© 2020 by The American Society of International Law
DOI:10.1017/ilm.2020.38

INTRODUCTORY NOTE TO NEVSUN RESOURCES LTD. V. ARAYA ET AL. (S.C.C.)

BY RUSSELL HOPKINS*

[February 28, 2020]

Introduction

In a judgment delivered on February 28, 2020, the Supreme Court of Canada held (by majority, 7–2) that Canadian common law does not contain an all-encompassing doctrine of non-justiciability based on foreign acts of state; and (by a narrower majority, 5–4) that alleged breaches of customary international law (CIL) arguably provide a novel cause of action in tort. The court held that claims against a Canadian mining corporation related to alleged violations at a mine in Eritrea could proceed to trial.

The majority's approach to CIL breaks new ground and will be of significant interest; however, it leaves difficult questions to the trial judge. The rejection of a foreign act of state prioritizes judicial discretion and restraint, which can be overcome when internationally contentious points are necessary or incidental to a claim.

The judgment is legally novel. It is also important because a substantial proportion of the world's publicly listed exploration and mining companies have their headquarters in Canada—over 50 percent according to a 2013 Canadian government publication.[1] Companies operating in other sectors are implicated—defense and security industries are obvious examples. Faced with increased legal risks over new tortious liabilities founded on CIL, this might persuade corporations to throw their weight behind an international convention on business and human rights laced with more predictable defenses based on due diligence standards and adequate procedures.

Background

The claimants are three Eritrean refugees who claim they were conscripted indefinitely into Eritrea's National Service Program, then forced to work at the Bisha gold, copper, and zine mine for little money under harsh conditions; their obedience was secured by punishments, including beatings, until they escaped to Canada. The defendant, Nevsun Resources Ltd (Nevsun), is a Canadian corporation that had a 60 percent interest in the mine via subsidiaries and a joint venture with Eritrea known as the Bisha Mining Share Corporation. The claimants allege that the joint venture hired a South African company, which entered into arrangements with construction companies owned by senior Eritrean military and political officials, and which used conscripts.

The claimants sought damages based on domestic torts (conversion, battery, unlawful confinement, conspiracy, and negligence) and four novel CIL grounds (breaches of prohibitions against forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity). Nevsun sought to strike out (1) the entire claim based on act of state, and (2) the CIL claims as having no reasonable prospects of success.

Nevsun's challenges were dismissed at first instance and by a unanimous Court of Appeal for British Columbia.[2] The Supreme Court heard Nevsun's appeal in January 2019 and took over a year to deliver its judgment. The result was finely balanced, especially on the CIL issue. It is a long judgment which contains extensive debate of scholarly works. The majority concluded that it was not "plain and obvious"—Canada's strike-out threshold—that the CIL claims had no reasonable likelihood of success.

Foreign Act of State

Nevsun contended that the claims, whether based on CIL or familiar torts, challenged Eritrea's National Services Program such as to be non-justiciable because the Canadian court was being invited to assess the sovereign acts of a foreign government. The majority rejected Nevsun's contention, concluding that Canadian law had developed differently from English and Australian law, where the act of state is a known (albeit criticized and curtailed) doctrine.[3]

* Russell Hopkins is a barrister in independent practice at Bright Line Law at Serle Court in London.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

The majority concluded that twin principles underly the act of state doctrine, which they identify (but do not fully explain) as (1) conflicts of laws and (2) judicial restraint. Although Canadian common law has the "same roots" as English law, these principles are said to have developed differently.[4] The majority examined well-known English authorities and limitations to the act of state doctrine as developed in England and Australia, including the public policy exception and the different approaches of Lords Mance, Neuberger, and Sumption in *Belhaj* (which allowed a tort claim against British forces for complicity in acts of rendition and torture abroad to proceed toward trial).[5] The majority eschewed English attempts to articulate an "all encompassing 'act of state doctrine'" in favor of "ordinary private international law principles which generally call for deference, but also allow for judicial discretion to decline to enforce foreign laws."[6] The crux is that the Canadian courts are "free to inquire into foreign law questions when doing so [is] necessary or incidental to the resolution of domestic legal controversies properly before the court."[7]

The dissent (Côté and Moldaver JJ) suggests that the majority failed to address the "unique issue of justiciability."[8] It distinguishes this "branch" from a separate branch dealing with conflicts of laws. The claims were said to be non-justiciable because their foundation was the allegation that Eritrea committed an internationally wrongful act.[9] The dissent draws a sharp distinction between private law claims and other cases that implicate fundamental constitutional rights (such as asylum cases, where the conduct of foreign states is often assessed).[10] The dissent also rejects any "public policy exception" to the act of state doctrine on the basis that a rule of non-justiciability is absolute.[11] This would have been a more extreme version of the act of state doctrine than the one refashioned by the UK Supreme Court in *Belhaj.* For the minority, while a court can consider the legality of a foreign state's acts when the issue arises "incidentally," it cannot do so when the issue is "central to the litigation."[12] The minority criticized the claim as "a device" brought to avoid the hurdle posed by Eritrea's sovereign immunity.[13]

Customary International Law

The majority held that, although the law in this area remains unsettled, the CIL claims were sufficiently arguable to survive the strike out threshold.[14] Moreover, the Canadian courts should not "be shy about implementing and advancing international law": they ought to embrace this role and join the "choir" of domestic courts shaping international law.[15] The starting point was the absence of doubt that CIL is automatically adopted (incorporated) into Canadian common law.[16] The crucial step was to hold that companies can be liable for violations of CIL via such adoption because international law is not restricted to relations between states and does not contain "norms of liability or non-liability applicable to categories of actors."[17] The Canadian courts can therefore fashion new remedies in order to implement and advance CIL.[18] The "right to remedy" for human rights violations meant that it was not plain and obvious that Canadian courts could not develop a civil remedy against companies for violations of CIL norms adopted into Canadian law.[19]

The majority added that it was arguable that domestic torts such as battery and unlawful confinement did not capture how breaches of CIL shock the conscience of humanity.[20] Symbolism and proper labelling were said to be crucial: an award of punitive damages under existing torts might be inadequate and/or fail to deter violations.[21] The majority emphasized the importance of providing "different and stronger" responses to breaches of CIL.[22] The majority left undecided the question of whether the trial judge should recognize new nominate torts, or whether breaches of CIL should be directly remedied at common law, but suggested that a "compelling argument" existed for the latter approach.[23]

The dissent on CIL from Brown and Rowe JJ attacks a number of majority's steps by contending that, absent legislative change, the claims are bound to fail. The dissent criticizes the majority's approach to adopting CIL norms.[24] The dissent rejects any civil "liability rule," stressing that no widespread state practice exists whereby civil liability exists for violations of CIL.[25] The majority is criticized for giving CIL horizontal effect between private parties.[26] As to questions of labeling, gravity, and deterrence, the dissent suggests that punitive damages and public judicial reasoning would suffice. The majority is also criticized for ignoring incrementalism, and the dissent warns of uncertain ramifications, including a paradox whereby more nebulous pleadings and legal theories will more easily survive strike-out motions.[27] The dissent prefers an approach whereby CIL merely aids the interpretation of common law, rather than generating a cause of action.[28] The minority also disputes the possibility that Canadian domestic law might recognize new nominate torts inspired by CIL (as opposed to the majority's preference for more direct

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

liability). Although Côté and Moldaver JJ joined the (larger) majority on foreign acts of state, they suggested that new nominate torts would intrude into the conduct of Canada's foreign relations.[29]

Conclusion

Whereas the U.S. Supreme Court has successively restricted the scope of the Alien Tort Statute in recent years, the Supreme Court of Canada's decision that CIL arguably binds companies is significant, as is its call for domestic courts to join the "choir" shaping international law. The majority and dissenting opinions in *Nevsun* are at cross-purposes on CIL. Whereas the dissent highlights the lack of state practice and *opinio juris* to support corporate civil liability for breaches of CIL, the springboard for the majority's analysis was to assign questions of remedies to domestic law and conclude that Canadian law can therefore fashion a novel remedy against companies alleged to be complicit in violations of CIL. The opinions appear to mischaracterize international criminal law as providing for corporate liability.[30] That question is contentious;[31] however, this may not matter if the question of *who* can be civilly liable for violations of CIL turns on domestic law. The majority concludes that Canadian common law could make this leap.

Much is left to the trial judge, including the crucial question of whether the CIL claims will finally apply to companies, as opposed to merely surviving a strike out. The judgment is silent on the mode(s) of liability to be applied, including the relevant standard of knowledge and/or intent. It is unclear, for example, whether civil liability might draw on the approaches of international criminal law or state responsibility, or whether it will be rooted in domestic tort law principles. If the claims succeed on the facts, further questions will arise as to the measure of damages for complicity in breaches of CIL.

ENDNOTES

1 GOVERNMENT OF CANADA, DOING BUSINESS THE CANADIAN WAY: A STRATEGY TO ADVANCE CORPORATE SOCIAL RESPONSIBILITY IN CANADA'S EXTRACTIVE SECTOR ABROAD (2013), https://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf.

2 Nevsun had also challenged jurisdiction on *forum non conveniens* grounds but this was rejected by Abrioux J at first instance and by the Court of Appeal, and not pursued before the Supreme Court.

3 Nevsun Resources Ltd v. Araya, [2020] S.C.C. 5 (Can.) [hereinafter Nevsun] ¶ 28.

4 *Id.* ¶ 44.

5 Belhaj and another v. Straw and others [2017] UKSC 3.

6 Nevsun, *supra* note 3, ¶ 45.

7 *Id.* ¶ 47.

8 *Id.* ¶ 275.

9 *Id.* ¶¶ 272–73.

10 *Id.* ¶¶ 296, 305.

11 *Id.* ¶ 301.

12 *Id.* ¶ 306.

13 *Id.* ¶ 310.

14 *Id.* ¶ 69.

15 *Id.* ¶ 71–72.

16 *Id.* ¶ 95, 90.

17 *Id.* ¶¶ 105–107.

18 *Id.* ¶¶ 117–118.

19 *Id.* ¶ 122.

20 *Id.* ¶ 124.

21 *Id.* ¶ 125–126.

22 *Id.* ¶ 129.

23 *Id.* ¶ 127.

24 *Id.* ¶ 191.

25 *Id.* ¶¶ 148, 169, 171.

26 *Id.* ¶¶ 210–211.

27 *Id.* ¶ 261. A similar paradox has been said to arise in England in relation to questions of jurisdiction following Altimo Holdings v. Kyrgyz Mobil Tel Ltd. [2011] UKPC 7. *See* Okpabi & Others v. Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd. [2018] EWCA Civ 191, per Simon LJ at ¶ 32 and the Chancellor at ¶ 182.

28 Nevsun, *supra* note 3, ¶ 176.

29 *Id.* ¶ 259.

30 *Id.* ¶¶ 112, 185(f), 194(3), 199, 211.

31 *See e.g.*, Prosecutor v. Al Jadeed SAL & Karma al Khayat, STL-14-05, Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings (Special Trib. Leb. Oct. 2, 2014) ¶ 67.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

© 2020 by The American Society of International Law
DOI:10.1017/ilm.2020.38

NEVSUN RESOURCES LTD. V. ARAYA ET AL. (S.C.C.)*

[February 28, 2020]

SUPREME COURT OF CANADA

CITATION: Nevsun Resources Ltd. *v.* Araya, 2020 SCC 5

APPEAL HEARD: January 23, 2019
JUDGMENT RENDERED: February 28, 2020
DOCKET: 37919

BETWEEN:

Nevsun Resources Ltd.
Appellant

and

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle
Respondents

- and -

International Human Rights Program, University of Toronto Faculty of Law, EarthRights International, Global Justice Clinic at New York University School of Law, Amnesty International Canada, International Commission of Jurists, Mining Association of Canada and MiningWatch Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

REASONS FOR JUDGMENT: (paras. 1 to 133)	Abella J. (Wagner C.J. and Karakatsanis, Gascon and Martin JJ. concurring)
JOINT REASONS DISSENTING IN PART: (paras. 134 to 266)	Brown and Rowe JJ.
DISSENTING REASONS: (paras. 267 to 313)	Côté J. (Moldaver J. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* This document was reproduced and reformatted from the text available at the Supreme Court of Canada website (visited June 8, 2020), https://scc-csc.lexum.com/scc-csc/scc-csc/en/18169/1/document.do.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

NEVSUN RESOURCES LTD. *v.* ARAYA

Nevsun Resources Ltd. *Appellant*

v.

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle *Respondents*

and

International Human Rights Program, University of Toronto Faculty of Law,

EarthRights International,

Global Justice Clinic at New York University School of Law,

Amnesty International Canada,

International Commission of Jurists,

Mining Association of Canada and

MiningWatch Canada *Interveners*

Indexed as: Nevsun Resources Ltd. *v.* Araya

2020 SCC 5

File No.: 37919.

2019: January 23; 2020: February 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Public international law — Human rights — Act of state doctrine — Customary international law — Jus cogens — Peremptory norms — Doctrine of adoption — Direct remedy for breach of customary international law — Eritrean workers commencing action against Canadian corporation in British Columbia — Workers alleging they were forced to work at mine owned by Canadian corporation in Eritrea and subjected to violent, cruel, inhuman and degrading treatment and seeking damages for breaches of customary international law prohibitions and of domestic torts — Corporation bringing motion to strike pleadings on basis of act of state doctrine and on basis that claims based on customary international law have no reasonable prospect of success — Whether act of state doctrine forms part of Canadian common law — Whether customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity can ground claim for damages under Canadian law — Whether claims should be struck.

Cases Cited

By Abella J.

Distinguished: *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; **considered:** *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964; *Blad v. Bamfield* (1674), 3 Swans. 604, 36 E.R. 992; *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, 9 E.R. 993; *Yukos Capital sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855, [2014] Q.B. 458; *Oppenheimer v. Cattermole*, [1976] A.C. 249; *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888; *Moti v. The Queen*, [2011] HCA 50; *Laane and Baltser v. Estonian State Cargo & Passenger s.s. Line*, [1949] S.C.R. 530; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; **referred to:** *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet*

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Ugarte (No. 3), [2000] 1 A.C. 147; *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883; *Belhaj v. Straw MP*, [2014] EWCA Civ 1394, [2016] 1 All E.R. 121; *Habib v. Commonwealth of Australia*, [2010] FCAFC 12; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441; *Willow v. Chong*, 2013 BCSC 1083; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3; *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7; *Prosecutor v. Jelisić*, IT-95-10-T, 14 December 1999; *Prosecutor v. Krstić*, IT-98-33-T, 2 August 2001; *Prosecutor v. Erdemović*, IT-96-22-A, 7 October 1997; *The Paquete Habana*, 175 U.S. 677 (1900); *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529; *Triquet v. Bath* (1764), 3 Burr. 1478, 97 E.R. 936; *Chung Chi Cheung v. The King*, [1939] A.C. 160; *The Ship "North" v. The King* (1906), 37 S.C.R. 385; *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34, [2000] 1 S.C.R. 842; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, [2015] 2 S.C.R. 214; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *Dunlea v. Attorney-General*, [2000] NZCA 84, [2000] 3 N.Z.L.R. 136; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

By Brown and Rowe JJ. (dissenting in part)

Moran v. Pyle National (Canada) Ltd., [1975] 1 S.C.R. 393; *British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C.L.R. (5th) 69; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *R. v. Jones (Margaret)*, [2006] UKHL 16, [2007] 1 A.C. 136; *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Finta*, [1994] 1 S.C.R. 701; *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2nd Cir. 2007); *Kadic v. Karadžić*, 70 F.3d 232 (2nd Cir. 1995); *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675; *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551; *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. 391; *Chung Chi Cheung v. The King*, [1939] A.C. 160; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551; *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, leave to appeal refused, S.C.C. Bull., September 20, 2019, 7; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177; *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126; *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108; *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241; *R. (Miller) v. Secretary of State*, [2017] UKSC 5, [2018] A.C. 61; *Frame v. Smith*, [1987] 2 S.C.R. 99; *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701; *McLean v. McLean*, 2019 SKCA 15; *6165347 Manitoba Inc. v. Jenna Vandal*, 2019 MBQB 69; *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, 101 O.R. (3d) 665, aff'd 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused,

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[2011] 2 S.C.R. vii; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44.

By Côté J. (dissenting)

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2nd Cir. 2010), aff'd 569 U.S. 108 (2013); *Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270; *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964; *Johnstone v. Pedlar*, [1921] 2 A.C. 262; *Oppenheimer v. Cattermole*, [1976] A.C. 249; *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883; *Laane and Baltser v. Estonian State Cargo & Passenger s.s. Line*, [1949] S.C.R. 530; *Buck v. Attorney General*, [1965] 1 All E.R. 882; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888; *Blad v. Bamfield* (1674), 3 Swans. 604, 36 E.R. 992; *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, 9 E.R. 993; *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846; *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981); *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990).

Statutes and Regulations Cited

Alien Tort Statute, 28 U.S.C. § 1350 (2018).

Business Corporations Act, S.B.C. 2002, c. 57.

Canadian Charter of Rights and Freedoms, s. 7.

Constitution Act, 1867, s. 96.

Constitution Act, 1982, s. 52(1).

Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24.

Criminal Code, R.S.C. 1985, c. C-46, s. 9.

European Communities Act 1972 (U.K.), 1972, c. 68.

Human Rights Act 1998 (U.K.), 1998, c. 42, s. 6(1), (3).

Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2, s. 4.

Law and Equity Act, R.S.B.C. 1996, c. 253, s. 2.

State Immunity Act, R.S.C. 1985, c. S-18.

Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 9-5, 21-8.

Treaties and Other International Instruments

African Charter on Human and Peoples' Rights, 1520 U.N.T.S. 217, art. 5.

American Convention on Human Rights, 1144 U.N.T.S. 123, art. 5.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

American Declaration of the Rights and Duties of Man, April 30, 1948, art. 26.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S. 1987 No. 36, art. 16.

Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, art. 3.

Convention on the Rights of the Child, Can. T.S. 1992 No. 3, art. 37.

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1561 U.N.T.S. 363.

Inter-American Convention to Prevent and Punish Torture, O.A.S.T.S. No. 67.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, arts. 2, 7.

North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, Can. T.S. 1994 No. 2.

Statute of the International Court of Justice, Can. T.S. 1945 No. 7, art. 38(1).

Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37, art. 53.

Authors Cited

Aftab, Yousuf, and Audrey Mocle. *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy.* Toronto: LexisNexis, 2019.

Akhavan, Payam. "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331.

Alston, Philip, and Ryan Goodman. *International Human Rights*. Oxford: Oxford University Press, 2013.

Axworthy, Lloyd. *Navigating A New World: Canada's Global Future*. Toronto: Vintage Canada, 2003.

Banu, Roxana. "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 *Windsor Y.B. Access Just.* 197.

Bassiouni, M. Cherif. "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63.

Baughen, Simon. *Human Rights and Corporate Wrongs: Closing the Governance Gap*. Cheltenham: Edward Elgar, 2015.

Bianchi, Andrea. "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491.

Bingham, Tom. *The Rule of Law.* London: Allen Lane, 2010.

Blackstone, William. *Commentaries on the Laws of England: Book the Fourth*. Oxford: Clarendon Press, 1769.

Brierly, James L. *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed. Oxford: Clarendon Press, 1963.

Brownlie, Ian. *Principles of Public International Law*, 7th ed. Oxford: Oxford University Press, 2008.

Brunnée, Jutta, and Stephen J. Toope. "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3.

Brunnée, Jutta, and Stephen J. Toope. "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429.

Bühler, Martin. "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 343.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Canada. Global Affairs Canada. *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/Enhanced_CS_Strategy_ENG.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_1_eng.pdf).

Canada. Global Affairs Canada. *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online: https://www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_2_eng.pdf).

Canada. Global Affairs Canada. *Responsible business conduct abroad — Questions and answers*, last updated September 16, 2019 (online: https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_3_eng.pdf).

Cassese, Antonio. *International Law*, 2nd ed. Oxford: Oxford University Press, 2005.

