INTERNATIONAL LAW MATURES WITHIN THE CANADIAN LEGAL SYSTEM: *ARAYA ET AL V NEVSUN RESOURCES LTD*

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Introduction

A little over a decade ago, I commented in the pages of this *Review* on the Supreme Court of Canada's decision in *Hape v The Queen*.[1] There, I focused, as did the majority of the Court in that case, on the role and status of customary international law within the Canadian legal system. Justice Lebel, writing for a bare majority of the Court, 5 to 4, at long last unambiguously affirmed what had been conventional wisdom within the Canadian international law community 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

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1 2007 SCC 26 [*Hape*]; See H Scott Fairley, "International law comes of age: *Hape v the Queen*," (2008) 87 Can B Rev 229 [*Hape* Comment].

legislation."[2] *Hape* was first and foremost a criminal law case where defence counsel had raised defences under the *Canadian Charter of Rights and Freedoms* to the admissibility of Crown evidence obtained abroad. The balance of the Court concurred in the result that the *Charter* defences should not succeed. Moreover, they did not take issue with the adoption theory *per se*. Rather, they felt they did not need to reach or apply the international law on point.

Scroll forward to *Araya et al v Nevsun Resources Ltd.*[3] and the consequences of Justice Lebel's judicial creativity come to fruition, this time in the novel civil context of international human rights-based torts. That context prompted the *Nevsun* majority led by Justice Abella, again in a 5 to 4 decision, to apply international law toward the recognition of common law rights of action—and potential remedies—the nature and scope of which the Court has remanded to the trial process. Replicating *Hape*, a substantial plurality of the Court did not wish to admit customary international law into the mix for purposes of framing the applicable domestic legal rules. This time around, however, that reticence obliged the dissenting voices to analyze the relevant international law before burning the proposed bridge to domestic law on point.

Unlike *Hape, Nevsun* addresses only threshold justiciability, not the precise content of the law to be applied. Nevertheless, it takes judicial creativity to the next level by injecting customary international law directly into common law discourse as a source for new or revised legal norms, provocatively extending the boundaries of justiciability by releasing a potential change agent for lower courts to apply. In doing so, the *Nevsun* majority may be seen to generate considerable controversy over the potential threat of judicially-released floodgates into realms invasive of the executive and legislative branches of government. Thus, one two-judge partial dissent, and another two-judge comprehensive dissent, both united in objecting strenuously to the justiciability of customary international law forming the basis for new rules of civil liability as a matter of common law. A principal goal of this *Comment* is to illuminate that tension, which Canadian courts will undoubtedly confront in future cases, but also to suggest that the *Nevsun* majority has embraced a necessary and proper course for Canadian common law to chart.

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2 *Hape*, *supra* note 1 at para 39. The term "prohibitive" is less restrictive than it sounds, since clarified by Justice Lebel himself as referring to rules of international law as "mandatory". See discussion *infra* note 48 and accompanying text.

3 2020 SCC 5 [*Nevsun* SCC].

1. Some Necessary Background: Actionable Customary International Law?

Nevsun is one of a number of Canadian cases where claims have been brought based on alleged violations of international human rights norms in the course of commercial ventures abroad.[4] More importantly, it is also one of the few cases to survive jurisdictional challenges to a hearing on the merits and the first case to reach and be decided by the Supreme Court of Canada affirming that such jurisdiction exists.[5]

International human rights-based claims seeking a bridge into domestic tort liability and consequential damages have arisen primarily in the context of Canadian resource-based companies operating in jurisdictions where the local rule of law is fragile at best, and Canadian courts have come to be viewed as the only available repository of access to justice.[6] Cases of this kind have gradually proliferated in Canada at the same time that analogous litigation opportunities in the United States have been severely curtailed by the US Supreme Court's re-interpretation of jurisdiction conferred on US federal courts by the *Alien Tort Statute.*[7] The latter, a long dormant statute of the First United States Congress, had been judicially reinvigorated to reach foreign actors operating abroad with little or no connection to the United States, only to be recently read down to impose that requirement.[8] One notorious example prior to the imposition of jurisdictional limitation was the prolonged *ATS* litigation

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4 Most of the early cases were dismissed on jurisdictional grounds, e.g., *Piedra v Copper Mesa Mining Corporation*, [2012] QCCA 1455, rev'g [2011] QCCS 1966; *Recherches Internationales Quebéc v Cambior Inc*, [1998] QJ 2554 (QL), 1998 CanLII 9780 (Sup Ct).

