side "any consideration of embarrassment of the executive, which in our view would not be a proper basis for declining jurisdiction", to analyse the question of what weight, if any, should be given to representations concerning possible damage to the foreign relations and security interests of the United Kingdom.

***Belhaj, supra*, para 111.**

123. The court found that:

> while an approach based on deference to executive suggestion as to the likely consequences for foreign relations of the exercise of jurisdiction, capable of varying according to the issues raised or the foreign state concerned, may well be suited to the very different constitutional arrangements in the United States, it has played no part in the development of the act of state doctrine in this jurisdiction.
>
> ***Belhaj, supra*, para 113.**

124. Following this initial framework analysis, the court turned to the central issue for determination: whether this court should go beyond *Oppenheimer* and *Kuwait Airways* and apply the public policy limitation in a case where the court, if it exercised jurisdiction, would be required to conduct a legal and factual investigation into the validity of the conduct of a foreign state.

***Belhaj, supra*, para 114.**

125. After specifically finding that the "*ratio decidendi* of *Kuwait Airways* does not confine the limitation to cases where such an investigation is unnecessary", the court concluded that there were compelling reasons for concluding that the public policy limitation should be applied in the present case. The reasons are as follows:

First, a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place. ... These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.

Secondly, the allegations in this case - although they are only allegations - are of particularly grave violations of human rights. The abhorrent nature of torture and its condemnation by the community of nations is apparent from the participation of states in the UN Convention against Torture ... and from the recognition in customary international law of its prohibition as a rule of jus cogens, a peremptory norm from which no derogation is permitted....

Thirdly, the respondents in these proceedings are either current or former officers or officials of state in the United Kingdom or government departments or agencies. They are not entitled to any immunity before the courts in this jurisdiction, whether *ratione personae* or *ratione materiae*. Furthermore, their conduct, considered in isolation, would not normally be exempt from investigation by the courts. On the contrary there is a compelling public interest in the investigation by the English courts of these very grave allegations. The only ground on which it could be contended that there is any exemption from the exercise of jurisdiction in the present case is because of the alleged involvement of other states and their officials in the conduct alleged. Notwithstanding our view that the present proceedings would entail an investigation of the legality of the conduct of those foreign officials, the fortuitous benefit the act of state doctrine might confer on the respondents is a further factor supporting the application of this public policy limitation.

Fourthly, this is not a case in which there is a lack of judicial or manageable standards. On the contrary, the applicable principles of international law and English law are clearly established. The court would not be in a judicial no man's land.

Fifthly, the stark reality is that unless the English courts are able to exercise jurisdiction in this case, these very grave allegations against the executive will never be subjected to judicial investigation. The subject matter of these allegations is such that, these respondents, if sued in the courts of another state, are likely to be entitled to plead state immunity. Furthermore, there is, so far as we are aware, no alternative international forum with jurisdiction over these issues. As a result, these very grave

allegations would go uninvestigated and the appellants would be left without any legal recourse or remedy.

Sixthly, notwithstanding the evidence of Dr. Bristow that there is a risk that damage will be done to the foreign relations and national security interests of the United Kingdom, we do not consider that in the particular circumstances of this case these considerations can outweigh the need for our courts to exercise jurisdiction. For the reasons set out above, we consider that there is a compelling case in favour of these proceedings being heard in this jurisdiction. In this particular context, the risk of displeasing our allies or offending other states, and even the risk of the consequences of varying severity which it is said are likely to follow, cannot justify our declining jurisdiction on grounds of act of state over what is a properly justiciable claim.

***Belhaj, supra*, paras 114 – 120.**

The public policy limitation in Australia

126. Prior to the English Court of Appeal decision in *Belhaj*, the Federal Court of Australia held that the doctrine does not apply to a claim against government officials for aiding and abetting torture and other inhumane treatment by foreign officials.

127. In *Habib*, the applicant claimed civil damages against the Commonwealth for torts of misfeasance in public office and intentional but indirect infliction of harm, as a result of Commonwealth officials aiding, abetting and counselling his torture and other inhumane treatment by foreign officials when detained in foreign countries.

128. Jagot J. concluded that the court had both the power and a constitutional obligation to determine Mr. Habib's claim. She arrived at that conclusion by two distinct lines of reasoning. One turned on the status and effect of the Australian Constitution. Section 61 of the Constitution and the legislation having extra-territorial effect on which the claimant's allegations of unlawful conduct relied founded the jurisdiction of the court under Ch. III of the Constitution. A judge-made doctrine could not exclude that jurisdiction. The other was that the operation of the act of state doctrine did not, in any event, preclude judicial

determination of the claim.

Habib, supra.