Clapham, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, 2006.

Clapham, Andrew. "On Complicity", dans Marc Henzelin et Robert Roth, dir., *Le droit pénal à l'épreuve de l'internationalisation*. Paris: L.G.D.J., 2002, 241.

Craig, Paul. "Britain in the European Union", in Jeffrey Jowell, Dawn Oliver and Colm O'Cinneide, eds., *The Changing Constitution*, 8th ed. Oxford: Oxford University Press, 2015, 104.

Crawford, James. *Brownlie's Principles of Public International Law*, 9th ed. Oxford: Oxford University Press, 2019.

Criddle, Evan J., and Evan Fox-Decent. "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331.

Currie, John H. *Public International Law*, 2nd ed. Toronto: Irwin Law, 2008.

Currie, John H. "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55.

Currie, John H., et al. *International Law: Doctrine, Practice, and Theory*, 2nd ed. Toronto: Irwin Law, 2014.

de Mestral, Armand, and Evan Fox-Decent. "Rethinking the Relationship Between International and Domestic Law" (2008), 53 *McGill L.J.* 573.

Dodge, William S. "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045.

Emanuelli, Claude. *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne*, 3e éd. Montréal: Wilson & Lafleur, 2010.

Fitzgerald, Oonagh E. "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law.* Toronto: Irwin Law, 2006, 625.

Green, James A. *The Persistent Objector Rule in International Law.* Oxford: Oxford University Press, 2016.

Harrington, Joanna. "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 *McGill L.J.* 465.

Hathaway, Oona A., and Scott J. Shapiro. *The Internationalists: How a Radical Plan to Outlaw War Remade the World*. New York: Simon & Schuster, 2017.

Henckaerts, Jean-Marie. "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" (2005), 87 *Int'l Rev. Red Cross* 175.

Higgins, Rosalyn. "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

International Labour Organization. International Labour Office. "Forced labour in Myanmar (Burma) — Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)", *I.L.O. Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B.

Jennings, Robert, and Arthur Watts. *Oppenheim's International Law*, vol. 1, 9th ed. Oxford: Oxford University Press, 2008.

Jouannet, Emmanuelle. "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 *Mich. J. Int'l L.* 815.

Joyner, Christopher C. "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 *Va J. Int'l L.* 693.

Kammerhofer, Jörg. "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l* 523.

Keyes, John Mark, and Ruth Sullivan. "A Legislative Perspective on the Interaction of International and Domestic Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 277.

Kindred, Hugh M. "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law*. Toronto: Irwin Law, 2006, 5.

Koh, Harold Hongju. "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661.

Koh, Harold Hongju. *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online: http://opiniojuris.org/2018/03/05/international-law-vs-donald-trump-a-reply/; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_4_eng.pdf).

Koh, Harold Hongju. "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263.

Koh, Harold Hongju. "Transnational Legal Process" (1996), 75 *Neb. L. Rev.* 181.

Koh, Harold Hongju. "Twenty-First Century International Lawmaking" (2013), 101 *Geo. L.J.* 725.

La Forest, Gérard V. "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89.

Lauterpacht, Hersch. "Is International Law a Part of the Law of England?", *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939*. London: Sweet & Maxwell, 1940, 51.

LeBel, Louis. "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 *U.N.B.L.J.* 3.

LeBel, Louis, and Gloria Chao. "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 *S.C.L.R.* (2d) 23.

Macklem, Patrick. *The Sovereignty of Human Rights*. New York: Oxford University Press, 2015.

McLachlan, Campbell. *Foreign Relations Law*. Cambridge: Cambridge University Press, 2014.

McLachlin, Beverley. "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147.

O'Keefe, Roger. *International Criminal Law*. Oxford: Oxford University Press, 2015.

O'Keefe, Roger. "The Doctrine of Incorporation Revisited", in James Crawford and Vaughan Lowe, eds., *The British Year Book of International Law 2008*. Oxford: Oxford University Press, 2009, 7.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Pearson, Lester B. "Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951*. Toronto: T. H. Best Printing Co., 1951, 346.

Phillipson, Gavin. "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev.* 824.

Pitel, Stephen G. A., and Matthew B. Lerner. "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344.

Provost, René. "Judging in Splendid Isolation" (2008), 56 *Am. J. Comp. L.* 125.

Ramasastry, Anita, and Robert C. Thompson. *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law — A Survey of Sixteen Countries*. Oslo: Fafo, 2006.

Raponi, Sandra. "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 373.

Roberts, Anthea. "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57.

Sands, Philippe. *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"*. New York: Alfred A. Knopf, 2016.

Schwartz, Osnat Grady. "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587.

Scott, Craig. "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 45.

Sharpe, Robert J. *Good Judgment: Making Judicial Decisions*. Toronto: University of Toronto Press, 2018.

Simma, Bruno, and Philip Alston. "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B.I.L.* 82.

Slama, Jo Lynn. "*Opinio Juris* in Customary International Law" (1990), 15 *Okla. City U.L. Rev.* 603.

Sossin, Lorne M. *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. Toronto: Carswell, 2012.

Stephens, Beth. "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45.

Toope, Stephen J. "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 *U.N.B.L.J.* 11.

United Nations. General Assembly. *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007.

United Nations. Human Rights Committee. *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004.

United Nations. International Law Commission. *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018.

van Ert, Gib. "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law*. New York: Oxford University Press, 2019, 501.

van Ert, Gib. "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2*. Waterloo, Ont.: Centre for International Governance Innovation, 2018.

van Ert, Gib. *Using International Law in Canadian Courts*, 2nd ed. Toronto: Irwin Law, 2008.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

van Ert, Gib. "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law.* Toronto: Irwin Law, 2006, 85.

Verdier, Pierre-Hugues, and Mila Versteeg. "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514.

Virgo, Graham. "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*. Portland, Or.: Hart Publishing, 2001, 325.

Walker, Janet. *Castel & Walker: Canadian Conflict of Laws*, vol. 1, 6th ed. Toronto: LexisNexis, 2005 (loose-leaf updated 2019, release 77).

Warner La Forest, Anne. "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law.* Toronto: Irwin Law, 2006, 367.

Weissbrodt, David, and Anti-Slavery International. *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4. New York: United Nations, 2002.

Zerk, Jennifer. *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies — A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online: https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/Stu dyDomesticeLawRemedies.pdf; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC5_5_eng.pdf).

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Dickson JJ.A.), 2017 BCCA 401, 4 B.C.L.R. (6th) 91, 419 D.L.R. (4th) 631, 12 C.P.C. (8th) 225, [2017] B.C.J. No. 2318 (QL), 2017 CarswellBC 3232 (WL Can.), affirming a decision of Abrioux J., 2016 BCSC 1856, 408 D.L.R. (4th) 383, [2016] B.C.J. No. 2095 (QL), 2016 CarswellBC 2786 (WL Can.). Appeal dismissed, Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting.

Mark D. Andrews, *Q.C.*, *Andrew I. Nathanson*, *Gavin R. Cameron* and *Caroline L. Senini*, for the appellant.

Joe Fiorante, *Q.C.*, *Reider M. Mogerman*, *Jen Winstanley*, *James Yap* and *Nicholas C. Baker*, for the respondents.

Cory Wanless and *Yolanda Song*, for the intervener the International Human Rights Program, University of Toronto Faculty of Law.

Tamara Morgenthau and *Alison M. Latimer*, for the interveners EarthRights International and the Global Justice Clinic at New York University School of Law.

Paul Champ, *Jennifer Klinck* and *Penelope Simons*, for the interveners Amnesty International Canada and the International Commission of Jurists.

Luis Sarabia and *Steven Frankel*, for the intervener the Mining Association of Canada.

Bruce W. Johnston, *Andrew E. Cleland*, *Jean-Marc Lacourcière* and *Clara Poissant-Lespérance*, for the intervener MiningWatch Canada.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ. was delivered by

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

ABELLA J. —

[1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

[2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case.

This is one of those cases.

[3] Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

[4] The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings, the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, "unlawful confinement" (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[1]

[5] Nevsun brought a motion to strike the pleadings on the basis of the "act of state doctrine", which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea's National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success.[2]

[6] Both the Chambers Judge and the Court of Appeal dismissed Nevsun's motions to strike on these bases. For the reasons that follow, I see no reason to disturb those conclusions.

Background

[7] The Bisha mine in Eritrea produces gold, copper and zinc. It is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly-held corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

[8] The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company which was owned by Eritrea's only political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program.

[9] The National Service Program was established by a 1995 decree requiring all Eritreans, when they reached the age of 18, to complete 6 months of military training followed by 12 months of "military development service" (2016 BCSC 1856, at para. 26). Conscripts were assigned to direct military service and/or "to assist in the construction of public projects that are in the national interest".

[10] In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[11] For those conscripted to the Bisha mine, the tenure was indefinite. The workers say they were forced to provide labour in harsh and dangerous conditions for years and that, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments were used. They say these punishments included "being ordered to roll in the hot sand while being beaten with sticks until losing consciousness" and the "'helicopter' which consisted of tying the workers' arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour".

[12] The workers claim that those who became ill — a common occurrence at the mine — had their pay docked if they failed to return to work after five days. When not working, the Eritrean workers say they were confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families. They say their wages were as low as US$30 per month.

[13] Gize Yebeyo Araya says he voluntarily enlisted in the National Service Program in 1997 but instead of being released after completing his 18 months of service, was forced to continue his military service and was deployed as a labourer to various sites, including the Bisha mine in February 2010. At the mine, he says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius. He escaped from Eritrea in 2011.

[14] Kesete Tekle Fshazion says he was conscripted in 2002 and remained under the control of the Eritrean military until he escaped from Eritrea in 2013. He says he was sent to the Bisha mine in 2008 where he worked from 6:00 a.m. to 6:00 p.m. six days a week and 6:00 a.m. to 2:00 p.m. on the seventh day.

[15] Mihretab Yemane Tekle says he was conscripted in 1994 and, after completing his 18 months of service, was deployed to several positions, mainly within the Eritrean military. He says he was transported to the Bisha mine in February 2010 where he worked 6 days a week from 6:00 a.m. to 6:00 p.m., often outside, uncovered, in temperatures approaching 50 degrees Celsius. He escaped Eritrea in 2011.

Prior Proceedings

[16] Nevsun brought a series of applications seeking: an order denying the proceeding the status of a representative action; a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*); an order striking portions of the evidence — first-hand affidavit material and secondary reports — filed by the Eritrean workers; an order dismissing or striking the pleadings pursuant to rule 21-8 or, alternatively, rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the grounds that British Columbia courts lacked subject matter jurisdiction as a result of the operation of the act of state doctrine; and an order striking that part of the pleadings based on customary international law as being unnecessary and disclosing no reasonable cause of action, pursuant to rule 9-5 of the *Supreme Court Civil Rules*.

[17] The Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation".

[18] He denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favours Eritrea as the appropriate forum. There was also a real risk of an unfair trial occurring in Eritrea. Abrioux J. admitted some of the first-hand affidavit material and the secondary reports for the limited purpose of providing the required social, historical and contextual framework, but he denied the proceeding the status of a representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom are still in Eritrea.

[19] As to the act of state doctrine, Abrioux J. noted that it has never been applied in Canada, but was nonetheless of the view that it formed part of Canadian common law. Ultimately, however, he concluded that it did not apply in this case.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[20] In dealing with Nevsun's request to strike the claims based on customary international law, Abrioux J. characterized the issue as "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law . . . may form the basis of a civil proceeding in British Columbia". He said that claims should only be struck if, assuming the pleaded facts to be true, it is "plain and obvious" that the pleadings disclose no reasonable likelihood of success and are bound to fail. He rejected Nevsun's argument that there is no reasonable prospect at trial that the court would recognize either "claims based on breaches of [customary international law]" or claims for "new torts based on the adoption of the customary norms advanced by the [workers]". He held that customary international law is incorporated into and forms part of Canadian common law unless there is domestic legislation to the contrary. Neither the *State Immunity Act*, R.S.C. 1985, c. S-18, nor any other legislation bars the Eritrean workers' claims. In his view, while novel, the claims stemming from Nevsun's breaches of customary international law should proceed to trial where they can be evaluated in their factual and legal context, particularly since the prohibitions on slavery, forced labour and crimes against humanity are *jus cogens*, or peremptory norms of customary international law, from which no derogation is permitted.

[21] On appeal, Nevsun argued that Abrioux J. erred in refusing to decline jurisdiction on the *forum non conveniens* application; in admitting the Eritrean workers' reports, even for a limited purpose; in holding that the Eritrean workers' claims were not barred by the act of state doctrine; and in declining to strike the Eritrean workers' claims that were based on customary international law. The Eritrean workers did not appeal from Abrioux J.'s ruling denying the proceeding the status of a representative action.

[22] Writing for a unanimous court, Newbury J.A. upheld Abrioux J.'s rulings on the *forum non conveniens* and evidence applications (2017 BCCA 401). As for the act of state doctrine, Newbury J.A. noted that no Canadian court has ever directly applied the doctrine, but that it was adopted in British Columbia by virtue of what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, which recognizes that the common law of England as it was in 1858 is part of the law of British Columbia. She concluded, however, that the act of state doctrine did not apply in this case because the Eritrean workers' claims were not a challenge to the legal validity of a foreign state's laws or executive acts. Even if the act of state doctrine did apply, it would not bar the Eritrean workers' claims since one or more of the doctrine's acknowledged exceptions would apply.

[23] Turning to the international law issues, Newbury J.A. noted that in actions brought against foreign states, courts in both England and Canada have not recognized a private law cause of action since they involved the principle of state immunity, codified in Canada by the *State Immunity Act*. But because the Eritrean workers' customary international law claims were not brought against a foreign state, they were not barred by the *State Immunity Act*.

[24] Finally, Newbury J.A. was alert to what she referred to as a fundamental change that has occurred in public international law, whereby domestic courts have become increasingly willing to address issues of public international law when appropriate. With this in mind, she characterized the central issue on appeal as being "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described". She concluded that the fact that aspects of the Eritrean workers' claims were actionable as private law torts, did not mean that they had no reasonable chance of success on the basis of customary international law.

[25] Ultimately, Newbury J.A. held that since the law in this area is developing, it cannot be said that the Eritrean workers' claims based on breaches of customary international law were bound to fail.

Analysis

[26] Nevsun's appeal focussed on two issues:

(1) Does the act of state doctrine form part of Canadian common law?

(2) Can the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Nevsun did not challenge the Court of Appeal's decision on the admissibility of the reports or on *forum non conveniens*. As a result, there is no dispute that if the act of state doctrine does not bar the matter from proceeding, British Columbia courts are the appropriate forum for resolving the claims.

The Act of State Doctrine

[27] Nevsun's first argument is that the entire claim should be struck because the act of state doctrine makes it non-justiciable.

[28] The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law. Nonetheless, Nevsun asserts that these proceedings are barred by its operation. It is helpful, then, to start by examining what the doctrine is.

[29] There is no single definition that captures the unwieldly collection of principles, limitations and exceptions that have been given the name "act of state" in English law. A useful starting point, however, is Lord Millett's description: "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (*R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3*), [2000] 1#A.C. 147 (H.L.), at p. 269).

[30] The act of state doctrine shares some features with state immunity, which extends personal immunity to state officials for acts done in their official capacity. But the two are distinct, as Lord Sumption explained in *Belhaj v. Straw*, [2017] UKSC 3:

> Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. *But it is wholly the creation of the common law.* Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. *The foreign act of state doctrine is at best permitted by international law.* [Emphasis added; para. 200.]

[31] The outlines of the act of state doctrine can be traced to the early English authorities of *Blad v. Bamfield* (1674), 3 Swans 604, and *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, (see also *Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855, at para. 40).

[32] In *Blad*, Bamfield and other English traders brought a claim in the English courts against a Danish trader who had been granted letters patent by the King of Denmark as ruler of Iceland "for the sole trade of Iceland" (p. 993). The trader seized Bamfield's goods in Iceland for allegedly fishing contrary to his letters patent. Bamfield challenged the validity of the letters patent. Lord Nottingham ruled that Bamfield's action was barred on the grounds that "to send it to a trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd" (p. 993).

[33] In the subsequent case of *Duke of Brunswick*, the deposed Duke sued the King of Hanover in England, alleging that, through acts done in Hanover and elsewhere abroad, he had aided in depriving the Duke of his land and title. The House of Lords refused to judge the acts of a sovereign in his own country. In the words of the Lord Chancellor:

> [A] foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign. [pp. 998-99]

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[34] Since then, the English act of state doctrine has developed a number of qualifications and limitations, and it no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of foreign state acts. This became clear in the case of *Oppenheimer v. Cattermole*, [1976] A.C. 249, where the House of Lords refused to recognize and apply a Nazi decree depriving Jews of their German citizenship and leading to the confiscation of all their property on which the state could "lay its hands" (p. 278). Lord Cross held that such a discriminatory law "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", noting that it is "part of the public policy of this country that our courts should give effect to clearly established rules of international law" (p. 278). The House of Lords elaborated on this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, where Lord Nicholls held that foreign laws "may be fundamentally unacceptable for reasons other than human rights violations" (para. 18).

[35] There has also been a proliferation of limitations on, and exceptions to, the act of state doctrine in England, reflecting an attempt to respond to the difficulties of applying a single doctrine to a heterogeneous collection of issues. This challenge was identified by Lord Wilberforce in his influential account of the English act of state doctrine in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), a defamation action that arose in the context of two conflicting oil concessions granted by neighbouring states in the Arabian Gulf. He referred to the act of state doctrine as "a generally confused topic", adding that "[n]ot the least of its difficulty has lain in the indiscriminating use of 'act of state' to cover situations which are quite distinct, and different in law" (p. 930). He explained that, though often referred to using the general terminology of "act of state", English law differentiates between Crown acts of state (concerning the acts of officers of the Crown committed abroad) and foreign acts of state (concerning the justiciability in domestic courts of actions of foreign states). He went on to observe that within the foreign act of state doctrine, the cases support the existence of two separate principles: a more specific principle guiding courts to consider the choice of law in cases involving whether and when a domestic court will give effect in its law to a rule of foreign law; and the more general principle that courts refrain from adjudicating the transactions of foreign states.

[36] And in the 2012 *Yukos* case, Rix L.J., writing for the Court of Appeal of England and Wales, modernized the description of the doctrine:

> 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 . . . may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae,* closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state. [para. 66]

[37] Rix L.J. noted the numerous limitations or exceptions to the doctrine which he grouped into five categories. First, the impugned act must occur within the territory of the foreign state for the doctrine to apply. Second, "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" (para. 69). Third, judicial acts are not "acts of state" for the purposes of the doctrine. Fourth, the doctrine will not apply to the conduct of a state that is of a commercial (rather than sovereign) character. Fifth, the doctrine does not apply where the only issue is whether certain acts have occurred, not the legal effectiveness of those acts.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[38] *The effect of all these limitations, as he noted, was to dilute the doctrine substantially:*

> The important thing is to recognise that increasingly in the modern 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 upon 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 . . . 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. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era [as in *Oppenheimer*]. [Emphasis added; para. 115.]

[39] The doctrine was again recently assessed by the English courts in *Belhaj*, where Mr. Belhaj and his wife alleged that English officials were complicit with the Libyan State in their illegal detention, abduction and removal to Libya in 2004. The court of first instance concluded that most of the claims were barred by the foreign act of state doctrine. On appeal, Lloyd Jones L.J. for the court cited with approval the modern description of the doctrine and its limitations set out in *Yukos* and held that the action could proceed in light of compelling public policy reasons ([2014] EWCA Civ 1394).

[40] Upholding the Court of Appeal, a divided Supreme Court provided four separate sets of reasons, each seeking to clarify the doctrine but disagreeing on how to do so.