5 See also *Tahoe Resources v Garcia*, [2017] BCCA No 3a [*Tahoe*] (alleged human rights violations by Tahoe joint venture in Guatemala), rev'g 2015 BCSC 2045 (lawsuit subsequently settled by Pan American Silver in 2019 which acquired Tahoe in February 2019); *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 (alleged human rights violation by Hudbay predecessor in Guatemala).

6 See generally Audrey Macklin & Penelope Simons, *The Governance Gap*: *Extractive Industries, Human Rights, and the Home State Advantage* (London: Routledge, 2014); Yousuf Aftab & Audrey Macklin, *Business and Human Rights as Law: Towards Justiciability of Right, Involvement and Remedy* (Toronto: Nexis, 2019).

7 28 USC § 1350 (2011).

8 See and compare *Sosa v Alvarez-Machain,* 542 US 692 (2004) (limiting ATS claims to those (i) resting on a norm of customary law that (ii) is defined with specificity comparable to those violations of international law that existed when the ATS was enacted (1789)); *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013), aff'g in part 621 F 3d 111 (2nd Cir 2010) [*Kiobel*] (enlarging the analysis in *Sosa v Alvarez-Machain, supra*, and further limiting the scope of the *ATS*) with *Filartiga v Pena-Irala*, 630 F 2d 876 (2nd Cir 1980) (initial affirmation of US federal court *ATS* jurisdiction over alleged violations abroad of the law of nations, including torture and other human rights atrocities).

against a Canadian company, Talisman Energy, with respect to its joint venture in the Southern Sudan, subsequently overwhelmed by a civil war.[9]

While there have been a number of attempts in Canada to create statutory causes of action against Canadian corporations allegedly acting abroad in a manner abusive of international human rights standards—and which would not be tolerated in any Canadian jurisdiction—none have passed into law, although Canadian public policy has moved in that direction.[10] Rather, *Nevsun* is solely the product of the common law, underscoring both its novelty and the controversy surrounding it.

2. The Courts Below

A) At the Threshold: Defeating the "Plain and Obvious" Test

Nevsun commenced with what became an abortive class action accompanied by a series of procedural and jurisdictional defences, culminating in the Supreme Court's eventual remand to a trial on the merits. The merits centre on allegations by former employees of Nevsun's joint venture with the Government of Eritrea to develop an extensive gold and copper mining operation in that country—the Bisha Mine—arising from conduct occurring at the Bisha Mine between 2008 and 2012. The individual plaintiffs claimed personally, and initially in a representative capacity for more than 1000 former employees, that they had been conscripted into a forced labour regime mandated by the Government of Eritrea. Under that regime, the plaintiffs were allegedly required to work in conditions amounting to slavery, accompanied by violent, cruel, inhuman and degrading treatment at Bisha that Nevsun allegedly condoned and from which the company derived substantial profits. The pleadings alleged breaches of torts already recognized in Canadian law—conversion, battery, false imprisonment, conspiracy, negligence—and, in addition, damages for breaches of customary international law prohibitions against forced labour, slavery, and various other crimes against humanity.[11]

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9 *Presbyterian Church of Sudan v Talisman Energy, Inc*, 453 F Supp 2d 633 (SDNY 2006), aff'd 582 F 3d 244 (2d Cir 2009); cert denied 1315 S Ct 79 (2010).

10 "Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad" (2019), online: *Global Affairs Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>; "Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise" (8 April 2019), online: *Global Affairs Canada* <www.canada.ca/en/global-affairs/news/2019/04/minister-carr-announces-appointment-of-first-canadian-ombudsperson-for-responsible-enterprise.html> (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct).

11 *Nevsun* SCC, *supra* note 3 at paras 4, 7–15, Abella J.