129. It is the second line of reasoning that is relevant in this case.

130. The reasons of Jagot J. were concurred in by Chief Justice Black. Jagot J. considered the question of whether the act of state doctrine was engaged on the facts of the case. In doing so she conducted a review of the case law in the US, including the decisions in *Doe v Unocal Corp*, 395 F 3d 932 (9th Cir 2002) and *Sarei v Rio Tinto Plc*, 456 F 3d 1069 (9th Cir 2006). Both *Unocal* and *Rio Tinto* were cases in which the court refused to apply the act of state doctrine to bar claims against a corporation arising from involvement in alleged human rights violations. Jagot J. concluded that the "jurisprudence of the United Kingdom shows a similar development of principle."

***Habib, supra*, paras 91-97.**

131. Jagot J. then reviewed a number of decisions including *Oppenheimer*, *Kuwait Airways*, *Pinochet (No 1)*, and *Abassi* and found that these decisions show that a number of cases refer to the existence of a "public policy exception" to the act of state doctrine, and that such a limitation on the doctrine was not inconsistent with Australian authority.

***Habib*, supra, paras 98-109.**

132. In *Habib*, the Commonwealth sought to distinguish its case (in which Mr. Habib's allegations remained untested) from cases such as *Oppenheimer* and *Kuwait Airways* in which the violations of international law were clear. Jagot J. declined to give effect to the suggested distinction:

> However, the cases do not support a distinction between known and alleged violations. Moreover, there is no principled basis for such a distinction. As Mr. Habib submitted, there is no requirement apparent in the jurisprudence that the violations of international law and human rights alleged be "established at some indeterminate level of confidence at an interlocutory stage." This must be so. The effect of the Commonwealth's invocation of the act of state doctrine, if accepted, is to preclude the truth or otherwise of the allegations founding the claim from being tested and

> determined. The essence of the allegations founding the claim as ones involving grave breaches of international law and contraventions of Australian law, remain. As in *Kuwait Airways*, these legal parameters provide the standards necessary for judicial determination and place the present case in a category different from the "judicial no-man's land" apparent in the *Buttes* case (see, in particular, the reference by Lord Nicholls in *Kuwait Airways No 5* at [26] to the decision in *Buttes* turning upon "adjudication problems.") [Emphasis added]
>
> ***Habib, supra*, para 110.**

133. Jagot J. accepted Mr. Habib's submission that, if proved, his allegations would constitute grave violations of international human rights law. "The weight of the authority discussed above does not support the protection of such conduct from judicial scrutiny other than in the face of a valid claim for sovereign immunity."

***Habib*, supra, para 112.**

134. Chief Justice Black agreed with Jagot J., and added the following comments:

> Judicial consideration of the doctrine in Australia has been limited and conceptions of it in this country draw upon cases decided by the House of Lords and courts of the United States. The doctrine is commonly defined by reference to the observations of Fuller J in *Underhill v Hernandez* 168 US 250 (1897) at 252 that:
>
> > Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.
>
> I agree with Jagot J that the common law has evolved such that the authorities do not support the application of the act of state doctrine in the present case. If, however, the choice were finely balanced, the same conclusion should be reached. <u>When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another. [Emphasis added]</u>
>
> ***Habib, supra*, paras 6-7.**

135. In its discussion of the decision in *Habib*, Nevsun asserts that that the basis of Jagot J.'s decision was that "embarking on the inquiry would not offend

international comity." This is a inaccurate interpretation of Jagot J.'s analysis.

Nevsun Chambers Brief at para 125.

136. The Commonwealth advanced a number of arguments as to why the act of state doctrine applied. Jagot J. identified three difficulties with the Commonwealth's contentions. The first was that the development of the caselaw does not support their contentions. The second was that the considerations informing the content of the doctrine indicate that the dispute is justiciable in an Australian court. The third was that none of the case law directly on point was decided in Australia's constitutional and statutory context.

***Habib, supra*, para 90.**

137. In her discussion of the development of the caselaw, Jagot J. reached the conclusion excerpted above, that the cases do not support a distinction between known and alleged violations.

***Habib, supra*.**

138. Later in her reasons she discussed the considerations informing the content of the doctrine, and in particular the Commonwealth's submission that international comity is concerned not only with the content of the international consensus against torture but also the question of who may judge any contravention of that norm. She rejected that submission in the passage excerpted at paragraph 125 of Nevsun's Chambers Brief, although the full passage continues to state: "Insofar as judicial scrutiny might be thought to give rise to embarrassment to Australia's foreign relations, the Commonwealth disavowed any suggestion that Australian jurisprudence should adopt an approach of deference to the advice of the executive about the state of foreign relations from time to time [citations omitted]."

***Habib, supra*, at para 118.**

139. Jagot J. dedicates a total of two paragraphs responding to the Commonwealth's arguments regarding international comity. These paragraphs are not, as Nevsun

asserts, one of the two grounds on which her refusal to apply the act of state doctrine was based.