[41] Lord Mance held that the doctrine should be disaggregated into three separate rules, subject to limitations. He concluded that the doctrine did not apply to the circumstances of the case and, if it did, a public policy exception like the one articulated in *Yukos* would apply. Lord Neuberger separated the doctrine into different rules from those of Lord Mance. Like Lord Mance, he concluded that the doctrine did not apply in this case and, even if it did, a public policy exception would preclude its application. Lady Hale and Lord Clarke agreed with Lord Neuberger and Lord Mance that the foreign act of state doctrine did not apply to the case and, notwithstanding the differing list of rules provided by Lords Mance and Neuberger, considered their reasons on the matter to be substantially the same. Lord Sumption maintained a more unified version of the doctrine, holding that it would have applied but for a public policy exception.

[42] As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion. *Attempting to apply a doctrine which is largely* defined by its limitations has also caused some confusion in *Australia.* In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12, Jagot J. observed that the act of state doctrine has been described as "a common law principle of uncertain application" (para. 51 (AustLII)).

[43] Similarly, in *Moti v. The Queen*, [2011] HCA 50, the court rejected the contention that the act of state doctrine jurisprudence established "a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law" (para. 50 (AustLII)). The court noted that "the phrase 'act of State', must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula" (para. 52).

[44] The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*. But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

"act of state doctrine". As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

[45] Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

[46] *Laane and Baltser v. Estonian State Cargo & Passenger Line*, [1949] S.C.R. 530, is an early example of how the law has developed in Canada (see Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 343, at pp. 346-48 and 351). In *Laane*, this Court considered whether Canada would give effect to a 1940 decree of the Estonian Soviet Socialist Republic purporting to nationalize all Estonian merchant ships, including those in foreign ports, with compensation to the owners at a rate of 25 percent of each ship's value. One of the ships was in the port of Saint John, New Brunswick, when it was sold by court order at the insistence of crew members who were owed wages. The balance of the sale proceeds was claimed by the Estonian State Cargo and Passenger Steamship Line. This Court refused to enforce the 1940 decree because it was confiscatory and contrary to Canadian public policy. None of the four judges who gave reasons had any hesitation in expressing views about the lawfulness of Estonia's conduct, whether as a matter of international law or Canadian public policy. As Rand J. noted: "... there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy" (p. 545). No act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court. Instead, the case was dealt with as a straightforward private international law matter about whether to enforce the foreign law despite its penal and confiscatory nature.

[47] Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.

[48] In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, this Court confirmed that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts. The issue in *Hunt* was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute. In concluding that British Columbia courts did have such authority and, ultimately, that the statute in question was constitutionally inapplicable to other provinces, La Forest J. made no reference to act of state:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation...
>
> ...
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. [pp. 308-9]

[49] The decision in *Hunt* confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally" (p. 309). And in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court noted that, in certain circumstances, the adjudication of questions of

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

international law by Canadian courts will be necessary to determine rights or obligations within our legal system, and in these cases, adjudicating these questions is "not only permissible but unavoidable" (para. 23; see also Gib van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 501).

[50] Our courts are also frequently asked to evaluate foreign laws in extradition and deportation cases. In these instances, our courts consider comity but, as in other contexts, the deference accorded by comity to foreign legal systems "ends where clear violations of international law and fundamental human rights begin" (*R. v. Hape*, [2007] 2 S.C.R. 292, at para. 52; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1047; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, at paras. 18 and 26; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at para. 16). In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, an extradition case, La Forest J. recognized that

> in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. [p. 522]

[51] McLachlin J. endorsed this principle in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, where she explained that "[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state 'sufficiently shocks' the Canadian conscience" (p. 849, citing *Schmidt*, at p. 522). As part of the inquiry, the reviewing court must consider "the nature of the justice system in the requesting jurisdiction" in light of "the Canadian sense of what is fair, right and just" (*Kindler*, at pp. 849-50).

[52] And in *United States v. Burns*, [2001] 1 S.C.R. 283, this Court unanimously held that "[a]n extradition that violates the principles of fundamental justice will always shock the conscience" (para. 68 (emphasis in original)). The Court concluded that it was a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* for the Minister to extradite Canadian citizens to the United States without, as a condition of extradition, assurances that the death penalty would not be sought.

[53] In the deportation context, the Court's unanimous decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, concluded that the Minister, and by extension the reviewing court, should consider the human rights record of the foreign state when assessing whether the potential deportee will be subject to torture there.

[54] The question of whether and when it is appropriate for a Canadian court to scrutinize the human rights practices of a foreign state in the context of deportation hearings was also squarely before the Court in *India v. Badesha*, [2017] 2 S.C.R. 127. Moldaver J., writing for the Court, said: "I am unable to accept . . . that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system", concluding that the Minister and the reviewing court are entitled to "consider evidence of the general human rights situation" in a foreign state (para. 44).

[55] Even though all of these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the "act of state doctrine".

[56] Despite the absence of any cases applying the act of state doctrine in Canada, Nevsun argues that the doctrine was part of the English common law received into the law of British Columbia in 1858.

[57] While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.

[58] To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[59] The doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims.

Customary International Law

[60] The Eritrean workers claim in their pleadings that customary international law is part of the law of Canada and, as a result, a "breach of customary international law . . . is actionable at common law". Specifically, the workers' pleadings claim:

> 7. The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law.
>
> . . .
>
> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> . . .
>
> 56. The plaintiffs claim:
>
> (a) damages at customary international law as incorporated into the law of Canada;
>
> . . .
>
> 60. The use of forced labour is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> . . .
>
> 63. Slavery is a breach of customary international law and *jus cogens* and is actionable at common law.
>
> . . .
>
> 66. Cruel, inhuman or degrading treatment is a breach of customary international law and is actionable at common law.
>
> . . .
>
> 70. Crimes against humanity are a breach of customary international law and *jus cogens* and are actionable at common law.

[61] As these excerpts from the pleadings demonstrate, the workers broadly seek damages from Nevsun for breaches of customary international law as incorporated into the law of Canada.

[62] As the Chambers Judge and the Court of Appeal noted, this Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. The question before us is whether Nevsun has demonstrated that the Eritrean workers' claims based on breaches of customary international law should be struck at this preliminary stage.

[63] Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).

[64] A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is "plain and obvious" that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at paras. 14-15). When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven" (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[65] Under rule 9-5(1)(b), a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2013 BCSC 1083, stating:

> Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff's cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court's time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

[66] This Court admonished in *Imperial Tobacco* that the motion to strike

> is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed . . . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]

[67] The Chambers Judge in this case summarized the issues as follows:

> The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:
>
> (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
>
> (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.

[68] In the British Columbia Court of Appeal, Newbury J.A. also believed that a private law remedy for breaches of the international law norms alleged by the workers may be possible. In her view, recognizing such a remedy may be an incremental first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.

[69] For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it: "The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success".

[70] Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the *Canadian Yearbook of International Law*:

> [I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> (Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 *Can. Y.B. Intl Law* 89, at pp. 100-1)

[71] Since "[i]nternational law not only percolates down from the international to the domestic sphere, but . . . also bubbles up", there is no reason for Canadian courts to be shy about implementing and advancing international law (Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 *I.C.L.Q.* 57, at p. 69; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at pp. 4-6, 8 and 56; see also Hugh M. Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 5, at p. 7).

[72] Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the "choir" of domestic court judgments around the world shaping the "substance of international law" (Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 *Cardozo J. Intl & Comp. L.* 587, at p. 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 *Am. J. Comp. L.* 125, at p. 171).

[73] Given this role, we must start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers' customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.

[74] Customary international law has been described as "the oldest and original source of international law" (Philip Alston and Ryan Goodman, *International Human Rights* (2013), at p. 72). It is the common law of the international legal system — constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.

[75] But in the case of the norms the Eritrean workers claim Nevsun breached, the task is less onerous, since these norms emerged seamlessly from the origins of modern international law, which in turn emerged responsively and assertively after the brutality of World War II. It brought with it acceptance of new laws like prohibitions against genocide and crimes against humanity, new institutions like the United Nations, and new adjudicative bodies like the International Court of Justice and eventually the International Criminal Court, all designed to promote a just rule of law and all furthering liberal democratic principles (Philippe Sands, *East West Street: On the Origins of "Genocide" and "Crimes Against Humanity"* (2016), at pp. 361-64; Lloyd Axworthy, *Navigating A New World: Canada's Global Future* (2003), at pp. 200-1).

[76] The four authoritative sources of modern international law, including customary international law, are found in art. 38(1) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, which came into force October 24, 1945: . . .

> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations;
>
> c. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professors Brunnée and Toope have described art. 38 as the "litmus test for the sources of international law" (Brunnée and Toope (2002), "A Hesitant Embrace", at p. 11).

[77] There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

(United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3, at para. 71; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 38; Harold Hongju Koh, "Twenty-First Century International Lawmaking" (2013), 101 *Geo. L.J.* 725, at p. 738; Jean-Marie Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict" (2005), 87 *Int'l Rev. Red Cross* 175, at p. 178; Antonio Cassese, *International Law* (2nd ed. 2005), at p. 157).

[78] To meet the first requirement, the practice must be sufficiently general, widespread, representative and consistent (International Law Commission, at p. 135). To meet the second requirement, *opinio juris*, the practice "must be undertaken with a sense of legal right or obligation", as "distinguished from mere usage or habit" (International Law Commission, at p. 138; *North Sea Continental Shelf*, at para. 77).

[79] The judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law. As the Permanent Court of International Justice noted in *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7, legal decisions are "facts which express the will and constitute the activities of States" (p. 19; see also *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, 14 December 1999 (ICTY, Trial Chamber), at para. 61; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2001 (ICTY, Trial Chamber), at paras. 541, and 579-89; *Prosecutor v. Erdemović*, IT-96-22-A, Joint separate opinion of Judge McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber), at paras. 47-55).

[80] When an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law. As Professor James L. Brierly wrote:

> Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.
>
> (James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at p. 59, cited in John H. Currie, et al., *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at p. 116)

[81] This process, whereby international practices become norms of customary international law, has been variously described as "accretion", "crystallization", "ripening" and "gel[ling]" (see, e.g., Bruno Simma and Philip Alston, "The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles" (1988), 12 *Aust. Y.B. I.L.* 82, at p. 104; *The Paquete Habana*, 175 U.S. 677 (1900), at p. 686; Jutta Brunnée and Stephen J. Toope, "International Law and the Practice of Legality: Stability and Change" (2018), 49 *V.U.W.L.R.* 429, at p. 443).

[82] Once a practice becomes a norm of customary international law, by its very nature it "must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour" (*North Sea Continental Shelf*, at para. 63).

[83] Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, which have been "accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 53). This Court acknowledged that "a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable" (*Kazemi*, at para. 47, citing John H. Currie, *Public International Law* (2nd ed. 2008), at p. 583; Claude Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at pp. 168-69; *Vienna Convention on the Law of Treaties*, art. 53).

[84] Peremptory norms have been accepted as fundamental to the international legal order (Ian Brownlie, *Principles of Public International Law* (7th ed. 2008), at pp. 510-12; see also Andrea Bianchi, "Human Rights and the Magic of *Jus Cogens*" (2008), 19 *E.J.I.L.* 491; Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of Jus Cogens" (2009), 34 *Yale J. Intl L.* 331).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[85] How then does customary international law apply in Canada? As Professor Koh explains, "[l]aw-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms" (Harold Hongju Koh, "Transnational Legal Process" (1996), 75 *Neb. L. Rev.* 181, at p. 204 (emphasis in original)). Some areas of international law, like treaties, require legislative action to become part of domestic law (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at pp. 160-61 and 173-74; Currie, *Public International Law*, at pp. 225-26).

[86] On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht, "Is International Law a Part of the Law of England?", in *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939* (1940), 51). In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. As Professor Brownlie explains:

> The dominant principle . . . is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. [p. 41]

[87] The adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century (Gib van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 184-208). Blackstone's 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that "the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land", at p. 67; see also *Triquet v. Bath* (1764), 3 Burr. 1478, (K.B.)). Similarly, in the frequently cited case of *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), Lord Atkin wrote:

> The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. [p. 168]

[88] Direct incorporation is also far from a niche preserve among nations. In a study covering 101 countries over a period between 1815 and 2013, Professors Pierre-Hugues Verdier and Mila Versteeg found widespread acceptance of the direct application of customary international law:

> [P]erhaps the most striking pattern that emerges from our data is that in virtually all states, CIL [Customary International Law] rules are in principle directly applicable without legislative implementation . . . [M]ost countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly.
>
> (Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015), 109 *Am. J. Intl L.* 514, at p. 528)

[89] In Canada, in *The Ship "North" v. The King* (1906), 37 S.C.R. 385, Davies J., in concurring reasons, expressed the view that the Admiralty Court was "bound to take notice of the law of nations" (p. 394). Similarly, in *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, Taschereau J., drawing on *Chung Chi Cheung*, held that the body of rules accepted by nations are incorporated into domestic law absent statutes to the contrary (pp. 516-17).

[90] As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. This approach was more recently confirmed by this Court in *Hape*, where LeBel J. for the majority held:

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law *should* be incorporated into domestic law in the absence of conflicting legislation. The *automatic* incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word "may" later in the paragraph cannot be taken as overtaking his clear direction that, based on "a long line of cases", customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.

[91] Justice LeBel himself, in an article he wrote several years after *Hape*, explained that the Court's use of the word "may" in *Hape* was in no way meant to diverge from the traditional approach of directly incorporating customary norms into Canadian common law:

> Following [*Hape*], there was some comment and concern to the effect that the [statement that "courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law" (para. 39)] left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development. In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation. Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter.* Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty "may be adopted into the common law of Canada in the absence of conflicting legislation". The gist of the majority opinion in *Hape* was that accepting incorporation of customary international [law] was the right approach. *In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them.* [Emphasis added.]
>
> (Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 *U.N.B.L.J.* 3, at p. 15)

[92] As for LeBel J.'s novel use of the word "prohibitive", we should be wary of concluding that he intended to create a new category of customary international law unique to Canada. In the same article, LeBel J. clarified that "prohibitive" norms simply mean norms that are "mandatory", in the sense that they are obligatory or binding (LeBel, at p. 17). As Professor Currie observes, the word "prohibitive" is a "puzzling qualification [that] does not figure in any of the authorities cited by LeBel J. for the doctrine, nor is it a feature of the doctrine of adoption that operates in the United Kingdom" (John H. Currie, "Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law" (2007), 45 *Can. Y.B. Intl Law* 55, at p. 70; see also Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship Between International and Domestic Law" (2008), 53 *McGill L.J.* 573, at p. 587).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[93] The use of the word "prohibitive", therefore, does not add a separate analytic factor, it merely emphasizes the mandatory nature of customary international law (see van Ert, *Using International Law in Canadian Courts*, at pp. 216-18). This aligns with LeBel J.'s statement in *Hape* that the "automatic incorporation" of norms of customary international law "is justified on the basis that *international custom, as the law of nations, is also the law of Canada*" (para. 39 (emphasis added)).

[94] Therefore, as a result of the doctrine of adoption, norms of customary international law — those that satisfy the twin requirements of general practice and *opinio juris* — are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, "[t]he Canadian story of international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law', because international law is partly *our* law" (Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 *U.N.B.L.J.* 11, at p. 23 (emphasis in original)).

[95] There is no doubt then, that customary international law is also the law of Canada. In the words of Professor Rosalyn Higgins, former President of the International Court of Justice: "In short, there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject" (Rosalyn Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 *Commonwealth L. Bull.* 1268, at p. 1273). The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

[96] In other words, "Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact" (Gib van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; see also van Ert, *Using International Law in Canadian Courts*, at pp. 62-69).

[97] Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, "The Reception of International Law", at p. 6; van Ert, *Using International Law in Canadian Courts*, at pp. 62-69). Professor Higgins explains this as follows: "There is not a legal system in the world where international law is treated as 'foreign law'. It is everywhere part of the law of the land; as much as contracts, labour law or administrative law" (p. 1268; see also James Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1, at p. 57; van Ert, *Using International Law in Canadian Courts*, at p. 64).

[98] And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice — in the sense of not requiring formal proof by evidence — is appropriate and an inevitable implication both of the doctrine of adoption[3] and legal orthodoxy (Anne Warner La Forest, "Evidence and International and Comparative Law", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 367, at pp. 381-82; van Ert, *Using International Law in Canadian Courts*, at pp. 42-56 and 62-66).

[99] Some academics suggest that when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law (Anne Warner La Forest, at pp. 384 and 388; van Ert, *Using International Law in Canadian Courts*, at 67-69). The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

[100] Crimes against humanity have been described as among the "least controversial examples" of violations of *jus cogens* (Louis LeBel and Gloria Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 *S.C.L.R.* (2d) 23, at p. 33).

[101] The prohibition against slavery too is seen as a peremptory norm. In 2002, the Office of the United Nations High Commissioner for Human Rights confirmed that "it is now a well-established principle of international law that the 'prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained "*jus cogens*" status'" (David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4 (2002), at p. 3).

[102] Compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*. The International Labour Organization, in a report entitled "Forced labour in Myanmar (Burma)", *I.L.O Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B, recognized that, "there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights" (para. 203). To the extent that debate may exist about whether forced labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law.

[103] And the prohibition against cruel, inhuman and degrading treatment has been described as an "absolute right, where no social goal or emergency can limit [it]" (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at p. 627). This is reflected in the ratification of several international covenants and treaties such as the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), art. 7; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36 (entered into force June 26, 1987), art. 16; the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; the *American Declaration of the Rights and Duties of Man*, April 30, 1948, art. 26; the *American Convention on Human Rights*, 1144 U.N.T.S. 123, art. 5; the *African Charter on Human and Peoples' Rights*, 1520 U.N.T.S. 217, art. 5; the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 37; the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1561 U.N.T.S. 363; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S.T.S. No. 67 (Currie et al., *International Law: Doctrine, Practice, and Theory*, at p. 627).

[104] Nevsun argues, however, that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation.

[105] Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, "[i]nternational law . . . does not contain general norms of liability or non-liability applicable to categories of actors" (William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045, at p. 1046). Though certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state (see, e.g., Dodge; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at pp. 265-267; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), at p. 58).

[106] While states were classically the main subjects of international law since the Peace of Westphalia in 1648 (Cassese, at pp. 22-25; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at p. xix), international law has long-since evolved from this state-centric template. As Lord Denning wrote in *Trendtex Trading Corp.*: "I would use of international law the words which Galileo used of the earth: 'But it does move'" (p. 554).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[107] In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights.

[108] Professor Payam Akhavan notes that "[t]he rapid emergence of human rights signified a revolutionary shift in international law, from a state-centric to a human-centric conception of global order" (Payam Akhavan, "Canada and international human rights law: is the romance over?" (2016), 22 *Canadian Foreign Policy Journal* 331, at p. 332). The result of these developments is that international law now works "not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, [and] their education" (Emmanuelle Jouannet, "What is the Use of International Law? International Law as a 21st Century Guardian of Welfare" (2007), 28 *Mich. J. Int'l L.* 815, at p. 821). As Professor Christopher Joyner adds: "The rights of peoples within a state now transcend national boundaries and have become essentially a common concern under international law" (Christopher C. Joyner, "'The Responsibility to Protect': Humanitarian Concern and the Lawfulness of Armed Intervention" (2007), 47 *Va J. Int'l L.* 693, at p. 717).

[109] This represents the international law actualization of Professor Hersch Lauterpacht's statement in 1943 that "[t]he individual human being . . . is the ultimate unit of all law" (Sands, at p. 63).

[110] A central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship (Patrick Macklem, *The Sovereignty of Human Rights* (2015), at p. 22). They are discrete legal entitlements, held by individuals, and are "to be respected by everyone" (Clapham, *Human Rights Obligations*, at p. 58).

[111] Moreover, as Professor Beth Stephens has observed, these rights may be violated by private actors:

> The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children's rights, crimes against peace and security, and privacy. . . . It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.
>
> (Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 *B.J.I.L.* 45, at p. 73)

There is no reason, in principle, why "private actors" excludes corporations.

