

***Nevsun Resources Ltd. v. Araya*: What the Canadian Supreme Court decision means in holding Canadian companies accountable for human rights abuses abroad**

*By James Yap**

Momentum continues to gather for transnational human rights litigation brought in Canadian courts against Canadian corporations, with the release on February 28 2020 of the Supreme Court of Canada's decision in [Nevsun Resources Ltd. v. Araya](#). The key legal takeaways from the decision can be summarized as follows:

- There is no independent act of state doctrine in Canadian common law¹ (unanimous)
- Violations of customary international law may be civilly actionable in Canadian courts (5-4 majority)
- Rules of customary international law that are binding on individuals are also binding on corporations (5-4 majority)

The decision looks to be foundational in terms of the treatment of customary international law in Canadian common law courts. This and certain other aspects of the decision, notably the ruling on corporate liability under international law, may also have implications further afield.

Background

The claim was filed in November 2014 in the Canadian province of British Columbia by Eritrean nationals who have fled Eritrea and are living abroad as refugees. They allege that as part of a collaboration between the defendant Canadian mining company, Nevsun Resources, and the Eritrean government, they along with a large number of compatriots were forced to work on the construction of the Bisha mine in Eritrea. They allege that perceived disobedience was often met with severe punishments such as arbitrary detention and torture.

The situation at the Bisha mine has received attention from international organizations, with [Human Rights Watch](#) and a [United Nations Commission of Inquiry](#) both reporting on the use of forced labor there. The company denies all allegations.

The plaintiffs plead various conventional common law torts such as negligence, conspiracy, and battery. But in a novel argument, the plaintiffs also plead that the company's actions are civilly actionable as breaches of customary international law rules prohibiting slavery, forced labor, torture, crimes against humanity, and cruel, inhuman, and degrading treatment. Customary international law is said to be

¹ Unlike in the US, Canada's Supreme Court sets the common law throughout the country. *Nevsun* is thus controlling precedent everywhere in Canada.

automatically incorporated into domestic law through the common law, and so the plaintiffs argue that breaches of these international law rules must give rise to a civil remedy under domestic common law.²

The company filed a motion to strike the novel claims. It also filed two other motions to dismiss the lawsuit in its entirety: the first on the basis of the *forum non conveniens* doctrine, arguing that Eritrea was a more appropriate forum for the litigation than Canada, and the second on the basis of the act of state doctrine. The act of state doctrine is a rule that prevents courts from ruling on matters that engage the lawfulness of another sovereign state's conduct. Although recognized in other common law jurisdictions such as the UK, the US, and Australia, it has never been applied in Canada.

The company lost all three motions at the British Columbia Supreme Court, and appealed to the British Columbia Court of Appeal, where it lost again. The company then appealed to the Supreme Court of Canada on the act of state and customary international law motions. It did not seek leave to appeal the *forum non conveniens* decision, the lower courts having concluded that there was a real risk of an unfair trial in Eritrea on the evidence, inter alia, of several former Eritrean judges who had fled their country and were living abroad as refugees.

The Decision

The Supreme Court of Canada dismissed both motions under appeal in February 2020. A five-judge majority, led by Justice Abella, noted a line of British cases identifying the act of state doctrine as consisting of two distinct components: a choice of law rule requiring courts to recognize the validity and effect of foreign laws in foreign territory, and a rule of judicial restraint from adjudicating matters intruding too far into the realm of interstate relations (para. 35). The majority simply reasoned that Canadian law already had equivalent rules governing choice of law and judicial restraint. The act of state doctrine was thus superfluous and had no place in Canadian law, and therefore posed no bar to the plaintiffs' claims (paras. 44-59).

On the customary international law claims, the majority affirmed that customary international law forms part of the law of Canada (paras. 94-95), and that the norms invoked by the plaintiffs are part of customary international law, and perhaps even *jus cogens*³ (paras. 100-03). The majority also affirmed that rules of customary international law can also bind corporations (paras. 104-13, 185).

The majority further accepted that existing conventional common law torts may be inadequate to redress wrongs so severe that they breach core norms of customary international law (para. 129). For instance, an award of punitive damages under conventional tort law may be an inadequate response where serious international law violations such as those alleged here are concerned (para. 126).