The public policy limitation in the US

140. In the United States, the act of state doctrine does not operate to bar judicial enquiry into human rights abuses:

> Thus, even assuming that torture or similar human rights violations could be deemed the public acts of a recognized foreign sovereign, the act of state doctrine would not preclude U.S. judicial review because such acts violate universally agreed upon legal principles. The Restatement (Third) confirms that the act of state doctrine does not preclude review of an act of a foreign state challenged under principles of international law not in dispute, emphasizing that courts "can decide claims arising out of alleged violations of fundamental human rights." In *Sarei v. Rio Tinto, PLC,* for example, the Ninth Circuit held that systematic racial discrimination constitutes a violation of a jus cogens norm and therefore could not constitute a sovereign act protected by the act of state doctrine.
>
> **Stephens, supra, p. 352**

141. The Ninth Circuit Court of Appeals has ruled:

> Rio Tinto argues that the act of state doctrine requires dismissal of Plaintiffs' claims. This argument also fails.... [J]us cogens norms are exempt from the doctrine, since they constitute norms "from which no derogation is permitted." Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 714 (9th Cir. 1992) (quoting the Vienna Convention on the Law of Treaties) (internal quotations omitted); see id. at 718 (holding a violation of a jus cogens norm is not a sovereign act). Thus, Plaintiffs' claims that allege jus cogens violations are not barred by the act of state doctrine
>
> ***Sarei v. Rio Tinto*, 671 F.3d 736, (9th Cir. 2011), at p. 757.**

<u>The Kirkpatrick limitation</u>

142. In this case, the only issue requiring adjudication is the factual issue of what the alleged perpetrators – Nevsun, BMSC, Segen, Mereb, and the Eritrean military – actually did.

143. In *WS Kirkpatrick Co Inc v Environmental Tectonics Corp International*, the court addressed the issue of whether the act of state doctrine bars a court from

entertaining a cause of action that does not rest upon the asserted invalidity of an official act of a foreign sovereign.

***Kirkpatrick Co. Inc. v Environmental Tectonics Corp International*, 493 US 400 (1989) [*Kirkpatrick*].**

144. In *Kirkpatrick*, the respondent was an unsuccessful bidder for a construction contract from the Nigerian government. The respondent sued under various federal and state statutes, alleging that the petitioners had obtained the contract by bribing Nigerian officials. The petitioners maintained that the suit was barred by the act of state doctrine.

145. The court held that nothing in the suit required the court to declare invalid and thus ineffective as a rule of decision for US courts the official act of a foreign sovereign and therefore the factual predicate for the application of the act of state doctrine did not exist.

***Belhaj, supra*, paras 69-71, citing *Kirkpatrick*.**

146. The court further explained that act of state issues only arise when "a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign."

***Kirkpatrick, supra*, para 10.**

147. The court in Kirkpatrick referred to the decision in *Sharon v Time Inc*, 599 F Supp 538 (SDNY 1984). In that case, the defendant published an article which contained a discussion of the Kahan Commission's findings and recommendations in relation to the deaths of Palestinian civilians in refugee camps during Israel's occupation of West Beirut. Ariel Sharon, who had been Minister of Defence for the State of Israel, sued for libel. The defendant, Time, pleaded that the act of state doctrine applied, arguing that the courts would be required to pass judgment on the validity of acts of the states of Israel and Lebanon.

***Belhaj, supra*, para 73, citing *Sharon*.**

148. The court held that the act of state doctrine was inapplicable for two reasons. First, Time did not allege that General Sharon acted with the authority of the State of Israel. It actually argued that he had exceed his authority. Second, the issues in the case did not require the jury to pass on the validity of the acts alleged. He held that the litigation did not involve a challenge to the validity of the state's conduct:

> no one is suggesting that these acts – by which Time claims Sharon condoned the massacre of unarmed non-combatant civilians – have validity in the sense that they cannot be attacked. All agree – Israel, the United States, and the world community – that such actions, if they occurred, would be illegal and abhorrent. The issue in this litigation is not whether such acts are valid, but whether they occurred.
>
> ***Belhaj, supra*, para 73, citing *Sharon*.**

149. The *Kirkpatrick* exception has been accepted by courts in the United Kingdom.

***Belhaj, supra*, para 69.**

150. The reasoning in *Sharon* and *Kirkpatrick* is applicable in this case. The question for the court is whether the alleged acts of slavery and forced labour at the Bisha mine occurred. If the acts did occur, there is no suggestion that Nevsun is arguing that slavery and forced labour are permissible under international law. If the defence was raised that the acts are legal under Eritrean law, Canadian choice of laws principles would govern the analysis of whether a Canadian court will apply a foreign law purporting to legalize slavery.