[112] Canvassing the jurisprudence and academic commentaries, Professor Koh observes that non-state actors like corporations can be held responsible for violations of international criminal law and concludes that it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (Koh, "Separating Myth from Reality", at p. 266). He describes the idea that domestic courts cannot hold corporations civilly liable for violations of international law as a "myth" (Koh, "Separating Myth from Reality", at pp. 264-68; see also Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32). Professor Koh also notes that

> [t]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? [Emphasis in original.]
>
> (Koh, "Separating Myth from Reality", at p. 265)

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[113] As a result, in my respectful view, it is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" (Koh, "Separating Myth from Reality", at pp. 265 and 267; Andrew Clapham, "On Complicity", in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.

[114] Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.

[115] On the contrary, the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms (see, e.g., Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online); Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online) (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct)). With respect to the Canadian Ombudsperson for Responsible Enterprise, mandated to review allegations of human rights abuses of Canadian corporations operating abroad, the Canadian government has explicitly noted that "[t]he creation of the Ombudsperson's office does not affect the right of any party to bring a legal action in a court in any jurisdiction in Canada regarding allegations of harms committed by a Canadian company abroad" (Global Affairs Canada, *Responsible business conduct abroad — Questions and answers*, last updated September 16, 2019 (online); Yousuf Aftab and Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (2019), at pp. 47-48).

[116] In the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun.

[117] Is a civil remedy for a breach of this part of our common law available? Put another way, can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?

[118] Development of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; see also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Watkins v. Olafson*, [1989] 2 S.C.R. 750). In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development. As Lord Scarman noted:

> Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].
>
> (*Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871, at p. 884 (H.L.))

[119] With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee — which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* — provides additional guidance in its *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including "asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party" (para. 10). As to remedies, the Committee notes:

> [T]he enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. [para. 15]

[120] In the domestic context, the general principle that "where there is a right, there must be a remedy for its violation" has been recognized in numerous decisions of this Court (see, e.g., *Kazemi*, at para. 159; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 25; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 20; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159, at p. 179).

[121] The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman's estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that "[w]hile rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars" (para. 159). In effect, the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament's enactment of the *State Immunity Act*. However, the *State Immunity Act* protects "foreign states" from claims, not individuals or corporations.

[122] Unlike *Kazemi*, there is no law or other procedural bar precluding the Eritrean workers' claims. Nor is there anything in *Kazemi* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not "plain and obvious" that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

[123] Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, "unlawful confinement", conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts.

[124] Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these#norms "shock[s] the conscience of humanity" (M. Cherif Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69).

[125] Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

> From the perspective of the victim . . . the fact that torture is characterized as a tort, such as battery, will matter — simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of human rights . . . symbolism is crucial.
>
> . . .

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> [In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.
>
> (Graham Virgo, "Characterisation, Choice of Law, and Human Rights", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

[126] While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, "[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment". Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm" (Craig Scott, "Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn 4; see also Sandra Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

[127] The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

[128] The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, "What Is Reception Law?", in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

[129] Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84). The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

[130] As Professor Koh wrote about civil remedies for terrorism:

> Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.
>
> (Harold Hongju Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675)

[131] This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law . . . will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

[132] Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

[133] I would dismiss the appeal with costs.

The following are the reasons delivered by

BROWN AND ROWE JJ. —

I. Introduction

[134] At the British Columbia Supreme Court, Nevsun Resources Ltd. Applied to strike 67 paragraphs of the Eritrean workers' notice of civil claim ("NOCC"). The chambers judge dismissed Nevsun's application, holding that the claim was not bound to fail (2016 BCSC 1856, 408 D.L.R. (4th) 383). His decision was upheld on appeal (2017 BCCA 401, 4 B.C.L.R. (6th) 91). The majority would also uphold the dismissal of Nevsun's application to strike the pleadings of the workers.

[135] We would allow Nevsun's appeal in part. We agree with the majority that the dismissal of Nevsun's application should be upheld as it regards the foreign act of state doctrine, and we concur in the majority reasons from paras. 27 to 59. We would, however, allow Nevsun's appeal on the matter of the use of customary international law in creating tort liability. As we will explain, we part ways from the majority on this issue in several respects: the characterization of the content of international law; the procedure for identifying international law; the meaning of "adoption" of international law in Canadian law; and the availability of a tort remedy.

[136] Our reasons are structured as follows. We begin by explaining the theories of the case which are advanced to defend the pleadings from the motion to strike. We then set out our view of the proper approach to customary international law: it is to determine what practices states in fact engage in out of the belief that these practices are mandated by customary international law. We then explain how the rules of customary international law (frequently termed "norms") are given effect in Canada. When the norms are prohibitive, this question is simple; when the norms are mandatory, the matter is more complicated. We then do our best to explain why, on its theory of the case, the majority finds it not plain and obvious the claim is doomed to fail. We identify three domains of disagreement: the content of international law in fact; how the doctrine of adoption operates; and the differences between the effect of international law on domestic criminal law and tort law. In the final section, we turn to the theory of the case upon which the chambers judge relied in dismissing the motion to strike: the workers seek recognition of new common law torts. After stating the test for determining whether a new tort should be recognized, we explain why the causes of action advanced in the pleadings do not meet it.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

II. Two Theories of the Case

[137] The majority explains that the pleadings are broadly worded and identifies two separate theories upon which they could be upheld (Majority Reasons, at para. 127). One of these is the focus of the majority's reasons with regard to customary international law; the other is the focus of the chambers judge's reasons.

We would summarize these two theories as follows:

> a) *The majority's theory*: The workers seek to have Canadian courts recognize a cause of action for "breach of customary international law" and to prosecute a claim thereunder (para. 127). (While the majority never describes the workers' pleadings as raising a "tort" claim, we observe that its theory of the case describes a cause of action that can only be understood in Canadian common law as a "tort". A tort is simply a wrong against a third party, actionable in law, typically for money damages (*Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, at pp. 404-5). That is the very substance of the allegation here, and we will treat it as such. If the cause of action the majority is proposing is not a "tort", then it must be a species of action not known to Canadian common law, and so should fail simply on that basis).
>
> b) *The chambers judge's theory*: The workers seek to have Canadian courts recognize four new nominate torts *inspired by* customary international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[4] The workers then seek to prosecute claims under those torts.

In our respectful view, the latter theory is more consistent with the pleadings before us, but both must be defeated in order for Nevsun to succeed on its motion to strike.

[138] The following paragraphs of the workers' amended NOCC describe the proposed cause of action:

> 53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.
>
> . . .
>
> 57. Forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are prohibited under international law. This prohibition is incorporated into and forms a part of the law of Canada.
>
> . . .
>
> 60. The use of forced labour is a breach of customary international law and jus cogens and is actionable at common law.
>
> (A.R., vol. III, at pp. 170 and 172-73)

[139] Paragraphs 63, 66, and 70 are to the same effect as para. 60, except "use of forced labour" is replaced by "slavery", "cruel, inhuman, or degrading treatment" and "crimes against humanity", respectively (A.R., vol. III, at pp. 173-75).

[140] In our view, paras. 60, 63, 66 and 70 suggest that the workers sought to have four nominate torts recognized.

[141] The chambers judge's theory accords with how the workers framed their claims before this Court, as the following excerpts from their factum demonstrate:

> 98. The development of the common law will be aided by the recognition of torts which fully capture the prohibited injurious conduct, rather than treating these kinds of claims as a variant or hybrid of traditional torts . . .
>
> . . .
>
> 102 . . . In assessing whether to recognize new nominate torts, *Charter* values inform the assessment of the societal importance of the rights at issue . . .

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

. . .

> 117. To be clear, the [workers] do not contend that the adoption of *jus cogens* norms into Canadian law leads automatically to a civil remedy for the violation of those norms. Rather, the *jus cogens* norms serve as a source for development of the common law, and the test for recognition of new common law torts must still be satisfied.
>
> 118 . . . . the recognition of these new torts is desirable given the factors outlined at paragraphs 97 to 110 above.
>
> . . .
>
> 149. Here, recognizing new nominate torts for slavery or crimes against humanity under the common law complements and advances
>
> Parliament's broader intent in enacting legislation such as the *Crimes Against Humanity and War Crimes Act* that there be accountability for serious human rights abuses. [Emphasis added.]

[142] We also observe that, at para. 117 of their factum, the workers specifically disavow the majority's theory of the case.

[143] The second theory should be preferred also because, in deciding whether a pleading is bound to fail, it ought to be read generously. For example, the pleading ought to be considered as it might reasonably be amended (*British Columbia/Yukon Assn. of Drug War Survivors v. Abbotsford (City)*, 2015 BCCA 142, 75 B.C. L.R. (5th) 69, at para. 15; *Kripps v. Touche Ross & Co.* (1992), 69 B.C.L.R. (2d) 62 (C.A.)). In our view, the second theory is the *more* plausible claim. That said, the workers could reasonably amend their pleadings to clearly engage the first theory, so both must be considered.

[144] As the majority has explained, we ask whether it is plain and obvious a pleading is "certain to fail" or "bound to fail" because this is the test that courts apply on a motion to strike (*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980). This question is to be determined "in the context of the law and the litigation process", assuming the facts pleaded by the non-moving party are true (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 23 and 25 (emphasis omitted)).

[145] Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can. If a court would not recognize a novel claim when the facts as pleaded are taken to be true — that is, in the most favourable factual context possible in the litigation process — the claim is plainly doomed to fail (S.G.A. Pitel and M.B. Lerner, "Resolving Questions of Law: A Modern Approach to Rule 21" (2014), 43 *Adv. Q.* 344, at p. 351). As Justice Karakatsanis explained for this Court in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, judges can and should resolve legal disputes promptly to facilitate rather than frustrate access to justice (paras. 24-25 and 32). Answering novel questions of law on a motion to strike is one way they can do so (Pitel and Lerner, at p. 358). But there also are some questions that the court *could* answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the *Canadian Charter of Rights and Freedoms*, or questions where the facts are unlikely, if not implausible. Deciding a question of law without proof of the facts in such circumstances risks distorting the law for an ultimately fruitless purpose.

[146] The majority would find that it is not plain and obvious that the workers' cause of action is doomed to fail. So far as we can discern, the majority's reasons concern entirely extricated questions of law. In refraining to decide a question of law, there appears to be no pressing concern for judicial economy or for the integrity of the common law. The uncertainty in the majority's reasons relates to *which* theory the workers should rely on, not *whether* the workers' claim can succeed on either theory. We can only understand the inevitable effect of its reasons to be that, if the facts pleaded by the workers are proven, the workers' claim should succeed. In other words, in its view, the phoenix will fly. And concomitantly, it means that if the workers continue these proceedings relying on the majority's theory of the case, a court should recognize a new cause of action for tortious breach of customary international law.

[147] That observation aside, however, our disagreement with the majority in this matter about the better theory of the case does not affect either our, or its, proposed disposition of the appeal. As previously mentioned, the question

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

to be decided on a motion to strike is whether the pleadings are bound to fail on all reasonable theories of the case. In its view, the workers' claims are not bound to fail on either theory. In our view, they are, for four reasons.

[148] First, the claims run contrary to how norms of international law become binding in Canada. According to the doctrine of adoption, the courts of this country recognize legal prohibitions that mirror the prohibitive rules of customary international law. Courts do not convert prohibitive rules into liability rules. Changing the doctrine of adoption to do so runs into the second problem, which is that doing so would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy. Nor does developing a theory of the case that does not rely on the doctrine of adoption rescue the pleadings: the third problem is that some of the claims are addressed by extant torts. And, finally, the viability of other claims requires changing the common law in a manner that would infringe the separation of powers and place courts in the unconstitutional position of conducting foreign relations, which is the executive's domain. We therefore find the workers' claims for damages based on breach of customary international law disclose no reasonable cause of action and are bound to fail.

III. On the First Theory, the Claim Is Bound to Fail

[149] The majority maintains that, because international law is incorporated into Canadian law, it is not plain and obvious that a claim to remedy such a breach brought in a Canadian court is doomed to fail. But to give effect to this claim would displace international law from its proper role within the Canadian legal system. In the following section, we will explain why this is so. We will also explain why changing the role of international law within Canadian law exceeds the limits of the judicial role.

A. THE OPERATION OF INTERNATIONAL LAW IN CANADA

[150] One essential point of disagreement we have with the majority concerns which law is supreme in Canadian courts: Canadian law, or international law. The majority (at para. 94) adopts the opinion of Professor Stephen J. Toope, who has opined that "[i]nternational law ... speaks directly to Canadian law and requires it to be shaped in certain directions" ("Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 *U.N.B.L.J.* 11, at p. 23). We disagree.

[151] The conventional — and, in our view, correct — approach to the supremacy of legal systems is that each court treats its own constituting document as supreme (J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 101). An international tribunal or international court will apply the law of its constituting treaty. Canadian law cannot require international law to be shaped in certain directions, except insofar as international law grants that power to Canadian law.

[152] It follows that Canadian courts will apply the law of Canada, including the supreme law of our Constitution. And it is that law — Canadian law — which defines the limits of the role international law plays within the Canadian legal system. To hold otherwise would be to ignore s. 52(1) of the *Constitution Act, 1982*, and s. 96 of the *Constitution Act 1867*. To be clear, then: international law cannot require Canadian law to take a certain direction, except inasmuch as Canadian law allows it.

[153] On the majority's theory, the workers' pleadings — which seek the remedy of money damages — are viable only if international law is given a role that exceeds the limits placed upon it by Canadian law. These limits are set out in *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 39, where this Court stated that "prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation". These prohibitive rules of customary international law, by their nature, *could not* give rise to a remedy. On its terms then, for these pleadings to succeed, Canadian law must change. And, in our view, such a change would require an act of a competent legislature. It does not fall within the competence of this Court, or any other. And yet, without that change, the pleadings are doomed to fail.

[154] Below, we set out the existing limits of the role that public international law can play according to Canadian law. Public international law has two main sources: custom and convention, which have different effects on and in Canadian law. While the focus of this appeal is customary international law, its role and function can best be

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

understood in relation to its counterpart, conventional international law. Below, we describe these two main sources of international law in more detail.

(1) Conventional International Law: the Role of Treaties

[155] Although customary international law was historically the primary source of international law (J.H. Currie, *Public International Law* (2nd ed. 2008), at p. 124), convention, most often in the form of treaties, has become the source of much substantive international law today (J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y. B. Intl Law* 3, at p. 13). This trend originated in the late 19th and early 20th centuries, with the growth of international bodies and the elaboration of broader-based treaty regimes, mostly concerned with the conduct of war and humanitarian law (Currie, at p. 124).

[156] A treaty is much like a contract, in the sense that it records the terms to which its signatories consent to be bound (J. Harrington, "Redressing the Democratic Deficit in Treaty Law Making: (Re-)Establishing a Role for Parliament" (2005), 50 *McGill L.J.* 465, at p. 470): "The essential idea [of treaties] is that states are bound by what they expressly consent to" (Brunnée and Toope, at p. 14). It sets out the parties' mutual legal rights and obligations, and are governed by international law (Currie, at p. 123). Article 38(1)(a) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, contains an implicit definition of treaty when it specifies that the International Court of Justice shall apply "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" (see also Brunnée and Toope, at p. 14). A treaty may be bilateral (recording reciprocal undertakings among two or more states) or multilateral (recording a generalized agreement between several states) (Currie, at p. 123). In either form, it permits states to enter into agreements with other states on specific issues or projects, or to establish widely applicable norms intended to govern legal relationships with as many states as will expressly agree to their terms (p. 123).

[157] Because a treaty is concerned with express agreement between states, certain formalities govern the process of entering a binding treaty (Brunnée and Toope, at p. 14), which we discuss below.

[158] In Canada, each order of government plays a different role in the process of entering a treaty. Significantly, it is *the executive* which controls the negotiation, signature and ratification of treaties, in exercise of the royal prerogative power to conduct foreign relations. Its signature manifests initial consent to the treaty framework, but does not indicate consent to be bound by specific treaty obligations; that latter consent is given by ratification. It is only when a treaty enters into force that the specific treaty obligations become binding. For multilateral treaties, entry into force usually depends on the deposit of a specific number of state ratifications. If a treaty is in force and ratified by Canada, the treaty binds Canada as a matter of international law (Brunnée and Toope, at pp. 14-15).

[159] Many treaties do not require a change in domestic law to bind the state to a course of action. Where it does, however, and even when internationally binding, a treaty has no formal legal effect domestically until it is transformed or implemented through a domestic-law making process, usually by legislation (Harrington, at pp. 482-85; Currie, at p. 235). Giving an unimplemented treaty binding effect in Canada would result in the executive creating domestic law — which, absent legislative delegation, it cannot do without infringing on legislative supremacy and thereby undermining the separation of powers. Any domestic legal effect therefore depends on Parliament or a provincial legislature adopting the treaty rule into a domestic law that can be invoked before Canadian courts (Currie, at p. 237). For example, the environmental commitments in the *North American Free Trade Agreement*, Can. T.S. 1994 No. 2 (entered into force January 1, 1994) ("*NAFTA*") were implemented by provincial governments through a Canadian Interprovincial Agreement (Harrington, at pp. 483-84). The formalities associated with treaties respect the role that each order of the state is competent to play, in accordance with the separation of powers and the principle of legislative supremacy.

(2) Customary International Law

[160] As with conventional international law, the content of customary international law is established by the actions of states on the international plane. The relevance of customary international law to domestic law has both a substantive and a procedural aspect. Substantively, customary international law norms can have a direct effect on public common law, without legislative enactment. But for that substantive effect to be afforded a

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

customary international law norm, the existence of the norm must be proven as a matter of fact according to the normal court process.

(a) Sources of Customary International Law

[161] As the majority describes (at para. 77), customary international law is a general practice accepted as law that is concerned with the principles of custom at the international level. A rule of customary international law exists when state practice evidences a "custom" and the practicing states accept that custom as law (Currie, at p. 188).

[162] A custom exists where a state practice is applied both generally and uniformly. To be general, it must be a sufficiently widespread practice. To be uniform, the states that apply that practice must have done so consistently. A state practice need not, however, be perfectly widespread or consistent at all times. And for good reason: if that were true, the moment one state departs from either requirement, the custom would cease to exist (Currie, pp. 188-93).

[163] The requirement that states, which follow the practice, do so on the basis that they subjectively believe the practice to be legally mandated is known as *opinio juris* (Currie, at p. 188; J. L. Slama, "*Opinio Juris* in Customary International Law" (1990), 15 *Okla. City U.L. Rev.* 603, at p. 656). The practicing state must perform the practice out of the belief that this practice is necessary in order to fulfil its obligations under customary international law, rather than simply due to political, security or other concerns.[5]

[164] The high bar established by the twin requirements of state practice and *opinio juris* reflects the extraordinary nature of customary international law: it leads courts to adopt a role otherwise left to legislatures; and, unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented (Currie, at p. 187). And, if a rule becomes recognized as peremptory (i.e., as *jus cogens*) then even persistent objection will not relieve a state of the rule's constraints (J. A. Green, *The Persistent Objector Rule in International Law* (2016), at pp. 194-95).

(b) The Adoption of Customary International Law in Canada

[165] Once a norm of customary international law has been established, it can become a source of Canadian domestic law unless it is inconsistent with extant statutory law. This doctrine is called "adoption" in Canada and "incorporation" in its English antecedents. *Hape* explains the doctrine as follows:

> The English tradition follows an adoptionist approach to the reception of customary international law. Prohibitive rules of international custom may be incorporated directly into domestic law through the common law, without the need for legislative action. According to the doctrine of adoption, the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule:
>
> I. Brownlie, *Principles of Public International Law* (6th ed. 2003), at p. 41. Although it has long been recognized in English common law, the doctrine received its strongest endorsement in the landmark case of *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (C.A.). Lord Denning considered both the doctrine of adoption and the doctrine of transformation, according to which international law rules must be implemented by Parliament before they can be applied by domestic courts. In his opinion, the doctrine of adoption represents the correct approach in English law. Rules of international law are incorporated automatically, as they evolve, unless they conflict with legislation . . . .
>
> . . .
>
> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; paras. 36 and 39.]