² In the common law, a plaintiff must typically invoke one of an established category of civil wrongs with set requirements. However, a plaintiff can also argue that the common law should recognize a new, previously unrecognized civil wrong, which is what the plaintiffs did here.

³ A *jus cogens* norm of international law is one that is so fundamental that no derogation is permitted.

The majority thus accepted that the plaintiffs' argument to recognize new nominate torts based on customary international law claims could very well succeed at trial. Further, they also observed that in the alternative to recognizing new nominate torts, a case could be made 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." (para. 127) The claim was therefore allowed to proceed (para. 132).

Two other judges led by Justice Brown issued a partial dissent, in which they agreed with the majority's conclusions on the act of state doctrine, but would have dismissed the customary international law claims.

Among other things, Justice Brown would have held that corporations cannot be bound by international law (paras. 188-91). Justice Brown criticized Justice Abella's majority reasons, *inter alia*, for citing only one authority on this point. However he himself cited only two, which themselves offered weak support. His first authority cautioned that it was only a result of "preliminary research" concerning corporate liability in a specific subfield of international law, and explicitly recognized elsewhere in the text that certain other international law norms, including some of the ones invoked in the *Nevsun* case, may well apply to corporations. His second authority cited the first.

It is nevertheless true that Justice Abella did not cite as much authority as she could have, particularly as there were plenty of authorities cited on this question throughout the proceedings. [The Court of Appeal's reasons](#), for instance, cited several authorities on the topic (paras. 190-94), while the original [motion judge's reasons](#) made special note of the copious volumes of authorities that had been referred to him on the question (para. 470).

A further dissent was delivered by two judges led by Justice Côté. She agreed with the majority that the principles underlying the act of state doctrine were essentially subsumed into existing Canadian law (paras. 285, 293). She also agreed with Justice Brown's reasons that the customary international law claims should be dismissed (paras. 267-69, 313). However, she would also have dismissed the entire case based on act of state principles as applied through the existing Canadian legal rules of non-justiciability (paras. 293-313).

What Happens Next

Because of the Supreme Court's ruling on act of state, the claim may now proceed to trial. Because of the Supreme Court's ruling on the customary international law claims, those novel arguments may also now be advanced at the trial. It bears emphasizing that the Supreme Court's ruling goes no further than this, and it is left to the trial process to make the final determination of whether the plaintiffs' customary international law claims are indeed possible under common law, and if so what they look like (apart from the question of whether the claims are established on the evidence in the first place).

The Supreme Court's guidance in *Nevsun* does set certain parameters for the analysis. The customary international law claims will proceed on the basis that the international law rules invoked here are indeed rules of customary international law, and the majority's reasons also seem to confirm that many if not all are *jus cogens* as well. The analysis will also proceed on the basis that rules of international law can be binding on corporations. What is more, determining whether a particular rule of international law is binding on corporations is merely a matter of determining whether or not it is of a strictly interstate character (para. 105). The implication seems to be that, at the very least, any rule of international law that is binding on individuals is also binding on corporations.

Other questions, however, remain to be answered. Of particular interest is the majority's commentary that a "direct approach" that creates civil liability for customary international law violations without the recognition of new nominate torts may be possible. It is unclear what the majority envisions here. It may be that they were inspired by the substantial US jurisprudence developed around the Alien Tort Statute⁴ (ATS), which also seems to provide civil actions for violations of international law somewhat outside the realm of conventional tort law. Indeed, the pioneering work done in the US around the ATS will inevitably loom large in the Canadian discussion, as courts weigh questions of whether recognizing domestic civil liability for violations of customary international law is feasible, and if so how it would operate.

Impact in Canada

Nevsun looks to be a transformative moment in the narrative of Canadian courts' engagement with international law. In substance, much about the decision is neither new nor surprising: the Supreme Court did little more than reach the same decision as both lower courts, and the ruling on customary international law is preliminary anyway. Moreover, Canadian courts have long declared that customary international law is part of the common law. But the difference is that up until now, customary international law has typically been treated more like an incidental afterthought or abstract curiosity, whereas the approach in *Nevsun* seems to recognize it as something much more substantive and consequential. In particular, international legal norms protecting human rights are "not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities" (para. 1). The overall message is clear and unmistakable: if such customary international law norms form part of Canadian law then Canadian law must affirmatively uphold them, and lower courts have a broad licence to be creative in using them to fashion civil remedies.