The commercial activity limitation

151. The commercial activity exception is another recognized limitation to the act of state doctrine:

> We turn to another exception to or limitation on the act of state doctrine, which is not in issue in this case, but which demonstrates the way in which caution needs to be maintained when considering how far broad statements of principle, made in another era when the doctrine of absolutely sovereign immunity held sway, still apply or extend in the modern world in which it is now accepted, as a matter of general

international law, that there is no immunity for the state's commercial activities. [Emphasis added]

***Yukos, supra*, para 92.**

152. In *The Playa Larga* the defendant to a claim in conversion was the Cuban state's sugar trading company. The goods in question were on the high seas and not within Cuban territory. The English Court of Appeal held that the act of state doctrine did not apply, but even if it did, "the conduct was not immune from the jurisdiction of the English Courts since its activity was trading rather than a government activity."

***The Playa Larga*, [1983] 2 Lloyd's Rep 171 (CA)**

153. The court in *Yukos* references *Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG*, another decision where the court applied the commercial activity exception to the act of state doctrine.

***Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG*, [2008] EWCA Civ 1355.**

154. Nevsun asserts that the "scope of the commercial activity limitation to the act of state doctrine is not entirely clear, but it is probably co-extensive with the common law commercial activity exception to state immunity."

Nevsun ChambersBrief, para 137.

155. The common law commercial activity exception to state immunity is now codified in the *State Immunity Act*:

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

***State Immunity Act*, s. 5.**

156. The SIA defines *commercial activity* as any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.

***State Immunity Act*, s.2**

157. Cases interpreting the commercial activity exception to the *SIA* have acknowledged that the state activity in question will often have a hybrid nature, therefore the acts should be assessed in context, considering both their nature and purpose.

***Re Canada Labour Code*, [1992] 2 SCR 50. p. 76.**

158. The two basic questions under s.5 are first, whether the acts in question constitute commercial activity and second, whether the proceedings are related to that activity.

***Bouzari v Islamic Republic of Iran*, 2004 CanLII 891 (ON CA) [*Bouzari*], para 52.**

159. In *Bouzari*, the court stated that "apart from their purpose, the acts of torture underpinning the appellant's action cannot be said to have anything to do with commerce."

***Bouzari, supra*, para 53.**

160. *Bouzari* was decided in a completely different factual context than this case. In *Bouzari,* the alleged acts of torture were only indirectly linked, by intent, to a commercial activity:

> The appellant believes that they [acts of torture] were committed with a purpose of affecting his involvement in the commercial activity of the South Pars project. Even if this is taken to include an intention to affect the commercial activity of Iran, that is not enough to turn the acts of torture themselves into the commercial activity of Iran. The acts of torture are related only by intention to the commercial activity of the South Pars project.
>
> ***Bouzari*, para 53.**

161. In contrast, the acts of slavery and forced labour alleged to have occurred at the Bisha mine are commercial in both their nature and their purpose.

162. In the United Kingdom, the courts ask whether the act in question could be performed by a private individual. The proper test is not what the state's objective is in performing the act, but whether the act could be performed by a private citizen.

***Kuwait Airways Corp v Iraq*, 2010 SCC 40, para 29.**

SUBMISSIONS

The act of state doctrine should not be adopted by this court

163. There are three Canadian cases that discuss that act of state doctrine. None of these cases apply the doctrine. The one case that contains some discussion of the doctrine, the PEI Supreme Court decision in *Dash*, correctly cites the decision in *Kuwait Airways* for the proposition that there is a public policy exception to the act of state doctrine, but then analyses the public policy exception in the context of the *State Immunity Act*.

***Dash SC, supra*, paras 31, 35.**

164. The appeal of the lower court decision in *Dash* raises the argument that the *State Immunity Act* is a complete code which governs other issues such as the act of state doctrine.

***Dash CA, supra*, para 10.**

165. The act of state doctrine has never been applied by a Canadian court and there is no precedent that requires this court to adopt it.

166. As demonstrated by the difficulty encountered by the highest courts in three common law countries in clearly defining its scope, the act of state doctrine is incoherent and unwieldy and its introduction into Canadian common law would raise significant conceptual difficulties.

167. Practical difficulties would arise as well. For instance, Nevsun acknowledges that the act of state doctrine, if introduced into Canadian law, would apply to

administrative tribunals.[1] As such, it would also apply to the determinations made by the IRB. The IRB is responsible not just for adjudicating refugee claims such as the ones cited above, but also for other determinations such as when a person is inadmissible to Canada on the grounds of having committed human or international rights violations.[2]

168. In order to make such determinations, the IRB is regularly called to sit squarely in judgment of the acts of a foreign government, and occasionally its legislation, and should not be constrained in doing so. See for instance, *Canada v. Saini,* [2002] 2001 FCA 311, where the Federal Court of Appeal expressly declined to give effect to a pardon granted by the President of Pakistan. The operative part of the decision is summarized in the headnote:

> (3) There will still be situations where Canadian immigration law must refuse to recognize the laws of close counterparts. There must be "some valid basis" or a "solid rationale" for not respecting the legislation of countries similar to ours. The seriousness of the offence can and should be considered under this third requirement. The crime of hijacking is universally condemned and severely punished. Aircraft hijackings not only jeopardize the safety of persons and property but also undermine the confidence of people throughout the world in the safety of civil aviation. They financially damage airlines and the economy as a whole. Terrorist hijackings exploit control over aircraft as weapons of psychological coercion and extortion against governments. The conviction was for an offence so abhorrent to Canadians, and arguably so terrifying to the rest of the civilized world, that the Court was not required to respect a foreign pardon of such an offence.