[166] In our view, two features of this passage are noteworthy: (1) that prohibitive rules of customary international law can be incorporated into domestic law "in the absence of conflicting legislation"; and (2) that adoption only operates with respect to "prohibitive rules of international custom". Taken together, these elements respect legislative supremacy in the incorporation of customary international law into domestic law.

[167] The primacy given to contrary legislation preserves the legislature's ability to control the effect of international laws in the domestic legal system. As Currie writes, the adoption of customary international law preserves "the domestic legal system's ultimate ability, primarily through its legislative branch, to control the content of domestic law through express override of a customary rule" (p. 234).

[168] The majority (at paras. 91-93) suggests that there is no difference between "mandatory" norms of international law and "prohibitive" norms, citing the extrajudicial writing of Justice LeBel (L. LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014), 65 *U.N.B.L.J.* 3). We agree that this is not a distinction that is generally drawn in international law jurisprudence. It is, however, a helpful distinction for explaining the capacity of a common law court to remedy a breach of an international law norm. As James Crawford (a judge of the International Court of Justice) has explained, the first question when considering a rule of customary international law is to ask whether it is susceptible to domestic application (p. 65). Although a common law court adopts both prohibitive and mandatory norms, the domestic legal effect of the adoption of a prohibitive norm is different from the domestic legal effect of the adoption of a mandatory norm. This distinction becomes clear when comparing the roles of the various branches of the state.

[169] To illustrate the difference between prohibitive and mandatory norms, it may be helpful to analogize to *certiorari* and *mandamus* or to acts and omissions. When a norm is prohibitive, in the sense that it prohibits a state from acting in a certain way, the doctrine of adoption means that actions by the executive branch contravening the norm can be set aside through judicial review, as is the case with *certiorari*. When a norm is mandatory, in the sense that it mandates a state to act in a certain way, the doctrine of adoption means that omissions in contravention of the norm can be remedied through judicial review, as is the case with *mandamus*.[6] *Mandamus* is a limited remedy — it allows courts to enforce a clear public duty, but not to devise a regulatory scheme out of whole cloth.

[170] When the legislative branch contravenes an adopted norm, there is no difference between prohibitive norms and mandatory norms. If the legislature passes a law contravening a prohibitive norm of international law, that law is not subject to review by the courts. Similarly, if the legislature does not pass a law in contravention of a mandatory norm of international law, the courts cannot construct that law for them, unless doing so is otherwise within the courts' power. Courts may presume the intent of the legislature is to comply with customary international law norms (see, for example, *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 182), but that presumption is rebuttable: customary international law has interpretive force, but it does not formally constrain the legislature. The interpretive force comes from the presumption that the legislature would not mean to inadvertently violate customary international law (J. M. Keyes and R. Sullivan, "A Legislative Perspective on the Interaction of International and Domestic Law", in O. E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 277, at p. 297).

[171] The final question is what happens when private common law contravenes a norm.[7] We are aware of no case where private common law has violated a prohibitive norm. Nor are we aware of any case where private common law has violated a mandatory norm. In the case that has come closest, *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court found that Canada was not under an obligation to provide a private law civil remedy for violations of a norm:

> While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.
>
> Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. [paras. 152-53]

[172] In short, even if a plaintiff can prove that, (1) a prohibition lies on nation states at international law; and (2) that prohibition is *jus cogens*, these two considerations are nonetheless insufficient to support the proposition that international law requires every state to provide a civil remedy for conduct in breach of the prohibition.

[173] There are good reasons for distinguishing between executive action and legislative action. Canada — and the provinces — have the ability, should they choose to exercise it, to violate norms of customary international law. But that is a choice that only Parliament or the provincial legislatures can make; the federal and provincial governments cannot do so without the authorization of those legislative bodies.

[174] But how does this inform the development of private common law? If there were a private common law rule that contravened a prohibitive norm — we confess that such a combination of norm and private law rule is beyond our imagination, but perhaps it could exist — we would agree that judges must alter that law. When the private common law contravenes a mandatory norm, the court is faced with determining whether any existing statutes prevent the court from amending the common law as necessary for it to comply with that norm.

[175] How, then, to determine whether a statute prevents so amending the common law? We would suggest that courts should follow a three-step process. First, precisely identify the norm. Second, determine how the norm would best be given effect. Third, determine whether any legislation prevents the court from changing the common law to create that effect. If no legislation does so, courts should implement that change to the common law. If any legislation does so, the courts should respect that legislative choice, and refrain from changing the common law. In such circumstances, judicial restraint respects both legislative supremacy and the superior institutional capacity of the legislatures to design regulatory schemes to comply with Canada's international obligations. These are foundational considerations, going to the proper roles of courts, legislatures and the executive. The incorporation of a rule of customary international law must yield to such constitutional principles (*R. v. Jones (Margaret)*, [2006] UKHL 16, [2007] 1 A.C. 136, at para. 23, per Lord Bingham; Crawford, at pp. 65-66).

[176] One final point on the doctrine of adoption. *Hape* is ambivalent as to whether incorporation means that rules of customary international law are incorporated (at para. 36), should be incorporated (at para. 39) or simply may aid in the interpretation of the common law (at para. 39). The traditional English view is the first. But the modern English jurisprudence puts that view in doubt, and rightly so (see *Jones*, at para. 11, per Lord Bingham). As we discussed above, a rule of customary international law may need to be adapted to fit the differing circumstances of common law instead of public international law.

(c) The Procedure for Recognizing Customary International Law

[177] Much of Canadian civil procedure depends on the distinction between law and facts. Facts are pled, but law is not; facts are determined through evidence, but law is not; facts cannot be settled on a motion to strike or summary judgment, but law can; factual findings by a trier of fact are deferred to by appellate courts; legal conclusions are not. Perhaps most importantly, judges cannot determine matters of fact without evidence led by the parties (except where judicial notice applies), but can decide questions of law. Judges doing their own research on law is not only accepted, but expected. Judges doing their own research on facts is impermissible.

[178] The majority suggests that the content of customary international law should be treated as law by Canadian courts, not fact, but, incongruously, also recognizes that the authorities on which it relies for this proposition nonetheless maintain that *evidence* of state practice is necessary to prove a new norm of customary international law (para. 96, citing G. van Ert, "The Reception of International Law in Canada: Three Ways We Might Go Wrong", in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 62-69). With respect, we see the approach of treating norms of international law as law and new norms of international law as fact as creating an

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

unwieldy hybridization of law and fact. As we have discussed above, procedure in Canadian law is largely built upon the distinction between law and fact, and such a hybrid therefore promises to cause confusion. The absence of clear methodology will foster conclusionary reasoning, in other words decision making by intuition. And, what standard of review would be applied to such decisions? Confusion in means gives rise to uncertainty in ends.

[179] The process is perhaps most conveniently understood as comprising three steps. The first requires the court to find the facts of state practice and *opinio juris*. In easy cases, the first step can be dispensed with without a trial due to the power of judicial notice. When there is or can be no dispute about the existence of a norm of customary international law it is appropriate for the courts to take judicial notice (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 61). In this case, we agree with the majority that the existence of some of the norms of international law that have been pled — for example, that crimes against humanity are prohibited — meets the threshold for taking judicial notice (Majority Reasons, at para. 99). Where, however, the existence of a norm of customary international law is contested — as it is on the question of whether corporations can be held liable at international law — judges should rely on the pleadings (on an application to strike or for summary judgment) or the evidence that is adduced before them.

[180] It is in these contested, hard cases where this step is particularly important. Courts will be called on to evaluate both whether there exists a custom generally among states that is applied uniformly, and whether the practicing states respect the custom out of the belief that doing so is necessary in order to fulfil their obligations under customary international law. These are, fundamentally, empirical exercises: they do not ask what state practice should be or whether states should comply with the norm out of a sense of customary international legal obligation, but whether states in fact do so. As van Ert has acknowledged, "[s]tate practice . . . is a matter of fact" (*Using International Law in Canadian Courts*, at p. 67) and that when a claimant asserts "a new rule of customary international law", proof in evidence may be required ("The Reception of International Law in Canada", at p. 6, fn. 60).

[181] As the majority has correctly described (at para. 79), the judicial decisions of national courts can be "evidence" of general practice or *opinio juris*. These national courts include Canadian courts, the courts of other common law systems, and the courts of every other national legal system. To determine whether a rule of customary international law exists, Canadian courts must be prepared to understand and evaluate judicial decisions from the world over. As this Court explained, "[t]o establish custom, an extensive survey of the practices of nations is required" (*R. v. Finta*, [1994] 1 S.C.R. 701, at p. 773). Canadian judges need to be able to understand decisions rendered in a foreign legal system, in which they are not trained, and in languages which they do not know. Making expert evidence available for judges to understand foreign language texts is simply sensible (van Ert, *Using International Law in Canadian Courts*, at p. 57). Put another way, the foundations of customary international law rest, in part, on foreign law. In Canada, foreign law is treated as fact, not law (J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, at p. 7-1). When a Canadian court applies Canadian conflict of laws rules and determines that the law of a foreign state is to be applied in a Canadian court proceeding, the Canadian judge does not then embark on their own analysis of the foreign law. Rather, the Canadian judge relies on the parties to adduce evidence of the content of the foreign law.

[182] It is only once the facts of state practice and *opinio juris* are found that the court can proceed to a second step, which is to identify which, if any, norms of customary international law must be recognized to best explain these facts. This question arises since state practice and *opinio juris* may be consistent with more than one possible norm. This is a question of law.

[183] The final step is to apply the norms, as recognized, to the facts of the case at bar. This is a question of mixed fact and law.

[184] We should note that, although we disagree with the majority on this procedural point, and although this point is important, it is ultimately not the nub of our disagreement. The more the questions in dispute are questions of fact, the more difficult it is for a court to properly strike the pleadings. It is therefore more difficult for us to strike these claims on *our* understanding of the jurisprudential character of international law, than it is on *the majority's* understanding. Nonetheless, as we will explain, we would do just that.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

B. The Claim, on the Majority's Theory, Contravenes These Limits Placed Upon International Law Within Canadian Law

[185] In the following section, we explain why the majority's theory of the case cannot succeed. We begin here by summarizing its approach, as we understand it:

> a) There are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, and degrading treatment (paras. 100-3).
>
> b) These prohibitions have the status of *jus cogens*, except possibly for that against the use of forced labour (paras. 100-3).
>
> c) Individuals and states both must obey some customary international law prohibitions, and it is a question for the trial judge whether they must obey these specific prohibitions (paras. 105, 110-11 and 113).
>
> d) Corporations must also obey certain such prohibitions (paras. 112-113).
>
> e) Individuals are beneficiaries of these prohibitions (paras. 106-11).
>
> f) It would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability" (para. 112, citing H. H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at p. 266).
>
> g) The doctrine of adoption makes any action prohibited at international law also prohibited at domestic law, unless there is legislative action to the contrary (paras. 94, 114 and 116).
>
> h) In domestic law, where there is a right there must be a remedy (paras. 120-21).
>
> i) There is no adequate remedy in domestic law, including in existing tort (paras. 122-26).

[186] We have no quarrel with steps (a), (b), (c), (e), and (h) of the majority's analysis.

[187] In our respectful view, however, the majority's analysis goes astray at steps (d), (f), (g), and (i). The conclusion it draws at step (d) relies upon it being possible for a norm of customary international law to exist when state practice is not general and not uniform. The conclusions it draws at steps (f) and (g) are not supported by the premises on which it relies. And the conclusions the majority draws at step (i) are possible only if one ignores the express *Criminal Code*, R.S.C. 1985, c. C-46, prohibition against courts creating common law offences. We will address these in turn.

(1) As a Matter of Law, Corporations Cannot Be Liable at Customary International Law

[188] The majority states that "it is not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law'" (para. 113, citing Koh, at p. 267). The authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh. It cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any. While it does cite a book by Simon Baughen and an article by Andrew Clapham, those authorities do not support its view of the matter (S. Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32; A. Clapham, "On Complicity", in M. Henzelin and R. Roth, eds., *Le Droit Pénal à l'Épreuve de l'Internationalisation* (2002), 241, at pp. 241-75). Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abetters is specific to the provision in the United States Code now commonly known as the *Alien Tort Statute*, 28 U.S.C. § 1350 (2018), and Clapham's article concerns the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules.

[189] In our view, that corporations are excluded from direct liability is plain and obvious. Although normally such a contested issue would be left to trial, in the context of a disputed norm of customary international law the existence of an opposing view can itself be dispositive. As this Court said in *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[190] In this regard, and against Professor Koh's lone essay, we would pit the United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, which states that "preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law" (para. 34). This is confirmed by the evaluation of Judge Crawford, in the book that the majority cites at para. 97 of its reasons (*Brownlie's Principles of Public International Law*):

> At present, no international processes exist that require private persons or businesses to protect human rights. Decisions of international tribunals focus on states' responsibility for preventing human rights abuses by those within their jurisdiction. Nor is corporate liability for human rights violations yet recognized under customary international law. [Emphasis added; footnotes omitted.] (Crawford, at p. 630)

[191] The authorities thus favour the proposition that corporate liability for human rights violations has *not* been recognized under customary international law; the most that one could credibly say is that the proposition that such liability has been recognized is equivocal. To repeat *Kazemi*, "customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal" (para. 102). Absent such a binding norm, the workers' cause of action is clearly doomed to fail.

(2) The Doctrine of Adoption Does Not Transform a Prohibitive Rule Into a Liability Rule

[192] With respect, we find the majority's analysis in respect of steps (f) and (g) difficult to follow.

[193] At paragraph 101, the majority writes that "[t]he prohibition against slavery too is seen as a peremptory norm". We are uncertain how it deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition. Perhaps it sees a liability rule as inherent in a "prohibition", or perhaps it sees the doctrine of adoption as producing a liability rule in response to a prohibition, or perhaps both.[8] We do not know.

[194] Faced with such uncertainty, we will consider all the plausible reasoning paths that could take the majority from the existence of a prohibition to the existence of a liability rule. We see three such paths that correspond to distinct interpretations of its reasons:

(1) Prohibitions of customary international law *require* the Canadian state to provide domestic liability rules between individuals and corporations. With regard to slavery, the prohibition would require Canada to provide a legal rule pursuant to which enslaved persons could hold a corporation responsible for their enslavement liable. The doctrine of adoption requires our courts to create such rules if they do not already exist. Paragraph 119 of the majority's reasons supports this interpretation.

(2) A prohibition in customary international law itself contains a liability rule between individuals and corporations. With regard to slavery, the prohibition upon slavery would include a subordinate rule that 'a corporation who is responsible for enslavement is liable to enslaved persons'. The doctrine of adoption requires domestic courts to enforce these rules. Paragraphs 127 and 128 of the majority reasons support this interpretation.

(3) General (that is, non-criminal) customary international law requires states to enact laws prohibiting certain actions. International criminal law also prohibits corporations from taking these actions. With regard to slavery, the prohibition upon slavery would mean that, respectively, 'Canada must prohibit and prevent slavery by third parties' and 'it is an international crime for a corporation to enslave someone'. The doctrine of adoption transforms these requirements and prohibitions into tort liability rules. Paragraphs 117 and 122 of the majority reasons support this interpretation.

[195] If either of the first two interpretations correctly represents the majority's reasons, then we would respectfully suggest that its reasons depend on customary international law norms that do not exist. If the third interpretation

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

correctly represents the majority's reasons, we would respectfully suggest that its reasons depend on affording to the doctrine of adoption a role it cannot have.

[196] If, as in the first interpretation above, the majority's reasons depend on customary international law *requiring* states to provide a civil remedy for breaches of prohibitions, then we say — first of all — that this theory is not what the workers have pleaded. The workers did not plead the necessary facts of state practice and *opinio juris*: they did not plead that there exists a general practice among states of providing a civil remedy for breaches of prohibitions, and that states perform that practice out of compliance with customary international law. Nor can the court take judicial notice of such practices, because they are not sufficiently well-established.

[197] Further, and more fundamentally, states are typically free to meet their international obligations according to their own domestic institutional arrangements and preferences. Customary international law may well require all states to prohibit slavery, but it does not typically govern the form of that prohibition. A civil liability rule is but one possibility. A prohibition could also be effected through, for example, the criminal law or through administrative penalties. How legislatures accomplish such a goal is typically a matter for them to consider and decide. As the Second Circuit Court of Appeals observed in *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254 (2nd Cir. 2007), the "law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations" (at p. 269, citing *Kadic v. Karadžić*, 70 F.3d 232 (2nd Cir. 1995), at p. 246). While it is conceivable that international law could develop to give such a result, it has not done so (*Kazemi*, at para. 153). Asserting that it has done so or that it should do so does not make it so.

[198] If, as in the second interpretation above, the majority's reasons depend on an existing a rule of customary international law that renders a corporation directly civilly liable to an individual, then we observe, once again, that this theory is not pleaded.

[199] The support for this conclusion in the majority's reasons (at para. 112) consists of the aforementioned academic essay by Professor Koh. Professor Koh's essay states it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability". If the majority is relying on this essay as evidence of the existence of such a rule, then we would say simply that a single essay does not constitute state practice or *opinio juris*.

[200] Even taken on its own terms as authority for any proposition, the Koh essay does not indicate that customary international law *has* so evolved; rather, it simply speculates that it *could* so evolve. The mere possibility that customary international law *could* change is not sufficient, on a motion to strike, to save a claim from being doomed to fail. Otherwise, all kinds of suppositious claims would succeed on the basis that the legislature *could* create a new statutory cause of action to support them. Of course, on a motion to strike, it is impossible to strike a novel common law claim for novelty alone. The relevant distinction here is that courts have some discretion to change the common law. Courts do not have that discretion in respect of statutory law or customary international law. Courts can recognize a change to customary international law, but they cannot change it directly themselves.

[201] We observe also that Professor Koh, in his other work, is clear that his academic project is normative in nature: he does not seek merely to *describe* the existing state of international law, but *to change* international law through his scholarship (see H. H. Koh, *International Law vs. Donald Trump: A Reply*, March 5, 2018 (online)). State practice is not a normative concept, but a descriptive one. It therefore cannot be established based on how a single U.S. academic thinks international law should work, but rather must be based on how states in fact behave. State practice is the difference between civil liability and criminal liability at customary international law. That criminal liability arises from customary international law has been accepted by the states of the international community since Nuremberg. It is precisely this acceptance that creates customary international law.

[202] Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals. This widely accepted view is neatly summarized by Professor Roger O'Keefe, who writes, "[t]he phenomenon of individual criminal responsibility under international law sets this subset of international crimes apart from the general body of public international law, the breach of whose rules gives rise only to the delictual responsibility of any state in breach" (*International Criminal Law* (2015), at pp. 47-48 (footnote omitted)). Indeed, as the majority of

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

this Court observed in *Kazemi* (at para. 104), criminal proceedings and civil proceedings are "seen as fundamentally different by a majority of actors in the international community".

[203] Authority from this country also supports the view that customary international law prohibitions do not create civil liability rules. In *Bouzari v. Islamic Republic of Iran* (2004), 71 O.R. (3d) 675, the Court of Appeal for Ontario considered and rejected the argument that the customary international law prohibition against torture "constitutes a right to be free from torture and where there is a right there must be a remedy", and therefore a civil remedy must exist (para. 92). As *Bouzari* correctly held, "[a]s a matter of principle, providing a civil remedy for breach of the prohibition of torture is not the only way to give effect to that prohibition" (at para. 93) and "as a matter of practice, states do not accord a civil remedy for torture committed abroad by foreign states" (para. 94). The issue may be simply stated: a domestic court cannot effect a change to the law by "seeing a widespread state practice that does not exist today" (para. 95).

[204] It may be that neither of our first two interpretations of its reasons is correct, and that the majority shares our view that there is no rule of customary international law that requires states to create civil liability rules or that purports to impose civil liability directly. If that is so, then, as in the third interpretation above, the doctrine of adoption must play in the majority's reasons the role of converting a general prohibition upon states and criminal prohibitions upon individuals into a civil liability rule. In our view, this would afford the doctrine of adoption a role it cannot play.