Nevsun brought a series of pre-emptive applications before Justice Abrioux of the British Columbia Supreme Court to defeat the action in advance of a possible trial on the merits.[12] These applications sought to deny the plaintiffs' proposed class action; stay the British Columbia action in favour of Eritrea being the more appropriate forum under the doctrine of *forum non conveniens*; to strike the plaintiffs' pleadings pursuant to an asserted "Act of State" doctrine in Canadian law, precluding domestic courts from entertaining actions assessing the sovereign acts of foreign governments; and to further strike the case as pleaded on the basis that the customary international law claims had no prospect of success. While Nevsun partially succeeded on a number of evidentiary issues, it did not succeed on *forum non conveniens* "given a real risk to the plaintiffs of an unfair trial occurring in Eritrea."[13]

On the question of jurisdiction over the parent company, it is instructive to note that Justice Abrioux peremptorily disposed of the corporate veil as between Nevsun itself and its joint venture in Eritrea, noting that effective operational control rested with the parent company. Nevsun's CEO served as Chair of the Board of the Bisha company, and a majority of the Bisha board overlapped with the Nevsun board, thus Nevsun effectively governed "all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation."[14] It can now be safely concluded that Canadian courts will recognize and apply an effective control test to overcome at least downstream corporate organization of joint ventures and subsidiary companies as nominally distinct legal entities.[15]

Going to the principal issues central to this *Comment*, Justice Abrioux acknowledged the nominal existence of an "Act of State" doctrine, but noted that it had never been applied in Canada and, in any event, did not apply in the case before him.[16] Co-equally, given that customary

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12 *Araya et al v Nevsun Resources Ltd*, 2016 BCSC 1856 [*Nevsun* BCSC] (summarized per Abella J in *Nevsun* SCC, *supra* note 3 at paras 16–20).

13 *Nevsun* BCSC, *supra* note 12 at paras 127–225 (regarding admissibility of evidence); *Ibid* at paras 226–296 (regarding suitability of forum).

14 *Nevsun* BCSC, *ibid* at paras 51–52.

15 *Nevsun* BCSC, *ibid* at para 411, accord in *Nevsun* SCC, *supra* note 3 at para 20; But, see *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 (regarding upstream respect for the corporate veil): For comment, see H Scott Fairley, "Principled Limitations on Access to Justice: Awaiting the Next Installment to the Canadian Chapter on the Chevron Saga" (5 July 2018), online (blog): *Cambridge LLP* <www.cambridgellp.com/cross-border-litigation-bulletins/>; H Scott Fairley, "Principled Limitations on Access to Justice: The Final Installment of the Canadian Chapter of the Chevron Saga" (22 June 2018), online (blog): *Cambridge LLP* <www.cambridgellp.com/cross-border-litigation-bulletins/>.

16 *Nevsun* BCSC, *supra* note 12 at para 484.

international law was part of the law of Canada, the claims based on customary international law should only be struck if—assuming the facts as pleaded were true—it was "plain and obvious" that, as pleaded, the case was bound to fail. Justice Abrioux concluded: "while novel, [the claims] … should proceed to trial so that they can be considered in their proper factual and legal context."[17]

B) On Appeal: Recognizing the Concept of Actionable "Transnational" Law

The Court of Appeal for British Columbia vindicated the provocative exercises of discretion by the motions judge. Justice Newbury on behalf of a unanimous three judge panel did so, however, from a novel platform of judicial invention that would enable validation by at least a bare majority of the Supreme Court of Canada on a national basis. Taking her cue from the English Supreme Court, Justice Newbury began by quoting Lord Justice Lloyd Jones in *Belhaj v Straw* for the proposition that:

> [A] fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place … These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate.[18]

"The overarching question" arising from the above-quoted passage for Justice Newbury was "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; or whether we are to remain on the traditional path of judicial abstention from the adjudication of matters touching on the conduct of foreign states in their own territories—even where that conduct consists of violations of peremptory norms of international law, or *jus cogens*.[19] The answer of the Court of Appeal for British Columbia panel was a resounding "yes", setting the stage for the imprimatur—or not—of Canada's court of last resort.

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17 *Ibid* at paras 423–485; *Ibid* at 484.

18 *Araya et al v Nevsun Resources Ltd*, 2017 BCCA 401 at para 1 [*Nevsun* BCCA], quoting *Belhaj v Straw,* [2014] EWCA Civ 1394, aff'g [2017] UKSC 3 at para 115 [*Belraj*]

19 *Nevsun* BCCA, *supra* note 18 at para 1.