169. Even if the act of state doctrine was somehow adopted in Canada on the basis that it would not apply to the IRB, it would be illogical and unjust to have some courts and tribunals in this country investigating and making such findings while other courts were prohibited from doing so.

170. Parliament has considered the extent of the immunity conferred on foreign states in Canadian courts, and enacted the *State Immunity Act* to articulate what it

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[1] The case Nevsun cites to argue that the act of state doctrine forms part of Canadian law, *United Mexican States*, is a labour tribunal case.
[2] *Immigration and Refugee Protection Act*, SC 2001, c 27, s. 35(1).

considers to be the appropriate limits on that immunity. In invoking the act of state doctrine, Nevsun is arguing that this court should essentially provide for a broader scope of immunity than provided by the *State Immunity Act,* by conferring immunity where the state is not directly or indirectly impleaded.

171. This is the argument that is before the PEI Court of Appeal. The argument finds support in the Federal Court decision in *Khadr 2014*, which refused to extend state immunity in the context of a claim against Canada alleging a conspiracy between Canada and the US to breach the applicant's rights.

172. The statements made by the Supreme Court of Canada in *Telezone* and the BC Court of Appeal in *Equustek* also weigh in favour of this court declining to accept that the act of state doctrine operates to remove the plaintiffs' claims from the jurisdiction of this court. There is no relevant statutory language limiting the court's jurisdiction and the defendant has not established that the doctrine clearly and expressly applies to the plaintiffs' claims.

The public policy limitation applies

173. If this court decides that the act of state doctrine applies to this case, the plaintiffs' claims fall squarely within the public policy exception articulated in *Belhaj* and *Habib*.

174. The court in *Belhaj* found that *Kuwait Airways* did not confine the public policy limitation to cases where an investigation into the plaintiffs' allegations was unnecessary. This is consistent with the conclusion in *Habib* that there is no requirement apparent in the jurisprudence that the violations of international law and human rights alleged be "established at some indeterminate level of confidence at an interlocutory stage."

***Belhaj, supra*, para 114; *Habib, supra*, para 110.**

175. The factors underlying the decision in *Belhaj*, modified to reflect the different factual background of the plaintiffs' claims, apply with equal force in this case.

176. The first factor in *Belhaj* is applicable to this case in its entirety. The fundamental changes that the court in *Belhaj* identifies as having occurred within public international law has occurred on an international scale and is reflected in both international and Canadian public policy:

> The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system in which non-state actors are rightly given rights and obligations. A corresponding shift in international public policy has also taken place. ... These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate. [emphasis added]

Belhaj, *supra*, para 115.

177. Secondly, as in *Belhaj*, the allegations in this case - although they are only allegations - are of particularly grave violations of human rights. The abhorrent nature of slavery, torture, and crimes against humanity and its condemnation by the community of nations is apparent from the participation of states in the numerous international conventions and from the recognition in customary international law of their prohibition as a rule of *jus cogens*, a peremptory norm from which no derogation is permitted.

178. Third, the defendant in this action is a Canadian corporation alleged to have been complicit in the commission of human rights abuses. Its alleged conduct would not normally be exempt from judicial scrutiny. There is a compelling public interest in the investigation by a Canadian court of the plaintiffs' allegations. The only ground on which it could be contended that there is any exemption from the exercise of jurisdiction in the present case is because of the alleged involvement of other states and their officials in the conduct alleged. Thus, the fortuitous benefit the act of state doctrine might confer on Nevsun is a further factor supporting the application of the public policy limitation.

179. Fourth, this is not a case in which there is a lack of judicial or manageable standards.

180. Fifth, unless the Canadian courts are able to exercise jurisdiction in this case, these very grave allegations against a Canadian corporation will never be subjected to judicial investigation. As argued on the *forum non conveniens* motion, the plaintiffs cannot bring their claims in the court of Eritrea: they are refugees who have fled the country to escape the human rights abuses that form the basis of their claims. As a result, these very grave allegations would go uninvestigated and the plaintiffs would be left without any legal recourse or remedy.

181. Sixth, there is no evidence that there is any risk of damage to Canada's foreign relations and national security interests should the claims proceed. In *Belhaj*, where the court was provided with such evidence, the court concluded that in the particular circumstances of the case those considerations did not outweigh the need for the court to exercise jurisdiction.