[205] It is not enough to simply say that the doctrine of adoption incorporates prohibitive and mandatory rules into the common law. Outside the realm of criminal law, customary international law imposes prohibitions and mandates on states, not private actors. As Judge Crawford puts it, "human rights . . . arise against the state, which so far has a virtual monopoly of responsibility" (p. 111). States are the only duty-holders under general customary international law.

[206] Nor is it enough to say that the doctrine of adoption must respond to a state's duties under customary international law. We do not dispute that a state's duties may include one to prohibit and another to prevent violations of those aforementioned rights. Nor do we dispute that such a mandatory norm can trigger the doctrine of adoption. Our dispute is limited to *how* the doctrine of adoption leads Canadian law to change in response to recognition of a norm of customary international law. In our view, the three-step process we defined above for determining whether to amend private common law rules in response to the recognition of a mandatory norm of customary international law ought to govern.

[207] At the first step, we would identify the mandatory norm at issue here as "Canada must prohibit and prevent slavery by third parties", *mutatis mutandis* for each of the activities alleged to be in violation of international law. We agree that the pleadings may allege that this norm may exist, and further, it is not plain and obvious to us that it does not. We would not therefore strike out the claim on that basis. This brings us to considering the second and third steps of the process for adopting a mandatory norm: determining how the norm would be best given effect, and determining whether any legislation prevents the court from changing the common law to give the norm that effect.

[208] At the second step, we say that such a mandatory rule is appropriately given effect through, and only through, the criminal law. Indeed, the majority's reasons appear animated by concerns that are the subject of the criminal law. We will discuss this aspect of its reasons in greater detail in the next section and will not repeat the point here.

[209] At the third step, we note that Parliament has, in s. 9 of the *Criminal Code*, clearly prohibited courts from creating criminal laws via the common law. In *R. v. D.L.W.*, 2016 SCC 22, [2016] 1 S.C.R. 402, at para. 3, this Court explicitly rejected the idea that it could "turn back the clock and re-enter . . . a period when the courts rather than Parliament could change the elements of criminal offences". At this step, we conclude that, on this interpretation of the majority's theory of the case, the pleadings are doomed to fail on two bases: first, that violations of the mandatory norms at issue here are properly remedied through the criminal law, for which there is not a private law cause of action; and secondly, that Parliament has prohibited the courts from creating new crimes.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[210] The majority's approach is no more tenable if we take a step back and consider it more conceptually. Essentially, on this interpretation, the majority's approach amounts to saying that the doctrine of adoption has what jurists in Europe would call "horizontal effect". Articles of the treaties that constitute the European Union give individuals rights both against the state ("vertical effect") and against other private parties ("horizontal effect") (P. Craig, "Britain in the European Union", in J. Jowell, D. Oliver and C. O'Cinneide, eds., *The Changing Constitution* (8th ed. 2015), 104, at p. 127). In Canada, this Court rejected the idea that the *Charter* has horizontal effect (see *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 597; see also G. Phillipson, "The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?" (1999), 62 *Mod. L. Rev.* 824, at p. 824). It would be astonishing were customary international law to have horizontal effect where the *Charter* does not. One wonders if the majority's view of the adoption of customary international law would amount to a new Bill of Horizontal Rights; conceptually, these are very deep waters.

[211] The majority's approach also amounts to recognizing a private law cause of action for simple breach of customary international public law. This would be similarly astonishing, since there is no private law cause of action for simple breach of statutory Canadian public law (see *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 9). As Judge Crawford has explained, a rule of customary international law will not be adopted if it is itself "contradicted by some antecedent principle of the common law" (p. 66, citing *West Rand Central Gold Mining Company v. Rex*, [1905] 2 K.B. 391, at p. 408, per Lord Alverstone C.J.; *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), at p. 168, per Lord Atkin).

[212] Further yet, the mere existence of international criminal liability rules does not make necessary the creation of domestic torts. As we have already noted, in support of its view that domestic courts can hold corporations civilly liable for breaches of international law, the majority (at para. 112) relies upon an essay by Professor Koh. But this essay concerns the domestic courts of the United States, not Canada. And the law being applied by U.S. courts differs in a highly significant respect. As Professor Koh writes, "Congress passed two statutes — the Alien Tort Statute and the Torture Victim Protection Act (TVPA) — precisely to provide civil remedies for international law violations" ("Separating Myth from Reality about Corporate Responsibility Litigation", at pp. 266-67 (emphasis added)). The former, the hoary and historically unique *Alien Tort Statute*, requires American courts to treat international law as creating civil liabilities (*Khulumani*, at p. 270, fn. 5). The *Alien Tort Statute* has no analogue outside the United States (A. Ramasastry and R. C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law — A Survey of Sixteen Countries* (2006), at p. 24; J. Zerk, *Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies — A report prepared for the Office of the UN High Commissioner for Human Rights*, February 2014 (online), at p. 45). The existence of these statutes has influenced the peculiar American equivalent to the doctrine of adoption. Essentially, the majority's approach would amount to Americanizing the Canadian doctrine of adoption without accounting for the unique statutory context from which the American doctrine arose. It goes without saying that Canadian courts cannot adopt a U.S. statute when Parliament and the legislatures have not.

[213] In short, in order to reach the conclusion it does about the necessity of a tort liability rule, the majority must significantly change the doctrine of adoption. As we will explain below (see section III, subheading C), this is not a change that this Court is empowered to make.

(3) A Tort Remedy Is Not Necessary

[214] At what we identified as step (h) of its reasons, the majority suggests that where there is a right, there must be a remedy. We agree. It adds, in what we termed step (i) of its reasons, that this truism signifies there is no bar to Canadian courts granting a civil remedy for violations of customary international law norms. Here is another point of disagreement. In our view, it is possible, even at this early stage of proceedings, to exclude a remedy *for money damages* for violations of customary international law norms. The right to a remedy does not necessarily mean a right to a *particular form, or kind of* remedy. Parliament could prefer another remedy, such as judicial review, or a criminal sanction. As this Court said in *Kazemi*, "[r]emedies are by no means automatic or unlimited; there is

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation" (para. 159).

[215] The majority rejects the possibility that existing domestic torts could suffice. In its view, "it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts" (para. 123). It tells us it is difficult to refute the concept that "torture is something more than battery" and that "slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment" (para. 126, citing R.F., at para. 4). There is, it says (at para. 125), important "symbolism", in the labelling of an action as "torture" or "battery". It adopts the view that the "remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern" (para. 125, citing G. Virgo, "Characterisation, Choice of Law, and Human Rights", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at para. 335). The majority also explains that these proposed causes of action are "inherently different from" and have "a more public nature than" traditional torts, since these tortious actions "shoc[k] the conscience" (para. 124, citing M. C. Bassiouni, "International Crimes: *Jus Cogens and Obligatio Erga Omnes*" (1996), 59 *Law & Contemp. Probs.* 63, at p. 69). It concludes by explaining that an appropriate remedy must emphasize "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches" (para. 129).

[216] With respect, these considerations are not relevant to deciding the scope of tort law. A difference merely of damages or the extent of harm will not suffice to ground a new tort. For example, in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, this Court explained that a separate tort of sexual battery was unnecessary because the harms addressed by sexual battery were fully encompassed by battery. The sexual aspect of the claim went to the amount of damages, which did not require the recognition of a separate tort (para. 27). Similarly, the Court of Appeal for Ontario recently held that "an increased societal recognition" of the wrongfulness of conduct did not necessitate the creation of a new tort (*Merrifield v. Canada (Attorney General)*, 2019 ONCA 205, 145 O.R. (3d) 494, at paras. 50-53, leave to appeal refused, S.C.C. Bull., September 20, 2019, at p. 7). The point is this: since all torture is battery (or intentional infliction of emotional distress), albeit a particularly severe form thereof, it does not need to be recognized as a new tort. Our law, as is, furnishes an appropriate cause of action.

[217] The majority provides plausible reasons for recognizing four new common law *crimes*, were that something courts could do. However, in our respectful view, they are inapposite for determining whether a new common law *tort* should be recognized.

[218] The suitability of criminal law, relative to tort law, in addressing this conduct, is readily apparent. Parliament reached precisely this conclusion when it chose to criminalize crimes against humanity (see *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24). Parliament chose not to provide for a liability rule in tort. As we have already mentioned, to find a new tort based on mere degree of harm would contradict *Scalera*. A more profound degree of harm, may, however, be an appropriate reason for crafting a different criminal remedy. "[S]ymbolism", too, is an issue well-addressed by criminal remedies and poorly addressed by tort. The labelling of a crime matters (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636); the labelling of a tort, not so much. Tort is not an area of law in which the primary value of bringing a case is often, or even usually, symbolic. Finally, the tort system has its own, built-in way to adapt to breaches of rights that are more grave or that need to be deterred: by awarding increased damages.

[219] The majority also suggests recognizing new nominate torts so that this Court can "ad[d] its voice to others in the international community collectively condemning [these crimes]" and so "furthe[r] the development of an international rule of law" (para. 130, citing H. H. Koh, "Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation" (2016), 50 *Tex. Intl L.J.* 661, at p. 675).

[220] In making this suggestion, the majority undervalues the tools Canadian courts already have that can be used to condemn crimes against humanity and degrading treatment. First, even were this action formally for the tort of battery, a court can express its condemnation of the conduct through its reasons. Nothing would prevent the trial judge in this case from writing in his or her reasons that Nevsun committed, or was complicit in, forced

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

labour, slavery and other human rights abuses, even if his or her ultimate legal conclusion is that Nevsun committed assault, battery, or other wrongs. Causes of action sometimes go by different names. For example, what this Court referred to as the "unlawful means" tort in *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177, is commonly referred to as '"unlawful interference with economic relations', 'interference with a trade or business by unlawful means', 'intentional interference with economic relations', or simply 'causing loss by unlawful means'" (para. 2). Similarly, what this Court referred to as the "tort of civil fraud" in *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, at para. 21, and *Mauldin*, at para. 87, is also commonly referred to as the "tort of deceit" (see *Dhillon v. Dhillon*, 2006 BCCA 524, 232 B.C.A.C. 249, at para. 77).

[221] A trial court could also express its condemnation through its damage award. Punitive damages, for example, have been recognized by this Court as "straddl[ing] the frontier between civil law (compensation) and criminal law (punishment)", have as a goal the *denunciation* of misconduct (*Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 36 and 44). The majority tells us that an award of punitive damages "may be inadequate" to remedy the violation of these international norms (para. 126). It says that a "different and stronger" response may be required (para. 129). But the "different and stronger" response that the majority concludes must be given appears to be a tort with a new name but the same remedy. Again, the better conclusion is that a remedy in criminal law is appropriate, while a remedy in tort law (established by the courts, rather than the legislature) is not.

[222] We note also that the majority's approach in this regard would put Canada out of step with other states. As Dr. Zerk explains, although "most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour", "these kinds of claims are not in most cases aimed at gross human rights abuses specifically" (p. 43). Instead, torts such as "assault", "battery", "false imprisonment", and "negligence" are used (pp. 43-44). Indeed, corporate liability for violations of customary international law generally depends on "ordinary common law torts or civil law delicts" (Ramasastry and Thompson, at p. 22). Such ordinary private law actions provide mechanisms to address the "harm arising out of a grave breach" of international criminal law (p. 24). This is a critical point here, where the workers advance such ordinary private law claims in addition to their claim founded on customary international law. Even were this part of Nevsun's motion to strike to be granted, the workers could pursue in Canada the same relief they could obtain in most other states.

[223] And, as we will discuss below in section IV, subheading D, our existing private international law jurisprudence also provides a vehicle by which courts can declare that the law of another state is so morally repugnant that the courts of this country will decline to apply it.

C. Changing the Limits of International Law Is Not the Job of Courts

[224] Above, we have described how the majority's reasons either depend on customary international law norms that do not exist or depend on affording to the doctrine of adoption a role it does not have. This requires us to consider whether this Court can change the doctrine of adoption so that it provides a civil liability rule for breaches of prohibitions at customary international law. In our view, it cannot, regardless of whether it is framed as recognizing a cause of action for breach of customary international law or as giving horizontal effect to that law.

[225] It is of course open to Parliament and the legislatures to make such a change. Absent statutory intervention, however, the ability of courts to shape the law is, as a matter of common-law methodology, constrained. Courts develop the law *incrementally*. This is a manifestation of the unwritten constitutional principle of legislative supremacy, which goes to the core of just governance and to the respective roles of the legislature, the executive and the judiciary (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61; *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, at pp. 436-38; *R. v. Salituro*, [1991] 3 S.C.R. 654, at pp. 666-67; *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108, at para. 43; B. McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006), 4 *N.Z.J.P.I.L.* 147). It also reflects the comparative want of expertise of the courts, relative to the legislature. The legislature has the institutional competence and the democratic legitimacy to enact major legal reform. By contrast, the courts are confined by the record to considering the circumstances of the particular parties before them, and so cannot anticipate all the consequences of a change.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[226] The importance, both practical and normative, of confining courts to making only incremental changes to the common law was stated by this Court in *Watkins*, at pp. 760-61:

> This branch of the case, viewed thus, raises starkly the question of the limits on the power of the judiciary to change the law. Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.
>
> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.
>
> Considerations such as these suggest that major revisions of the law are best left to the legislature. Where the matter is one of a small extension of existing rules to meet the exigencies of a new case and the consequences of the change are readily assessable, judges can and should vary existing principles. But where the revision is major and its ramifications complex, the courts must proceed with great caution. [Emphasis added.]

[227] In the same vein, Justice Robert J. Sharpe, writing extra-judicially, has reflected on the limits of the judicial role when faced with polycentric issues:

> The first question is whether the proposed change is of a nature that falls within the capacity of the courts to decide. Judges, as I have argued, should be conscious of the inherent limits of adjudication and the fact that their view of a legal issue will necessarily be limited by the dynamics of the adversarial litigation process. That process is well-suited to deal with the issues posed by bipolar disputes and considerably less capable of dealing with polycentric issues that raise questions and pose problems that transcend the interests of the parties. Judges should hesitate to move the law in new directions when the implications of doing so are not readily captured or understood by looking at the issue through the lens of the facts of the case they are deciding. The legislative process is better suited to consider and weigh competing policy choices that are external to legal rights and duties. Elected representatives have the capacity to reflect the views of the population at large. Government departments have the resources to study and evaluate policy options. The legislative process allows all interested parties to make their views known and encourages consideration and accommodation of competing viewpoints.
>
> The second question relates to the magnitude of the change. Common law judges constantly refer to incremental or interstitial change and characterize the development of the common law as a gradual process of evolution. Former Senior Law Lord Tom Bingham put it this way: it is very much in the common law tradition "to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices." If the proposed change fits that description, there is a strong tradition to support judicial law-making. It is quite another thing, however, "to seek to recast the law in a radically innovative or adventurous way," as that makes the law "uncertain and unpredictable" and is unfair to the losing party who relied on the law as it existed before the change. Developments of the latter magnitude may best be left to the legislature. [Footnote omitted.]
>
> (*Good Judgment: Making Judicial Decisions* (2018), at p. 93)

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Accordingly, for a change to be incremental, it cannot have complex and uncertain ramifications. This Court has repeatedly declined to change the common law in those very circumstances (*Watkins*, at p. 761; *London Drugs Ltd.*, at pp. 436-38; *Salituro*, at 677-78; *Fraser River Pile & Dredge Ltd.*, at para. 44).

[228] There is much accumulated wisdom in this jurisprudence. To alter the courts' treatment of customary international law would "se[t] the law on an unknown course whose ramifications cannot be accurately gauged" (*Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93). As this Court explained in *Kazemi*, at para. 108:

> The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in its conceptual infancy.

The majority views such a change as "necessary" (at para. 118), but provides no reason to believe the change will have anything other than complex and uncertain ramifications. Such a fundamental reform to the common law must be left to the legislature, even though doing so by judge-made law might seem intuitively desirable (*Salituro*, at p. 670).

[229] If Parliament wishes to create an action for a breach of customary international law, that is a decision for Parliament itself to take. It is not one for this Court to take on Parliament's behalf. As stated by Professor O'Keefe:

> . . . the recognition by the courts of a cause of action in tort for the violation of a rule of customary international law would be no less than the judicial creation of a new tort, something which has not truly happened since the coining of the unified tort of negligence in *Donoghue v Stephenson* in 1932.[9] The reason for this is essentially constitutional: given its wide-reaching implications, economic and sometimes political, the creation of a novel head of tort is now generally recognised as better left to Parliament, on account of the latter's democratic legitimacy and superior capacity to engage beforehand in the necessary research and consultation. [Footnote omitted.]
>
> (R. O'Keefe, "The Doctrine of Incorporation Revisited", in J. Crawford and V. Lowe, eds., *The British Year Book of International Law 2008* (2009), 7, at p. 76.)

[230] When the English courts determined to give horizontal effect to an international instrument (the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221), they did so pursuant to the direction of *a statute* that made it unlawful for a public authority — which by the terms of the statute included the courts — to act "in a way which is incompatible with a Convention right" (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 6(1) and (3)). Similarly, the horizontal effect of the Treaties of the European Union in the United Kingdom depends on a statutory instruction in the *European Communities Act 1972* (U.K.), 1972, c. 68 (*R. (Miller) v. Secretary of State*, [2017] UKSC 5, [2018] A.C. 61, at paras. 62-68). While we agree with the majority's reasoning (at para. 94) that legislative endorsement is not required for there to be *vertical* effect in the common law (that is, an effect against the executive) of a mandatory or prohibitive norm of customary international law, there is no such tradition of *horizontal* effect in the common law (that is, an effect on the relations between private parties) without legislative action. Further, and to the extent such an effect is even possible, it should be governed by the considerations we set out at paras. 174-75 concerning the effect of mandatory and prohibitive norms in private common law.

[231] It is thus for Parliament to decide whether to change the doctrine of adoption to provide courts the power to convert prohibitive rules of international law into free-standing torts. Parliament has not done so. While it has created a statutory cause of action for victims of terrorism, it has not chosen to do so for every violation of customary international law (see s. 4 of the *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, s. 2).

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

IV. On the Second Theory, the Claims Are Also Bound to Fail

[232] We have thus far confined our comments to the theory of the case given by the majority. As part of reading the pleadings generously, however, we must also consider the theory given by the chambers judge and the Court of Appeal. Under this theory, the amended pleadings sought to have the court recognize four new nominate torts *inspired* by international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

[233] On this theory of the case, international law plays a limited role. It will be of merely persuasive authority in recognizing the tort to begin with. It will also play less ongoing significance. Although proving the content of customary international law may be valuable for showing the urgency of recognizing a new tort, once a new tort is recognized, the new tort will have a comfortable home within the common law. If slavery is recognized as a tort, a future litigant will have no need to prove that an edge-case of slavery is a violation of customary international law; they can instead simply invoke the domestic tort. It is far easier for Canadian judges to know the contours of a domestic tort than it is for them to know the contours of customary international law. The transmutation of customary international law into individual domestic torts has another advantage, too. On an edge-case, where it is unclear whether states are obliged to prohibit the conduct under customary international law, Canadian judges will not be faced with a partly empirical question (as they would on the majority's theory of the case), but a normative question.

[234] The question that remains is: when should Canadian common law courts recognize these new nominate torts?

[235] We explain below, first, the test that Canadian courts have developed for recognizing — or more precisely, for refusing to recognize — a new nominate tort. We then apply that test to the four torts the workers allege.