The detailed parameters of the Court of Appeal decision can be dispensed with for present purposes as they are revisited, perhaps in even greater detail, by the combined reasons of the Supreme Court justices. This *Comment* also does not address the difficult evidentiary issues addressed by both the motions judge and the Court of Appeal, prompting the rejection of Nevsun's procedural defence of *forum non conveniens*.[20]

In summary, dealing first with the Act of State doctrine, Justice Newbury noted that the status of that doctrine remained uncertain as "Act of State has never been directly applied by a Canadian court."[21] American in origin, succinctly articulated by the US Supreme Court in *Underhill v Hernandez*,[22] the doctrine provides:

> Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.[23]

Concentrating primarily on the evolution of Act of State in UK jurisprudence, where the exceptions, particularly in the human rights context virtually eclipsed rather than proved the rule, Justice Newbury did not peremptorily rule out Nevsun's defence that Act of State was a preclusive rule of subject-matter jurisdiction akin to sovereign immunity, only that the doctrine did not apply in the case before her.[24] Central to that finding was the fact that no foreign legislation was being challenged, only the extraterritorial acts of a Canadian company domiciled within jurisdiction; that the conduct complained of was unlawful conduct under both Canadian domestic and international law; and that, in any event, Canadian public policy was a bar to its application[25] given "[t]he nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy."[26]

The icing on the proverbial cake for purposes of maintaining the jurisdiction of the British Columbia trial court, came from Justice Newbury's adoption of the US Supreme Court qualification to its own invocation of Act of State, the *Kirkpatrick* exception: "Act of State issues

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20 *Ibid* at paras 93–107 re difficulties on admissibility of evidence; *Ibid*, at paras 108–122 re forum

21 *Ibid* at para 123.

22 168 US 250 (1897) [*Underhill*].

23 *Nevsun* BCCA, *supra* note 18 at para 59, quoting *Underhill*, *supra* note 22 at 252.

24 *Nevsun* BCCA, *supra* note 18 at paras 123–176.

25 *Ibid* at paras 165–169.

26 *Ibid* at para 169.

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 the case, neither is the Act of State doctrine."[27] Justice Newbury then dispatches the Act of State argument, paraphrasing *Kirkpatrick* in concluding that "the plaintiffs here are not attempting to undo or disregard any act of government, but only to obtain damages from private parties who are alleged to have been complicit therein."[28] Thus, the Act of State defence, while theoretically still alive, albeit on jurisprudential life-support, did not succeed.

In much briefer reasons, Justice Newbury dispensed with Nevsun's defence that customary international law prohibiting slavery, torture and forced labour, "do not give rise to private law causes of action in Canada," noting that the motions judge "did not find it necessary to resolve this issue … given his view that it was not 'plain and obvious' the [customary international law] claims would fail."[29]

At the end of the day, Justice Newbury goes no further, conceding that, "[t]hus far, courts in both the U.K. and Canada have declined to recognize a private cause of action for breaches of *jus cogens*."[30] However, in reviewing the leading Canadian and UK authorities,[31] Justice Newbury emphasized that all involved "claims against foreign states. The case at bar does not", and as such, principles and rules of sovereign immunity legislated in Canada under the *State Immunity Act* are not engaged.[32] It followed that "the salience of arguments based on international comity and equality is obviously attenuated: those values are clearly less relevant to a claim against a British Columbia corporation."[33]

Thus, while choosing not to resolve the competing arguments, Justice Newbury could not conclude that the plaintiffs' claims were "bound to fail." Rather, Her Ladyship concluded where she began in observing that "international law is 'in flux' and that transnational law, which regulates 'actions or events that transcend national frontiers' is developing." In the

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27 *Ibid* at para 170, quoting *WS Kirkpatrick & Co v Environmental Tectonics Corporation International*, 493 US 400 at 705 (1990).

28 *Nevsun* BCCA, *supra* note 18 at para 173.

29 *Ibid* at para 178

30 *Ibid* at para 182.