182. All of these factors support the plaintiffs' submission that, if the act of state would otherwise apply, the plaintiffs' claims clearly fall within the public policy limitation.

183. If this court concludes that the choice as to whether the public policy limitation applies is "finely balanced", the plaintiffs urge the court to take the approach advocated by Chief Justice Black in *Habib*:

> When the common law, in its development, confronts a choice properly open to it, the path chosen should not be in disconformity with moral choices made on behalf of the people by the Parliament reflecting and seeking to enforce universally accepted aspirations about the behaviour of people one to another.
>
> ***Habib, supra*, para 7.**

184. Nevsun argues that this court should decline any invitation to follow *Belhaj*, and makes four points in support of its argument.

185. First, Nevsun argues that *Khadr* is the controlling authority. According to Nevsun, "[f]or the act of state doctrine to give way" *Khadr* requires a clear violation of fundamental human rights protected by international law that has been previously and conclusively established by a court or tribunal with jurisdiction over the foreign sovereign.

Nevsun's Chambers Brief, para 159.

186. This argument fails for a number of reasons. First, *Khadr* makes no reference to the act of state doctrine. Even on the most expansive reading of the decision, the court cannot be taken to have made a binding statement regarding the public policy limitation on the act of state doctrine.

187. Second, the passage cited by Nevsun for this proposition states:

> [21] Issues may arise about whether it is appropriate for a Canadian court to pronounce on the legality of the process at Guantanamo Bay under which Mr. Khadr was held at the time that Canadian officials participated in that process. We need not resolve those issues in this case. [Emphasis added]

***Khadr SCC, supra* at para 21.**

188. To the extent that the passage above could be interpreted to be referring to the act of state doctrine, the court specifically declined to consider whether it was precluded from considering the legality of Mr. Khadr's imprisonment.

189. The Federal Court held, in the context of a claim against Canada alleging a conspiracy between Canada and the US to commit torture, that it is "well accepted that a court may evaluate the behaviour of a foreign state for purposes that do not affect its legal interests."

190. Second, Nevsun argues that it is an essential feature of both *Habib* and *Belhaj* that unless the courts exercised jurisdiction, the grave allegations made against the officials of the Australian and UK governments would never be subjected to judicial investigation. Nevsun asserts that this concern is absent here, because

the plaintiffs not only have an alternative forum, "but it is the natural forum."

Nevsun Chambers Brief, para 161.

191. Aside from the fact that this consideration was not an essential feature of either judgment, this argument is not persuasive. The reality is that if this court does not exercise jurisdiction, the plaintiffs claims will not be heard. The plaintiffs are refugees who have fled Eritrea to escape the human rights abuses that form the basis of their claims. The assertion that Eritrea is the "natural forum" ignores this reality.

192. Third, Nevsun asserts that the decisions of other courts can be no more than a guide in determining what is contrary to Canadian public policy. In Nevsun's submission, the relevant public policy is not condemnation of human rights abuses, but whether a common law limitation on subject matter competence which does not admit for an exception for allegations of serious human rights abuses, is contrary to the fundamental morality of the Canadian legal system.

193. The public policy limitation analysis asks whether it would be contrary to public policy for the act of state doctrine to prevent this court from hearing the plaintiffs' claims, brought against a Canadian corporation, arising from allegations of grave infringements of human rights. Canadian public policy provides strong support for the conclusion that the public policy limitation does and should apply.

194. The factors identified in *Belhaj* indicating that a striking shift in attitude had taken place in that jurisdiction towards judicial examination of the conduct of foreign states and their agents are equally applicable in this jurisdiction. Judges hearing asylum and deportation cases are regularly called upon to determine whether foreign governments have violated human rights standards; in *forum non conveniens* applications judges frequently rule on issues relating to judicial independence and integrity of the judiciary of foreign states; and Canadian criminal law through the *Crimes against Humanity and War Crimes Act* and torture provisions of the Criminal Code gives courts the power to hear cases that

may implicate foreign governments in such abuses.

***Crimes against Humanity and War Crimes Act*, S.C. 2000, c. 24; Criminal Code s. 269.1**

195. Nevsun argues that even if the decisions in *Habib* and *Belhaj* were correct on the record before them, proceeding in the circumstances prevailing here would imperil comity. As the Supreme Court of Canada stated in *Hape*, comity ends where clear violations of international law and fundamental human rights begin.

Hape, *supra*, at para 39.

196. Comity does not require this court to turn a blind eye to allegations of Canadian complicity in human rights abuses in which a foreign state is alleged to be involved. The alleged human rights abuses are well-documented and have been the subject of extensive inquiry by the United Nations and other independent bodies. The government of Canada has commented publicly on Eritrea's human rights record, and has called on the government of Eritrea to end the practice of indefinite conscription. This court hearing the plaintiffs' claims cannot be said to imperil comity in these circumstances.