A. THE TEST FOR RECOGNIZING A NEW NOMINATE TORT

[236] In *Frame v. Smith*, [1987] 2 S.C.R. 99, at p. 120, Wilson J. (dissenting, but not on this point) described the history of disputed theories for recognizing new torts:

> It has been described in Solomon, Feldthusen and Mills, *Cases and Materials on the Law of Torts* (2nd ed. 1986), as follows (at p. 6):
>
> > Initially, the search for a theoretical basis for tort law centred on the issue of whether there was a general principle of tortious liability. Sir John Salmond argued that tort law was merely a patchwork of distinct causes of action, each protecting different interests and each based on separate principles of liability [see Salmond, *The Law of Torts* (6th ed., 1924) at pp. 9-10]. Essentially the law of torts was a finite set of independent rules, and the courts were not free to recognize new heads of liability. In contrast, writers such as Pollock contended that the law of torts was based upon the single unifying principle that all harms were tortious unless they could be justified [see Pollock, *The Law of Torts* (13th ed., 1929) at p. 21]. The courts were thus free to recognize new torts. Glanville Williams suggested a compromise between the two viewpoints. He argued that tort law historically exhibited no comprehensive theory, but that the existing categories of liability were sufficiently flexible to enable tort law to grow and adapt. [Emphasis added.]

Justice Wilson agreed with, and adopted, Glanville Williams's pragmatic approach (p. 120, citing G. L. Williams, "The Foundation of Tortious Liability" (1939), 7 *Cambridge L.J.* 1).

[237] Three clear rules for when the courts will not recognize a new nominate tort have emerged: (1) The courts will not recognize a new tort where there are adequate alternative remedies (see, for example, *Scalera*); (2) the courts will not recognize a new tort that does not reflect and address a wrong visited by one person upon another (*Saskatchewan Wheat Pool*, at pp. 224-25); and (3) the courts will not recognize a new tort where the change wrought upon the legal system would be indeterminate or substantial (*Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701, at paras. 76-77). Put another way, for a proposed nominate tort to be recognized by the courts, at a minimum it must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[238] The first rule, that of necessity, acknowledges at least three alternative remedies: another tort, an independent statutory scheme, and judicial review. If any of these alternatives address the wrong targeted by the proposed nominate tort, then the court will decline to recognize it.

[239] As we described above, a difference merely of damages or the extent of harm will not suffice to ground a new tort (*Scalera*). The proposed torts of "harassment" and "obstruction" also failed at the necessity stage. As the Saskatchewan Court of Appeal recently observed in *McLean v. McLean*, 2019 SKCA 15, at paras. 103-5 (CanLII), the proposed tort of harassment was entirely encompassed by the tort of intentional infliction of mental suffering and so need not be recognized as a distinct tort (see also *Merrifield*, at para. 42). Similarly, the proposed tort of obstruction — the plaintiffs had alleged the defendants had obstructed them from clearing trees — was encompassed by the existing torts of nuisance and trespass (*6165347 Manitoba Inc. v. Jenna Vandal*, 2019 MBQB 69, at paras. 91 and 100 (CanLII)).

[240] A statutory remedy can also suffice to show that a new nominate tort is unnecessary. For example, in *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181, at p. 195, this Court held that the *Ontario Human Rights Code*, R.S.O. 1970, c. 318 ("*Code*") foreclosed the development of a common law tort based on the same policies embodied in the *Code*. Similarly, in *Frame*, at p. 111, the Court declined to create a common law tort concerning alienation of affection in the family context because the legislature had occupied the field through the *Children's Law Reform Act*, R.S.O. 1980, c. 68.

[241] The second rule, that the tort must reflect a wrong visited by one person upon another, is also well-established and is reflected in the courts' resistance to creating strict or absolute liability regimes (see, for example, *Saskatchewan Wheat Pool*, at p. 224). It is also the converse of the idea so memorably expressed by Sharpe J.A. in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 69: there, the "facts . . . cr[ied] out for a remedy". When the facts do not make such a cry, the courts will not recognize a tort.

[242] Finally, the change wrought to the legal system must not be indeterminate or substantial. This rule reflects the courts' respect for legislative supremacy and the courts' mandate to ensure that the law remains stable, predictable and accessible (T. Bingham, *The Rule of Law* (2010), at p. 37). Hence, the Ontario Superior Court's rejection of a proposed tort of "derivative abuse of process" that would provide compensation for someone allegedly injured by another person's litigation. Such a tort, the court noted, would create indeterminate liability (*Harris v. GlaxoSmithKline Inc.*, 2010 ONSC 2326, 101 O.R. (3d) 665, aff'd on other grounds, 2010 ONCA 872, 106 O.R. (3d) 661, leave to appeal refused, [2011] 2 S.C.R. vii). Similarly, in *Wallace*, this Court rejected the proposed tort of "bad faith discharge" (at para. 78) because it would create a "radical shift in the law" (at para. 77) and contradict "established principles of employment law" (para. 76). A shift will be less radical when it is presaged by some combination of *obiter*, academic commentary, and persuasive foreign judicial activity, none of which are present here.

[243] *Jones v. Tsige* provides a rare and instructive example of where a proposed new nominate tort was found by a court to have passed this test. The breach of privacy was indeed seen by the court as a wrong caused by one person to another, and as a wrong for which there existed no other remedy in tort law or in statute. The Court of Appeal for Ontario found support to recognize a cause of action for intrusion upon seclusion in the common law and *Charter* jurisprudence (at para. 66), and looked to other jurisdictions which had recognized a similar cause of action arising from a right to privacy, either by statute or by the common law (paras. 55-64). The court defined the elements of the cause of action (at paras. 70-72) and identified factors to guide an assessment of damages (paras. 87-90). Having undertaken this careful analysis, the court concluded that it had the competence as an institution to make this incremental change to the common law — it being "within the capacity of the common law to evolve to respond to the problem" (para. 68).

B. TWO OF THE PROPOSED NOMINATE TORTS FAIL THIS TEST

[244] In our view, the proposed torts of cruel, inhuman or degrading treatment, and "crimes against humanity" both fail this test.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[245] The proposed tort of cruel, inhuman or degrading treatment fails the necessity test, since any conduct captured by this tort would also be captured by the extant torts of battery or intentional infliction of emotional distress. To the extent that this tort describes a greater degree of harm than that typically litigated in the conventional torts, this goes only to damages. As this Court found in *Scalera*, no distinct tort is necessary.

[246] The proposed tort of "crimes against humanity" also fails, but for a different reason: it is too multifarious a category to be the proper subject of a nominate tort. Many crimes against humanity would be already addressed under extant torts. If there are individual crimes against humanity that would not already be recognized as tortious conduct in Canada, the workers should specify them, rather than rely on a catch-all phrase that includes wrongs already covered. Adopting such a tort wholesale would not be the kind of incremental change to the common law that a Canadian court ought to make.

C. TWO OF THE PROPOSED NOMINATE TORTS MAY PASS THIS TEST

[247] In our view, it is possible the proposed torts of slavery and use of forced labour would pass the test for recognizing a new nominate tort. Recognizing each of these torts — subject to further development throughout the proceedings — may prove to be necessary, in that each may capture conduct not independently captured in torts such as battery, intentional infliction of emotional distress, negligence, or forcible confinement. For example, it is possible that the facts, if fully developed in the course of trial, might show that one person kept another person enslaved without need for any force or violence, simply by convincing that other person that they are rightfully property. Use of forced labour also, by its terms, may include liability that pierces the corporate veil or extends through agency relationships. And, to the extent there are non-tort alternative remedies under the criminal law, they would not restore the victim as tort law would.

[248] It is also uncontroversial that each of these torts — again, subject to further development — reflects wrongs being done by one person to another.

[249] Finally, the admission of these torts would not cause unforeseeable or unknowable harm to Canadian law. Both slavery and use of forced labour are widely understood in this country to be illegal and, indeed, morally reprehensible, and liability for such conduct would herald no great shift in expectations.

[250] Nonetheless, for the reasons that follow, we would hold that the attempt to create such nominate torts is doomed to fail.

D. SLAVERY AND USE OF FORCED LABOUR SHOULD NOT BE RECOGNIZED FOR THE FIRST TIME IN THE CIRCUMSTANCES OF THIS CASE

[251] In our view, proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory, where the workers in this case had no connection to British Columbia at the time of the alleged torts, and where the British Columbian defendant has only an attenuated connection to the tort.

[252] In general, tortious conduct abroad will not be governed by Canadian law, even where the wrong is litigated before Canadian courts. It is the law of the place of the tort that will, normally, govern (*Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1050). The only exception is when such law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it (p. 1054).

[253] One of two possibilities may arise when the proceedings in this case continue. It may be that the court finds Eritrean law not so offensive, and proceeds to apply it. In that case, judicial restraint would prevent the courts from recognizing a novel tort in Canadian law, because its application would be moot. Alternatively, if Eritrean law is found to be repugnant, the British Columbia courts would be in the unfortunate position of setting out a position for the first time on these proposed new torts based on conduct that occurred in a foreign state.

[254] There are problems, both practical and institutional, with developing Canadian law based on conduct that occurred in a foreign state.

[255] The practical problem is that the law that is appropriate for regulating a foreign state may not also be law that is appropriate for regulating Canada. It is trite to say that hard cases make bad law. When a case comes through the public policy exception to conflicts of law, it will, almost by definition, be a hard case.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[256] The institutional problem is well expressed by La Forest J. in *Tolofson*, at p. 1052:

> 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.

If that is true of legislatures, it is ever the more true for courts. Courts simply must recognize the limits of their institutional competence and the distinct roles of the judiciary vis-à-vis Parliament and the executive (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at paras. 46-47). The judiciary is confined to making incremental changes to the common law, and can only respond to the evidence and argument before it. In contrast, the executive has the resources to study complex matters of state, conduct research, and consult with affected groups and the public. Parliament can do so, too, as well as hearing expert testimony through its committees. While the remedy that a court may order is limited to the question before the court, the executive can craft broad legal and institutional responses to these issues. The executive can create delegated regulatory authority, and implement policy and procedures. Further, whereas courts do not have the jurisdiction or resources to monitor the impact of its decisions, the executive can develop specialized units with a mandate to monitor, make recommendations, implement and, where necessary, adjust a course of action. The domain of foreign relations is, in our view, perhaps the most obvious example of where the executive is competent to act, but where courts lack the institutional competence to do so.

[257] Lester B. Pearson, in a speech before the Empire Club of Canada and the Canadian Club of Toronto in 1951, spoke about developing foreign policy in Canada ("Canadian Foreign Policy in a Two Power World", *The Empire Club of Canada: Addresses 1950-1951* (1951), 346). Mr. Pearson emphasized the delicacy of foreign relations, which calls for balancing political, economic and geographical considerations and consultation with other nations — a role that courts are not institutionally suited to undertake:

> The formulation of foreign policy has special difficulties for a country like Canada, which has enough responsibility and power in the world to prevent its isolation from the consequences of international decisions, but not enough to ensure that its voice will be effective in making those decisions.
>
> Today, furthermore, foreign policy must be made in a world in arms, and in conflict . . .
>
> . . .
>
> We all agree, however, that we must play our proper part, no less and no more, in the collective security action of the free world, without which we cannot hope to get through the dangerous days ahead. But how do we decide what that proper part is, having regard to our own political, economic and geographical situation? It is certainly not one which can be determined by fixing a mathematical proportion of what some other country is doing. As long as we live in a world of sovereign states, Canada's part has to be determined by ourselves, but this should be done only after consultation with and, if possible, in agreement with our friends and allies. We must be the judge of our international obligations and we must decide how they can best be carried out for Canada . . . [pp. 349 and 352]

[258] Mr. Pearson's speech was given in the Cold War context, and considered Canada's foreign relations policy vis-à-vis two major world powers. Clearly, the landscape of international relations and Canada's role on the world stage have changed dramatically since 1951. Today, as the political and economic relationships between nations become increasingly complex, Mr. Pearson's message is even more compelling: foreign relations is a delicate matter, which the executive — and not the courts — is equipped to undertake.

[259] Setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations. The courts' role within this country is, primarily, to adjudicate on disputes within Canada, and between Canadian residents. This is the purpose for which the courts have been vested their powers by s. 96 of the *Constitution Act, 1867*.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Our courts' legitimacy depends on our place within the constitutional architecture of this country; Canadian courts have no legitimacy to write laws to govern matters in Eritrea, or to govern people in Eritrea. Developing Canadian law in order to respond to events in Eritrea is not the proper role of the court: that is a task that ought to be left to the executive, through the conduct of foreign relations, and to the legislatures and Parliament.

[260] In making these observations, we do not question the public policy exception to applying the law indicated by a choice of law exercise. The proper use of that exception, however, is to apply existing Canadian law, which is either the product of legislative enactment or the common law, to situations where applying the foreign law would be repugnant to the consciences of Canadians. That exception should not be used as a back door for the courts to create new law governing the behaviour of the citizens of other states in their home state.

V. Conclusion

[261] This appeal engages fundamental questions of procedure and substance. The majority's approach to the procedural question at the heart of a motion to strike will encourage parties to draft pleadings in a vague and under-specified manner. It offers this lesson: the more nebulous the pleadings and legal theory used to protect them, the more likely they are to survive a motion to strike. This approach will suck much of the utility from the motion to strike. Doomed actions will occupy the superior courtrooms of this country, persisting until the argument collapses at summary judgment or trial. In a moment where courts are struggling to handle the existing caseload, increasing the load is likely not to facilitate access to justice, but to frustrate it.

[262] In substance, this appeal is about, as much as anything else, maintaining respect for the appropriate role of each order of the Canadian state. The creation of a cause of action for breach of customary international law would require the courts to encroach on the roles of both the legislature (by creating a drastic change in the law and ignoring the doctrine of incrementalism), and the executive (by wading into the realm of foreign affairs).

[263] It is not up to the Court to ignore the foundations of customary international law, which prohibits certain state conduct, in order to create a cause of action against private parties. Rather, it would be up to Parliament to create a statutory cause of action. And, where an issue has consequences for foreign relations, the executive, not courts, is institutionally competent to decide questions of policy. Fundamentally, it is this understanding and respect for the institutional competence of each order of the state that underlies the proper functioning of the domestic and international order.

[264] A final word. The implications of the majority's reasons should be comprehended. On the majority's approach to determining what norms of customary international law may exist, generalist judges will be called upon to determine the practices of foreign states and the bases for those practices without hearing evidence from either party. They are to make these determinations aided only by lawyers, who themselves will rarely be experts in this field. The judiciary is institutionally ill-suited to make such determinations.

[265] The result, we fear, will be instability. In international law, on the majority's approach, Canadian courts will, perhaps on the word of a single law professor, be empowered to declare what the states of the world have through their practices agreed upon. And this uncertainty will redound upon the law of this country. The line of reasoning set out in this judgment departs from foundational principles of judicial law-making in tort law, and there is no reason to believe that Canadian courts will in the future be any more restrained with their use of international law. So fundamental a remaking of the laws of this country is not for the courts. This, ultimately, is where we part ways with the majority.

[266] For these reasons, we would allow the appeal in part and strike the paragraphs of the workers' claims related to causes of action arising from customary international law norms, with costs to Nevsun in this Court and in the courts below.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

The reasons of Moldaver and Côté JJ. were delivered by

CÔTÉ J. —

I. Introduction

[267] My main point of departure from the analysis of my colleague, Abella J., concerns the existence and applicability of the act of state doctrine, or some other rule of non-justiciability barring the respondents' claims. As for the reasons of Brown and Rowe JJ. concerning the respondents' claims inspired by customary international law, while I agree with their analysis and conclusion, I wish to briefly stress a few points on that issue before addressing the act of the state doctrine.

II. Claims Inspired by Customary International Law

[268] On this first issue, I must emphasize that the extension of customary international law to corporations represents a significant departure in this area of the law.

[269] The question posed to this Court is not whether corporations are "immune" from liability under customary international law (Abella J.'s reasons, at para. 104), but whether customary international law extends the scope of liability for violation of the norms at issue to corporations: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), at p. 120, aff'd on other grounds, 569 U.S. 108 (2013). While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences:

> As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.
>
> (*Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, at p. 298, per Lord Hoffman)

My colleague is indeed correct that international law "does move" (at para. 106), but it moves only so far as state practice will allow. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations: J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at pp. 102 and 607.

III. Act of State Doctrine

[270] Turning to the issue of the act of state doctrine, this is not a conflict of laws case. This Court is not being asked to determine whether the courts of British Columbia have jurisdiction over the parties, whether a court of another jurisdiction is a more appropriate forum to hear the dispute, whether the law of another jurisdiction should be applied or what the content of that foreign law happens to be.

[271] Rather, we must decide whether the respondents' claims are amenable to adjudication by courts within Canada's domestic legal order or whether they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. In my view, the respondents' claims, as pleaded, fall within this latter category. Accordingly, I would allow the appeal and dismiss the respondents' claims in their entirety, as they are not justiciable.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[272] In the reasons that follow, I begin by outlining two distinct branches within the act of state doctrine. I conclude that our choice of law jurisprudence does indeed play a similar role to that of certain aspects of the act of state doctrine. However, I also conclude that the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law.

[273] Next, I discuss how the doctrine of justiciability and the constitutional separation of powers explain why a Canadian court may not entertain a civil claim between private parties where the outcome depends on a finding that a foreign state violated international law. Finally, I apply the doctrine of justiciability to the respondents' claims, ultimately finding that they are not justiciable, because they require a determination that Eritrea has committed an internationally wrongful act.

A. SUBSTANTIVE FOUNDATIONS OF THE ACT OF STATE DOCTRINE

[274] Whether a national court is competent to adjudicate upon the lawfulness of sovereign acts of a foreign state is a question that has many dimensions. As the United Kingdom Supreme Court explained in *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964, the act of state doctrine can be disaggregated into an array of categories: para. 35, per Lord Mance; paras. 121-22, per Lord Neuberger; paras. 225-38, per Lord Sumption.

[275] My colleague holds that the act of state doctrine, and all of its animating principles, have been completely subsumed by the Canadian choice of law and judicial restraint jurisprudence. With respect, I am unable to agree with her approach. There is another distinct, though complementary, dimension of the act of state doctrine in addition to the choice of law dimension. Claims founded upon a foreign state's alleged breach of international law raise a unique issue of justiciability which is not addressed in my colleague's reasons.

[276] Whether this dimension is referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, the Canadian jurisprudence leads to the conclusion that some claims are not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

[277] I pause to note that the distinction between the non-justiciability and choice of law branches does not exhaust the "array of categories" within the act of state doctrine. Rather, I prefer to consider the doctrine along two axes: (1) unlawfulness under the foreign state's domestic law, as opposed to unlawfulness under international law; and (2) the choice of law branch, as opposed to the non-justiciability branch, of the doctrine. These two axes are interrelated. As I explain below, there are choice of law rules that apply to a court's review of alleged unlawfulness under the foreign state's domestic law and under international law. There are also rules of non-justiciability which address unlawfulness under the foreign state's domestic law and unlawfulness under international law. The discussion that follows is not intended to be comprehensive, as my aim is simply to demonstrate that the issue before this Court is whether a domestic court is competent to adjudicate claims based on a foreign state's violations of international law under the non-justiciability branch of the doctrine.

[278] I turn now to the underlying rationale for drawing a distinction between the respective branches of the act of state doctrine.

(1) Choice of Law Branch of the Act of State Doctrine

[279] The choice of law branch of the act of state doctrine establishes a general rule that a foreign state's domestic law — or "municipal law" — will be recognized and normally accepted as valid and effective: *Belhaj*, at paras. 35 and 121-22. In England, the effect of this principle is that English courts will not adjudicate on the lawfulness or validity of sovereign acts performed by a state under its own laws: *Johnstone v. Pedlar*, [1921] 2 A.C. 262, at p. 290 (H.L.). This branch is focused on whether an English court should give effect to a foreign state's municipal law.