31 *Ibid* at paras 182–187, citing *inter alia Bouzari v Islamic Republic of Iran* (2004), 71 OR (3d) 675, 243 DLR (4th) 406, (CA); *Jones v Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26; *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

32 RSC 1985, c S-18 (as amended).

33 *Nevsun* BCCA, *supra* note 18 at para 188.

result, that developing law was justiciable and should have the benefit of being considered and tested at trial.[34]

3. A Divided-But-Definitive Supreme Court

In three strongly worded opinions, a sharply divided Supreme Court of Canada nevertheless provided majority vindication of the courts below that emerging "transnational law" defeated a "plain and obvious" conclusion that the plaintiffs could not succeed at trial. The five Justices affirming Justice Newbury on point, led by Justice Abella (Chief Justice Wagner, Justices Karakatsanis, Gascon and Martin concurring) also laid down a robust foundation for domestic tort claims founded in customary international law. At the same time, the Abella majority, joined by Justices Brown and Rowe, delivered a definitive (7:2) *coupe de grâce* to the theoretical possibility of an Act of State doctrine in Canadian common law. However, Justices Brown and Rowe's partial dissent sharply diverges from the Abella majority on customary international law being able to provide subject-matter jurisdiction for corollary civil claims pleaded at common law. Finally, a comprehensive dissent by Justices Moldaver and Côté purports to resurrect Act of State for another day, while validating the partial dissent on the customary law point, with added emphasis that customary international law does not embrace corporate liability along with that of states and persons.

There is much to unpack here. The balance of this *Comment* will attempt to identify the high points of what may well become a new realm of transnational law for the common law to explore.

A) The Definitive Demise of Act of State?

The courts below had each noted that the Act of State doctrine had never been applied in Canada. The Supreme Court took the next step in finding that this doctrine—heavily criticized in England and Australia, but still embraced by US courts—was essentially superfluous to existing Canadian common law.[35] The *Nevsun* majority endorsed the critique of Act of State articulated by Lord Wilberforce in the waning days of the House of Lords, which identified twin underlying principles of the doctrine: "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] Noting

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34 *Ibid* at para 197.

35 *Nevsun* SCC, *supra* note 3 at paras 28–43, majority reasons.

36 *Ibid* at para 35, citing *Buttes Gas and Oil Co v Hammer (No. 3),* [1982] AC 888 at 930 (HL).

confusion arising from "[a]ttempting to apply a doctrine which is largely defined by its limitations", Justice Abella found greater clarity within the twin principles of "conflict of laws and judicial restraint" already developed in Canadian law on their own, without the encumbrance of "an all-encompassing 'Act of State' doctrine. As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence."[37]

The majority went on to emphasize that, as a matter of private international law, Canadian courts have made rulings on the validity of foreign laws or acts of a foreign state "incidental" to the resolution of a case otherwise properly before the court.[38] Similarly, with respect to the twin plank of whether or not judicial restraint should apply, the majority noted that "the deference accorded by comity to foreign legal systems 'ends where clear violations of international law and fundamental human rights begin.'"[39] Taken together, the basic point remained that none of these cases resorted to Act of State, but essentially covered the same ground with much greater jurisprudential coherence than a doctrine struggling with myriad exceptions to maintain an unnecessary rule.

In the result, the majority concluded that the concerns Act of State purports to address have been completely absorbed by the underlying principles of choice of law and judicial restraint such that "[t]he 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."[40] Justices Brown and Rowe concurred, without elaboration,[41] making the demise of Act of State that much more definitive than a bare majority ruling on point. Only Justice Côté, joined by Justice Moldaver, held out for "the existence and applicability of the Act of State doctrine, or some other rule of non-justiciability barring the respondents' claims."[42] The Côté/Moldaver dissent on this ground was fueled by corollary sensitivity to entertaining domestic legal claims informed by customary law raising, in their view, "a unique issue of justiciability."[43] As this dissenting rationale is intertwined with the applicability of customary

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37 *Ibid* at paras 42–45.

38 *Ibid* at paras 47–49, discussing *inter alia Hunt v T & N plc,* [1993] 4 SCR 289, 109 DLR (4th) 16.

39 *Nevsun* SCC, *supra* note 3 at para 50, quoting *Hape*, *supra* note 1 at para 52, referencing *Tolofson v Jensen*, [1994] 3 SCR 1022, 120 DLR (4th) 289; *Canada (Justice) v Khadr*, 2008 SCC 28; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 and *Canada v Schmidt*, [1987] 1 SCR 500, 39 DLR (4th) 18.

40 *Nevsun* SCC, *supra* note 3 at para 59.

41 *Ibid* at para 134.

42 *Ibid* at para 267.

43 *Ibid* at para 275.

international law norms to domestic legal accountability, I return to it in the context of that discussion.