As a result, Canadian corporate legal departments, as well as their outside counsel and insurers, will begin paying much closer attention to international law – particularly given the majority's suggestion that conventional measures of damages in Canadian tort law may not be a sufficiently strong response to grave violations of customary international law.

⁴ A 1789 federal provision granting US federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It has been used extensively as the basis of civil claims rooted in alleged violations international law.

Following its usual practice in such circumstances, the Supreme Court only set out broad principles, leaving the details to be filled in subsequently by lower courts. Canadian corporations will no doubt bemoan the lack of certainty this creates. Practically speaking, however, such uncertainty will have little if any negative impact. The common law has always been inherently uncertain by design, and ultimately if they truly desire certainty they need only avoid committing grave violations of international law such as slavery and torture.

Nevsun also seems to herald the triumph of a more globally-minded and expansive outlook on a Canadian court's role in adjudicating disputes featuring a significant extraterritorial connection. Interestingly, it came a week after the Supreme Court's decision in [*Newfoundland and Labrador \(Attorney General\) v. Uashaunnuat \(Innu of Uashat and of Mani-Utenam\)*](#), which raised the question of whether a Quebec court could hear a lawsuit against a mining company arising from a dispute concerning land in part situated across the provincial border in Newfoundland and Labrador. The same five-judge majority as in *Nevsun* joined to affirm the Quebec court's jurisdiction over the claim, while the same four-judge minority dissented.

This more global outlook is a key development for transnational human rights litigation against Canadian companies in Canadian courts, as the traditional judicial attitude towards such claims has been more inward-looking and restrictive. The first string of such cases failed as Canadian courts initially adopted a narrow approach to their jurisdiction over such claims. As recently as a decade ago, as ATS litigation in the US was thriving, it was a commonly held view that such claims were simply impossible in Canadian courts. However, the tide has since turned. Notably, the Supreme Court's decision in *Nevsun* follows two 2017 decisions of the British Columbia Court of Appeal – including the one in the same *Nevsun* litigation, mentioned above – rejecting attempts to dismiss human rights lawsuits against Canadian companies on the grounds of jurisdiction. Canadian corporations will begin scrutinizing the human rights implications of their activities more closely, if they haven't already.

Implications Abroad

The impact of this decision may also reverberate beyond Canada in various ways.

First, as a decision from a top common law court it is a persuasive authority elsewhere in the common law world, notably in countries such as the UK and Australia. For instance, other courts have found the act of state doctrine notoriously difficult to define with clarity, yet it serves no discernible purpose that is not already covered by other rules. For these reasons, there has been a recent trend across the common law world to restrict its scope: the UK Supreme Court imposed important constraints on the doctrine's application in [*Belhaj v. Straw*](#), and the Australian High Court's ruling in [*Moti v. The Queen*](#) has been described as “tantamount to the abolition” of the doctrine. Up to now common law courts have stopped short of outright abolition, likely out of deference to established precedent. However, the *Nevsun* decision may prove to be the “emperor's new clothes” moment for the act of state doctrine, emboldening common law courts elsewhere to take the logical next step.

It is also possible that other common law courts will take up and build on the Canadian court's suggestion that violations of customary international law may be civilly actionable in domestic law. It seems early at this stage to speculate on what other common law countries might do in this regard, as Canada itself has still only taken preliminary steps in this direction. However, the highly developed US case law built around the ATS may further embolden other common law countries contemplating doing so, as it provides a detailed and convenient road map for how it can be done.

Finally, the Supreme Court in *Nevsun* did not just issue rulings on Canadian law, it also decided several questions of customary international law that are applicable around the world. *Nevsun* may thus impact the decisions of other courts and tribunals considering the same legal questions. Perhaps most notable in this regard is the ruling on corporate liability under international law. Corporate defendants have for many years been attempting to argue that they are immune from the application of international law, and while these efforts have mostly failed, they have been [successful in some courts](#) (not to mention the dissent in the *Nevsun* decision). The Supreme Court of Canada's rejection of this argument moves international law closer to a global consensus resolving the question.

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