[280] There are exceptions to this general rule. The act of state doctrine gives way to the "well-established exception in private international law of public policy": C. McLachlan, *Foreign Relations Law* (2014), at para. 12.157. For example, in *Oppenheimer v. Cattermole*, [1976] A.C. 249, the House of Lords refused to apply a Nazi-era law

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

depriving Jews of their citizenship and property: pp. 277-78. Lord Cross reasoned that "it is part of the public policy of this country that our courts should give effect to clearly established rules of international law", and that the Nazi decree was "so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all": p. 278. The House of Lords reiterated this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883, holding that the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. Iraq had issued a decree expropriating aircrafts of the Kuwait Airways Corporation which were then in Iraq. The House of Lords held that the Iraqi decree was a clear violation of international law and that the English courts were therefore at liberty to refuse to recognize it on grounds of public policy. This shows how international law informs the public policy exception of the choice of law branch.

[281] In Canada, similar principles are reflected in this Court's choice of law jurisprudence. In *Laane and Baltser v. Estonian State Cargo & Passenger s. s. Line*, [1949] S.C.R. 530, this Court declined to give effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalize all Estonian merchant vessels and also purported to have extraterritorial effect. The appeal was decided on the principle that a domestic court will not give effect to foreign public laws that purport to have extraterritorial effect: see p. 538, per Rinfret C.J.; p. 542, per Kerwin J.; p. 547, per Rand J.; pp. 547-51, per Kellock J. However, Rand J. would also have held that, irrespective of the decree's extraterritorial scope, there is a "general principle that no state will apply a law of another which offends against some fundamental morality or public policy": p. 545. I note that no act of state issue actually arose on the facts of that case, as the domestic law branch of the act of state doctrine applies only to acts carried out in the foreign state's territory: see, e.g., *Belhaj*, at paras. 229 and 234, per Lord Sumption. Therefore, it is unsurprising that "[n]o act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court": Abella J.'s reasons, at para. 46.

[282] In another English case, *Buck v. Attorney General*, [1965] 1 All E.R. 882 (C.A.), the plaintiffs sought a declaration that the constitution of Sierra Leone was invalid. Lord Harman held that an English court could not make a declaration that impugned the validity of the constitution of a foreign state: p. 885. Lord Diplock reasoned that the claim had to be dismissed because the issue of the validity of the foreign law did not arise incidentally:

> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction. [pp. 886-87]

[283] While the facts of *Buck* fall within the non-justiciability branch, the effect of Lord Diplock's reasoning is that the act of state doctrine does not prevent a court from examining the validity of a foreign law if the court is obliged to determine the content of the foreign law as a choice of law issue. As Professor McLachlan points out, any other approach could lead to perverse results, because a court applying foreign law must apply the law as it would have been applied in the foreign jurisdiction: McLachlan, at para. 12.139.

[284] In this regard, too, this Court reached a similar result in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. The issue in it was whether British Columbia's superior court could rule on the constitutionality of a Quebec statute which prohibited the removal from Quebec of business documents required for judicial processes outside Quebec. This Court approached the question as one of conflict of laws, observing that there was no reason why a court should never be able to rule on the constitutionality of another province's legislation. Ultimately, this Court held that a provincial superior court has jurisdiction to make findings respecting the constitutionality of a statute enacted by the legislature of another province if this issue arises incidentally in litigation before it. The constitutionality of the Quebec statute was not foundational to the claim advanced in the British Columbia courts. Rather, it arose in the discovery process in the context of the parties' obligation to disclose relevant documents, some of which were in Quebec. Therefore, the constitutionality of the statute could properly be considered in the choice of law analysis. Of course, because the

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

facts of that case gave rise to an issue involving the British Columbia courts and Quebec legislation, it is, again, unsurprising that this Court "made no reference to act of state": Abella J.'s reasons, at para. 48.

[285] Nonetheless, based on this comparative review of the case law, it appears that this Court's choice of law jurisprudence leads to the same result as the choice of law branch of the English Act of State doctrine: see McLachlan, at paras. 12.24 and 12.126-12.167. To this extent, I agree with Abella J. that that jurisprudence plays a similar role to that of the choice of law branch of the act of state doctrine in the context of alleged unlawfulness under foreign domestic and international law: paras. 44-57. However, this is not true as regards the non-justiciability branch as applied to alleged violations of international law.

(2) Non-justiciability Branch of the Act of State Doctrine

[286] The non-justiciability branch of the doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states: see *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), at p. 931; McLachlan, at paras. 12.168 and 12.177-12.178. As I explain below, a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law.

[287] *Blad v. Bamfield* (1674), 3 Swans 604, 36 E.R. 992, may be the earliest case regarding this branch of the act of state doctrine. A Danish man, Blad, had seized property of English subjects (including Bamfield) in Iceland on the authority of letters patent granted by the King of Denmark. Blad was sued in England for this allegedly unlawful act. He sought an injunction to restrain the proceeding. In the High Court of Chancery, Lord Nottingham entered a stay of the proceeding against Blad because the English subjects' defence against the injunction was premised on a finding that the Danish letters patent were inconsistent with articles of peace between England and Denmark. Lord Nottingham reasoned that a misinterpretation of the articles of peace "may be the unhappy occasion of a war" (p. 606), and that it would be "monstrous and absurd" (p. 607) to have a domestic court decide the question of the legality of the Danish letters patent, the meaning of the articles of peace or the question of whether the English had a right to trade in Iceland.

[288] Another early case on the act of state doctrine is *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C.1, 9 E.R. 993. Revolutionaries in the German duchy of Brunswick overthrew the reigning Duke, Charles, in 1830. The King of Hanover deposed Charles in favour of Charles' brother, William, and placed Charles' assets under the guardianship of the Duke of Cambridge. Charles brought an action in which he sought an accounting for the property of which he had been deprived. In the House of Lords, Lord Chancellor Cottenham reasoned that the action was not concerned with determining private rights as between individuals but, rather, concerned an allegation that the King of Hanover had acted contrary to the "laws and duties and rights and powers of a Sovereign exercising sovereign authority": p. 1000. This led the Lord Chancellor to conclude that the English courts cannot "entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad": p. 1000.

[289] The leading case on the non-justiciability branch is *Buttes Gas*. The Occidental Petroleum Corporation and Buttes Gas and Oil Co. held competing concessions to exploit disputed oil reserves near an island in the Arabian Gulf. Occidental claimed its right to exploit the reserves under a concession granted by the emirate of Umm al Qaiwain. Buttes Gas claimed its right pursuant to one granted by the emirate of Sharjah. Both emirates, as well as Iran, claimed to be entitled to the island and to its oil reserves. After the United Kingdom intervened, the dispute was settled by agreement. Occidental's concession was subsequently terminated. Occidental alleged that Buttes Gas and Sharjah had fraudulently conspired to cheat and defraud Occidental, or to cause the United Kingdom and Iran to act unlawfully to the injury of Occidental: p. 920. Buttes Gas argued that an English court should not entertain such claims, as they concerned acts of foreign states.

[290] In the House of Lords, Lord Wilberforce held that Occidental's claim was not justiciable. He identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation: p. 931. He suggested that this branch was essentially a choice of law rule concerned with the choice of the proper law to apply to a dispute: p. 931. However, he drew one important distinction:

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf. *In re Helbert Wagg & Co. Ltd's Claim* [1956] Ch. 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts operating in the area of transactions between states. [p. 931]

[291] Lord Wilberforce went on to hold, following *Blad*, *Duke of Brunswick* and other authorities, that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

> It would not be difficult to elaborate on these considerations, or to perceive other important interstate issues and/or or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are … no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were "unlawful" under international law. [p. 938]

[292] In the two passages reproduced above, Lord Wilberforce touched on an important point: a distinction must be drawn between the types of problems addressed in justiciability cases and the types of problems addressed in choice of law cases. Private international law is a response to the problem of how to distribute legal authority among competing municipal jurisdictions: R. Banu, "Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules" (2013), 31 *Windsor Y.B. Access Just.* 197, at p. 199. However, the problem posed by claims based on violations of public international law is that the international plane constitutes an additional legal system with its own claim to jurisdiction over certain legal questions: McLachlan, at para. 12.22. Thus, conflict of laws rules alone are not capable of addressing the concerns raised by Lord Wilberforce in *Buttes Gas*, because they do not mediate between domestic legal systems and the international legal system. In order to address the problems raised by Lord Wilberforce regarding the legitimacy of a domestic court's consideration of questions of international law, this Court must inquire into whether such questions are justiciable under Canada's domestic constitutional arrangements.

[293] Before doing so, I want to express my agreement with Newbury J.A. that the early English cases which underpin the act of state doctrine were received into the law of British Columbia in 1858 by what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: 2017 BCCA 401, 4 B.C.L.R. (6th) 91, at para. 123. However, for conceptual clarity, the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability recognized by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. It is to that doctrine which I now turn.

B. JUSTICIABILITY OF INTERNATIONAL LAW QUESTIONS IN CANADA

[294] Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 29-30. It is "fundamental" that each order not "overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other": *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[295] This Court recognized the existence of a general doctrine of non-justiciability in *Highwood Congregation*, stating that the main question to be asked in applying the doctrine of justiciability is whether the issue is one that is appropriate for a court to decide: para. 32. The answer to that question depends on whether the court asking the question has the institutional capacity to adjudicate the matter and whether its doing so is legitimate: para. 34.

[296] A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125), the legality of an administrative decision (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3) or the interface between international law and Canadian public institutions (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 23). If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. In my view, although the court has the institutional capacity to consider such a claim, its doing so would not be legitimate.

[297] The executive is responsible for conducting international relations: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 39. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court observed that creating a universal civil jurisdiction allowing torture claims against foreign officials to be pursued in Canada "would have a potentially considerable impact on Canada's international relations", and that such decisions are not to be made by the courts: para. 107. Similar concerns arise in the case of litigation between private parties founded upon allegations that a foreign state has violated public international law. Such disputes "are not the proper subject matter of judicial resolution" (Sossin, at p. 251), because questions of international law relating to internationally wrongful acts of foreign states are not juridical claims amenable to adjudication on "judicial or manageable standards" (*Buttes Gas*, at p. 938, per Lord Wilberforce). Such questions are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

[298] In *Khadr* (2010), this Court justified its interference with the exercise by the executive of an aspect of its power over international relations on the basis that the judiciary possesses "a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action": para. 38. However, the same cannot be said of a private claim for compensation which is dependent upon a determination that a foreign state has breached its international obligations. This is not a case in which a court would be abdicating its constitutional judicial review function if it were to decline to adjudicate the claim.

[299] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D. New York), is an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations. In *Presbyterian*, a foreign state had sent a diplomatic note to the United States Department of State in response to litigation initiated in the U.S. by Sudanese residents against a company incorporated and domiciled in the foreign state that had operations in Sudan. The allegations were based on violations of international law by Sudan. Although the company's motion to dismiss the claim was not successful, the incident was significant enough to spur the foreign state to send the diplomatic note in which it insisted that its foreign policy was being undermined by the litigation. I would point out in particular that the motion failed because the action as pleaded did "not require a judgment that [the foreign state's foreign policy] was or caused a violation of the law of nations", which suggests that if the reverse were true, the claim would have been barred: para. 5. Thus, even in the case of disputes between private parties, when courts "engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy": *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981), at pp. 1358-60 (C.A., 9th Circuit).

[300] As a practical matter, Canadian courts have good reason to refrain from passing judgment on alleged internationally wrongful acts of foreign states. If Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

[301] Further, as this doctrine consists in a rule of non-justiciability, it is not amenable to the application of a public policy exception. It arises from the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. The public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary's bailiwick.

[302] Abella J. relies on the *Secession Reference* as authority for the proposition that the adjudication of questions of international law is permitted for the purpose of determining the private law rights or obligations of individuals within our legal system: para. 49. With respect, this is an overstatement of the scope of the reasoning in the *Secession Reference*, in which this Court held that it could consider the question whether international law gives the National Assembly, the legislature or the Government of Quebec the right to effect the secession of Quebec from Canada unilaterally: paras. 21-23. In the Court's view, the question was not a "pure" question of international law, because its purpose was to determine the legal rights of a public institution which exists as part of the domestic Canadian legal order: para. 23. This Court's holding was confined to delineating the scope of Canada's obligation to respect the right to self-determination of the people of Quebec. No issue regarding private law claims or internationally wrongful acts of a foreign state arose in the *Secession Reference*.

[303] In its public law decisions, this Court has had recourse to international law to determine issues relating to other public authorities, such as whether municipalities can levy rates on foreign legations (*Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208) and whether the federal or provincial governments possess proprietary rights in Canada's territorial sea and continental shelf (*Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86). It has never held that a Canadian court is free, in adjudicating a private law claim, to decide whether a foreign state — which does not exist as a part of the domestic Canadian legal order — has violated public international law.

[304] Abella J. also relies on decisions in the extradition and deportation contexts, in which courts consider the human rights records of foreign states as part of their decision-making process: paras. 50-55. However, when Canadian courts examine the human rights records of foreign states in extradition and deportation cases, they do so to ensure that Canada complies with its own international, statutory and constitutional obligations: see *Suresh*. The same cannot be said of a civil claim for compensation. To equate the respondents' civil claim for a private law remedy to claims in the public law extradition and deportation contexts is to disregard the judiciary's statutory and constitutional mandates to consider human rights issues in foreign states in extradition and deportation cases. No such mandate exists in the context of private law claims.

[305] In conclusion, although a court has the institutional capacity to consider international law questions, it is not legitimate for it to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. That interference is not justified without a mandate from the legislature or a constitutional imperative to review the legality of executive or legislative action in Canada. In the absence of such a mandate or imperative, claims based on a foreign state's internationally wrongful acts are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

IV. The Respondents' Claims Require a Determination That Eritrea Violated Public International Law

[306] In this context, justiciability turns on whether the outcome of the claims is dependent upon the allegation that the foreign state acted unlawfully. If this issue is central to the litigation, the claims are not justiciable: e.g., *Buck*, at pp. 886-87; *Buttes Gas*, at pp. 935-38. By contrast, a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally: e.g., *Hunt*; *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), at p. 406.

[307] In *Buck*, the issue of the validity of the foreign state's constitution was central to the plaintiffs' claim, because the plaintiffs were seeking a declaration that the constitution of Sierra Leone was invalid: p. 886. Lord Diplock stated:

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

> I do not think that this rule [that a state does not purport to exercise jurisdiction over the internal affairs of another state], which deprives the court of jurisdiction over the subject-matter of this appeal because it involves assertion of jurisdiction over the internal affairs of a foreign sovereign state, can be eluded by the device of making the Attorney-General of England a party instead of the government of Sierra Leone. [p. 887]

[308] A case to the opposite effect is *Kirkpatrick*, in which the respondent alleged that the petitioner had obtained a construction contract from the Nigerian Government by bribing Nigerian officials, which was prohibited under Nigerian law. Scalia J. found that the factual predicate for application of the act of state doctrine did not exist in that case, as nothing in the claim required the court to declare an official act of a foreign state to be invalid: p. 405. Scalia J. reasoned that:

> [a]ct 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. When that question is not in the case, neither is the act of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. [Emphasis in original; p. 406.]

[309] Similarly, in *Hunt*, La Forest J. concluded that the issue of the constitutionality of the "foreign" statute arose incidentally, because it arose in a proceeding in which the plaintiff sought the disclosure of relevant documents, which was barred by the impugned Quebec statute. In *Buttes Gas*, on the other hand, Occidental pleaded the tort of conspiracy against Buttes Gas, but to succeed, the claim required a determination that Sharjah, Umm al Qaiwain, Iran and the United Kingdom had violated international law. This was not incidental to the claim, and the House of Lords held that it was not justiciable: p. 938.

[310] In the case at bar, the issue of the legality of Eritrea's acts under international law is central to the respondents' claims. To paraphrase Lord Diplock in *Buck*, at p. 887, the respondents are simply using the appellant, Nevsun Resources Ltd., as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada. The respondents' central allegation is that Eritrea's National Service Program is an illegal system of forced labour (A.R., vol. III, at pp. 162-64) that constitutes a crime against humanity (p. 175). The respondents allege that "Nevsun expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military", and that it is directly liable for injuries suffered by the respondents as a result of its "failure to stop the use of forced labour and the enforcement practices at its mine site when it was obvious . . . that the plaintiffs were forced to work there against their will": A.R., vol. III, at p. 178.

[311] In other words, the respondents allege that Nevsun is liable because it was complicit in the Eritrean authorities' alleged internationally wrongful acts. As was the case in *Buttes Gas*, Nevsun can be liable only if the acts of the actual alleged perpetrators — Eritrea and its agents — were unlawful as a matter of public international law. The case at bar is therefore materially different from *Hunt* and *Kirkpatrick*, in which the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim.

[312] To obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun's part. In my view and with respect, Newbury J.A. erred in finding that the respondents were not asking the court to "inquire into the legality, validity or 'effectiveness' of the acts of laws or conduct of a foreign state": C.A reasons, at para. 172. As she had noted earlier in her reasons — and I agree with her on this point — given how the complaint was being pleaded, Nevsun could only be found liable if "Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct": para. 92. The respondents' claims, as pleaded, require a determination that Eritrea has violated international law and must therefore fail.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press

Conclusion

[313] It is plain and obvious that the respondents' claims are bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the respondents' claims are dependent upon a determination that Eritrea has violated its international obligations. Additionally, for the reasons given by Brown and Rowe JJ., I find that it is plain and obvious that the respondents' causes of action which are inspired by customary international law are bound to fail. Accordingly, I would allow the appeal and dismiss the respondents' claims.

Appeal dismissed with costs, BROWN *and* ROWE JJ. *dissenting in part and* MOLDAVER *and* CÔTÉ JJ. *dissenting*.

Solicitors for the appellant: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the respondents: Camp Fiorante Matthews Mogerman,

Vancouver.

Solicitors for the intervener the International Human Rights Program, University of Toronto Faculty of Law: Waddell Phillips Professional Corporation, Toronto; University of Toronto, Toronto.

Solicitors for the interveners EarthRights International and the Global Justice Clinic at New York University School of Law: Arvay Finlay, Vancouver.

Solicitors for the interveners Amnesty International Canada and the International Commission of Jurists: Champ & Associates, Ottawa; Power Law, Vancouver; University of Ottawa, Ottawa.

Solicitors for the intervener the Mining Association of Canada: Davies Ward Phillips & Vineberg, Toronto.

Solicitors for the intervener MiningWatch Canada: Trudel Johnston & Lespérance, Montréal; Andrew E. Cleland, Montréal.

ENDNOTES

1 Eritrean workers' amended notice of civil claim, at paras. 7, 53, 56(a), 60, 63, 66, 70 and 71 (A.R., vol. III, at p. 159).

2 Nevsun's notice of application: application to strike workers' customary international law claims as disclosing no reasonable claim (A.R., vol. III, at p. 58).

3 As Anne Warner La Forest writes: "[I]f custom is indeed the law of the land, then the argument in favour of judicial notice, as traditionally understood, is a strong one. It is a near perfect syllogism. If custom is the law of the land, and the law of the land is to be judicially noticed, then custom should be judicially noticed" (p. 381).

4 See chambers judgment, at paras. 427, 444, 455 and 465-66.

5 That this creates a paradox of sorts is a well-known problem in the theory of customary international law (see, for example, J. Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems" (2004), 15 *Eur. J. Int'l L.* 523). It is not a paradox we have cause to address in this case.

6 To be clear, we do not mean to suggest that relief in the nature of *certiorari* and *mandamus* are the only remedies available in such a situation: for example, equitable remedies such as injunctive or declaratory relief may also be available.

7 We say "private" common law in contradistinction to "public" common law. Public common law is the law that governs the activities of the Crown, and is of course the law related to the executive branch, discussed previously. "Private" common law is law that governs relations between non-state entities.

8 There is, of course, a further possibility, but it is not one that the majority advances. It may be neither the prohibition at customary international law nor the doctrine of adoption that creates the liability rule. Rather, it would be a prosaic change to the common law that creates the liability rule, inspired by the recognition that an action prohibited at customary international law is wrongful. This was the theory of the case by which the chambers judge upheld the pleadings. We consider and reject this theory in Part IV of our reasons.

9 This statement was written prior to *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241.

https://doi.org/10.1017/ilm.2020.38 Published online by Cambridge University Press