B) Majority Recognition of Customary International Law-Based Torts

The plaintiffs' action for damages was brought "under customary international law as incorporated into the law of Canada and domestic British Columbia law." The particular claims invoked under this umbrella included the use of forced labour, slavery, cruel, inhumane and degrading treatment, and crimes against humanity as breaches of customary international law. These acts were said to constitute peremptory norms, commonly referred to as *jus cogens*, from which no derogation is permitted.[44] All of the foregoing fell within the realm of legal norms accepted as binding by states *inter se* for adjudication by an international court, but here—breaking new ground for Canadian courts—it acted so as to bind a private actor under Canadian common law.[45]

This great leap into the hybrid realm of transnational law did not, however, extend to shaping either its specific content or its consequences in damages, if any, in the case before it. As Justice Abella took care to point out, the Court's task extended only to decide whether it was plain and obvious that the plaintiffs' novel claims would fail. In this limited task, the Abella majority affirmed the courts below that the plaintiffs' claims should proceed to trial, but in doing so, provided a broader contextual foundation for such claims going forward in this and future cases. Justice Abella acknowledged that the claims as pleaded were all grounded in fundamental norms of customary law that emerged in the post-colonial era in the wake of World War II, fulfilling the twin requirements of the "general practice" of states "accepted as law" to bind state conduct.[46] The plaintiffs' claims gained added strength in that they appealed to norms with *jus cogens* status "fundamental to the international legal order."[47]

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44 *Ibid* at para 60, quoting Plaintiffs' pleadings; On *jus cogens*, see *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force for Canada 27 January 1990), [1980] Can TS No 37, art 53: "A treaty is void if, at the time of its conclusion, conflicts with a peremptory norm of general international law." See generally James Crawford, *Brownlie's Principles of Public International Law,* 8th ed (Oxford University Press, 2012) at 578–80.

45 On the sources of international law recognized at the international level, see Statute of the International Court of Justice, 26 June 1945, 33 UNTS 993 (ICJ), art 38(1): (a) treaties, (b) international customary law, (c) general principles of law accepted by civilized nations, (d) international decisions and teachings of publicists [ICJ Statute].

46 *Nevsun* SCC, *supra* note 3 at paras 70–82, referencing, *inter alia*, ICJ Statute, art 38(1)(b) of the ICJ Statute.

47 *Nevsun* SCC, *supra* note 3 at paras 83–84.

Justice Abella then revisited the process by which customary law makes its way into the common law—automatic incorporation subject to conflicting statutory prescriptions—previously confirmed in *Hape*. In discussing *Hape,* Justice Abella usefully elaborated on Justice LeBel's apparent limitation to incorporation in relation to "prohibitive" rules of customary law. Her Honour citing Justice LeBel's own clarification in a post-retirement law review article, noted that the term "prohibitive" was only meant to address "mandatory" rules of international law, not a sub-category within otherwise mandatory norms.[48]

Justice Abella then turned to Nevsun's alternative defence that, even accepting the existence of Canadian common law on point, it did not apply to corporate entities. This is still an open issue in analogous US jurisprudence but not, it appears, for the *Nevsun* majority. Justice Abella marshalls extensive academic commentary to opposite effect, documenting a gradual shift away from a Grotian "state-centric" paradigm to a paradigm embracing other legal persons including individuals and corporations, particularly in the context of breaches of fundamental human rights-based norms.[49] "As a result," Justice Abella concludes, "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 … 'complicity offenses'."[50] In support of such principled argument, Justice Abella goes on to cite Canadian government policy seeking to ensure Canadian corporations operating abroad act in conformity with international human rights standards and Canada's assumed international human rights obligations, having observed at the outset that she could find no enacted Canadian laws undercutting the customary international law on point.[51]

While acknowledging the common law truism that where there is a right there must be a remedy, Justice Abella rejected Nevsun's alternative defence that the existing nominate common law torts also pleaded—conversion, battery, unlawful confinement, conspiracy and negligence—were sufficient to address Nevsun's claims without diving into the uncharted waters of international custom. That rejection was justifiably unequivocal: "Refusing to acknowledge the differences between existing

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48 *Ibid* at paras 86–93, citing *inter alia*, at para 91, Louis LeBel, "A Common Law of the World?" (2014), 65 UNBLJ 3 at 15.