197. Fourth, Nevsun submits that the results reached in *Habib* and *Belhaj* are subject to substantial critique, in that both decisions pay insufficient regard to the doctrine's purposes, and using the nature and seriousness of the allegations to delimit the rule "invites circularity".

198. The limitation on the doctrine in cases of grave infringements of human rights is consistent with both Canadian and international public policy and the development of international human rights law. Requiring the allegations to be proven in a domestic court or international forum as a pre-condition to a civil claim for damages renders the limitation meaningless.

199. Contrary to Nevsun's submission at paragraph 177, the effect of the application of the act of state doctrine in this case would certainly be "fortuitous". Nevsun is a Canadian corporation that is subject to this court's jurisdiction. It has not raised

the act of state doctrine out of some general benevolence towards the State of Eritrea. It has raised the doctrine to shield its conduct from judicial scrutiny. It is not the case, as it is under the *State Immunity Act*, that this court would be obliged to consider the doctrine if Nevsun had not raised it.

Nevsun Chambers Brief para 177.

200. Nevsun also argues that the conclusion that the act of state doctrine could not be available on grounds of public policy for allegations of grave violations of human rights would be contrary to the Supreme Court of Canada decision in *Kazemi*.

201. The decision in *Kazemi* was based on the court's interpretation of the *State Immunity Act* and its conclusion that Parliament had made a policy choice in drafting the *SIA*, giving priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. A crucial factor in the decision was the conclusion that the *SIA* is a complete code such that the only exceptions to state immunity are those explicitly provided for in the *Act*. In addition, the court analyzed international law and judgments of the International Court of Justice and European Court of Human Rights that specifically assessed the role of state immunity in the hierarchy of international law.

202. The priority expressed by Parliament in the drafting of the *SIA* has no application to the act of state doctrine – it is a priority given to confer *immunity rationae personae* on the foreign state. To conclude that the act of state doctrine, as yet never applied in a Canadian court, is limited in cases of allegations of grave infringements of human rights, would not be contrary to the decision in *Kazemi*.

The Kirkpatrick limitation applies

203. In *Kirkpatrick*, the court explained that act of state issues only arise when "a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign." It does not apply when the case does not require the court to declare invalid and ineffective the official act of a foreign

sovereign.

***Kirkpatrick*, supra, para 10.**

204. The reasoning in *Sharon* and *Kirkpatrick* is applicable in this case. The question for the court is whether the alleged acts of slavery and forced labour at the Bisha mine occurred. If the acts did occur, there is no suggestion that Nevsun is arguing that slavery and forced labour are legal or valid. However, if the defence was raised that the acts are legal under Eritrean law, Canadian choice of laws principles would govern the analysis of whether a Canadian court will apply a foreign law purporting to legalize slavery.

The commercial activity limitation applies

205. The *Notice of Civil Claim* pleads that the activities underlying this claim were commercial in nature:

(a) the conscript labour was provided to Nevsun through two companies, Segen Construction Company and Mereb Construction Company.

NCC, para 15.

(b) Nevsun and the state of Eritrea (through the state owned company ENAMCO) are engaged in a commercial enterprise for the common purpose of developing and exploiting the Bisha mine.

NCC, paras 22, 24, 25.

(c) Nevsun's principal and most valuable asset is the Bisha mine. All important decisions relating to the development and operation of the Bisha mine, including the retainer of contractors, were made and/or approved by Nevsun's senior management and/or the Board of Directors.

NCC, para 26.

(d) Nevsun engaged Segen, Mereb and the Eritrean military to build the infrastructure and mine facilities at Bisha.

NCC, para 27.

(e) Segen, Mereb and the Eritrean military deployed forced labour obtained from the plaintiffs and others to carry out this work.

NCC, para 27.

(f) Nevsun has projected that the Bisha mine will continue to generate significant cash flow for its shareholders over the current estimated remaining mine life of eleven years.

NCC, para 30.

206. Nevsun's assertion that the commercial activity exception does not apply is based on a re-characterization of the case pleaded against it. The pleadings allege that Nevsun, Segen and Mereb were engaged in a commercial enterprise – the building and exploitation of a mine.

207. The inquiry required under the commercial activity exception is first, whether the acts in question constitute commercial activity, and second, whether the proceedings are related to that activity.

***Bouzari, supra*, para 52.**

208. The acts in question here are slavery and forced labour at the Bisha mine site, a commercial enterprise, and the proceedings are related to that activity.

209. The facts in *Bouzari* are distinguishable from the facts in this case. The acts of slavery and forced labour at the Bisha mine are commercial in both their nature and purpose.

210. Further, the plaintiffs submit that this court should be cautious in applying the restrictive approach to the commercial activity exception articulated in the cases decided under the *SIA*. The *SIA* is a statute passed by Parliament. The act of state doctrine, if it is found to exist in Canada, would be a creation of common law. This case is brought against Nevsun, a Canadian corporation, arising from the use of slavery and forced labour at the Bisha mine. There is no question that the Bisha mine is a commercial venture.

211. Nevsun argues that the plaintiffs' claims relate to the implementation of the National Service Program and the Eritrean military's treatment of its members, and are therefore sovereign acts. This argument mischaracterizes the nature of the plaintiffs' claims. The claims are concerned specifically with use of slavery and forced labour at the Bisha mine.

212. In its submission that the commercial activity exception does not apply, Nevsun ponders the question of what contract or commercial transaction the plaintiffs' claims depend on. The commercial activity exception does not require a contract. The transaction is the joint commercial venture of developing and operating the Bisha mine. The slavery and forced labour provided in furtherance of this venture is the subject of the claims.

213. In its discussion of the commercial activity exception at paragraphs 139 to 140, Nevsun references a number of cases decided in the context of the *SIA*, and argues that a state cannot be deprived of its immunity by way of exceptions derived from common law or international law. This submission is irrelevant in light of the acknowledgment in Nevsun's submissions that the *State Immunity Act* does not apply in this case.

RESPONSES TO NEVSUN'S CHAMBERS BRIEF

214. In response to Nevsun's Chambers Brief, in addition to the points made above, the plaintiffs submit that Nevsun's argument is fundamentally flawed for the following reasons:

(a) its description of the inquiries and conclusions required to adjudicate the plaintiffs' claims are both factually and legally incorrect, and wildly exaggerated; and

(b) it places undue reliance on Canadian state immunity doctrine cases and conflates the two doctrines throughout its submissions.

215. First, Nevsun's description of the findings that this court will be required to make is incorrect and exaggerated. For example, Nevsun asserts at paragraphs 5 and 169 of its Chambers Brief that this court would be required to conclude that Eritrea is a rogue state. This finding is not necessary to prove the plaintiffs' claims. The term is used as a description of the State of Eritrea because its human rights practices are widely condemned as failing to adhere to international human rights norms.

Nevsun Chambers Brief para 5 and 169.

216. At paragraph 149, Nevsun asserts that the plaintiffs' claims engage "questions surrounding the treatment of Group Members by Eritrean public officials within the context of the State's security needs and the unresolved occupation of Eritrean territory...". The actions of the Eritrean military with respect to slavery and forced labour at the Bisha mine will be relevant to the plaintiffs' claims, however, the State's "security needs and the unresolved occupation of Eritrean territory" [emphasis added] are completely irrelevant.

Nevsun Chambers Brief, para 149.

217. Nevsun contends that the plaintiffs ask this court to "nullify the entire body of Eritrean law". This statement, aside from being completely inaccurate, relates to an analysis that is only relevant in the context of the *forum non conveniens* application.

Nevsun Chambers Brief, para 149.

218. Second, Nevsun places considerable reliance on Canadian cases decided in the context of the *State Immunity Act*. For example, Nevsun states that *Kazemi* "strikingly illustrates" that "the principles on which the act of state doctrine and state immunity rest have not been overtaken by international human rights law." The court in *Kazemi* did not even tangentially consider the common law act of state doctrine in its reasons. The court in *Kazemi* concluded that, even if an exception to state immunity in civil proceedings for acts of torture had reached the status of a customary rule of international law (which the court concluded it

had not) it could not operate as a common law exception to the *SIA* because the *SIA* is a complete code.

***Kazemi, supra*, paras 61-62 and 96.**

219. The courts in the UK and Australia that have considered the separate issue of whether the act of state doctrine is limited in cases involving grave infringements of human rights have concluded that it is. No Canadian court has considered this issue, because no Canadian court has applied the act of state doctrine. The comments made by the Supreme Court of Canada in the specific statutory context of the *State Immunity Act* do not conflict with the UK and Australian authorities on the act of state doctrine.

220. Finally, Nevsun repeatedly references the plaintiffs' Application Response re Forum and alleges that certain of the plaintiffs submissions in that unique context run counter to the act of state doctrine. The act of state doctrine does not apply to the *forum non conveniens* application – nor has Nevsun suggested that the act of state doctrine prevents the court from undertaking the *forum non conveniens* analysis. The repeated (and inaccurate) references to the findings that this court will be asked to make on the *forum non conveniens* application are wholly irrelevant to this application.

CONCLUSION

221. This court is not being asked to "set itself above the State of Eritrea" or to "ignore Eritrean sovereignty altogether". This court is being asked to adjudicate the plaintiffs' claims against Nevsun, a Canadian corporation, arising from human rights abuses and tortious conduct alleged to have occurred in furtherance of the development and construction of Nevsun's Bisha mine.

222. The act of state doctrine is not, as Nevsun contends, a "complete answer" to the plaintiffs' claims. It is no answer at all, and it should not bar this court from hearing this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: 14/DEC/2015

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