49 *Nevsun* SCC, *supra* note 3 at paras 104–112.

50 *Ibid* at paras 104–113, quoting, *inter alia,* Harold Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004) 7 J Intl Environmental L 263 at 265, 267.

51 *Nevsun*, SCC, *supra* note 3 at paras 114–119; See sources cited, *supra* note 10.

domestic torts and forced labour; slavery; cruel, inhumane 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."[52]

In fashioning a concrete bridge between international and domestic laws for remedial purposes, the majority passes the baton, noting that "[t]he mechanism for how these claims should proceed is a *novel question that must be left to the trial judge*."[53] However, in this regard, Justice Abella suggests—quite provocatively—that while one approach would be to recognize new nominate torts in domestic law, such a transformational process might not be necessary. For the majority, "[a] compelling argument can also be made, based on [the plaintiffs'] 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."[54] On this proposition, however, four Supreme Court Justices fundamentally disagreed.

C) Minority Retrenchment on the Frontiers of Justiciability

In an exhaustive dissent of 133 paragraphs, equalling that of the majority, Justices Brown and Rowe, without taking issue with the majority on Act of State, abhor what they view as the majority's treatment of "entirely extricated questions of law" with "no pressing concern for judicial economy or for the integrity of the common law." The majority's theory of the case in turn leads to an inevitable victory for the plaintiffs—"the phoenix will fly"—provided their facts as pleaded can be proven.[55]

Clearly, in the view of all four dissenting Justices, this "phoenix" should not even have begun to take off and, to complete the metaphor, must decisively burn. Justices Brown and Rowe offer four reasons for torching the majority: first, prohibitive rules do not "convert" into liability rules; second, to do so is "inconsistent with the doctrine of incrementalism and the principle of legislative supremacy"; third, the plaintiffs' claims can and are more properly addressed under the umbrella of existing tort law; and finally, the two justices see the majority infringing on the separation of powers, "plac[ing] courts in the unconstitutional position

52 *Nevsun* SCC, *supra* note 3 at para 125.
53 *Ibid* at para 127.
54 *Ibid* at para 127.
55 *Ibid* at para 146.

of conducting foreign relations, which is in the executive's domain."[56] A sweeping indictment indeed!

Justice Côté, joined by Justice Moldaver, defers in large measure to the Brown/Rowe dissent on resisting the penetration of customary international law norms, but takes aim on the specific issue of corporate liability for violations of customary international law, citing the majority reasons of Justice Cabranes in *Kiobel v Royal Dutch Petroleum Co*[57] for the proposition that no binding state practice exists for binding corporations to norms addressing international criminal liability. In this, the dissenting justices have good authority on their side that both state practice and *opinio juris* are lacking for where the majority goes on this issue. Justices Brown and Rowe echo the same point, taking issue with the majority's reliance on secondary sources, notwithstanding "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."[58]

It bears emphasis that customary international law, when viewed in isolation, points to a major weakness in the majority opinion on corporate liability. The seminal precedent of the Nuremburg Trials of Nazi Germany's primary and secondary leadership following World War II eschewed corporate liability at the same time that it made law in relation to individual liability for waging aggressive war, war crimes and crimes against humanity, and setting aside defences such as compulsion or "acting under orders."[59] However, none of the opinions on point appear to contemplate the possibility of cross-pollination between parallel sources of international law. Under the rubric of "general principles of international law accepted by civilized nations",[60] corporate criminal liability is not at all controversial among many nations, including Canada.[61] Such an analysis

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56 *Ibid* at para 148; For elaboration, see *ibid* at paras 149–231 (refuting Justice Abella regarding direct incorporation not transforming civil liability rules); See also paras 232–260 (refuting chamber judge's theory advancing new torts).

57 *Ibid* at para 269, citing *Kiobel*, *supra* note 8 at para 269, citing 621 F 3d 111 (2nd Cir 2010) at 120, aff'd on other grounds, 569 US 108 (2013).

58 *Nevsun* SCC, *supra* note 3 at para 188; See also *ibid* at paras 189–191, for elaboration.

59 *Nürnberg Trial*, 6 FRD 69, 110 (IMT 1946); Jonathan Kolieb, "Through The Looking-Glass: Nuremberg's Confusing Legacy On Corporate Accountability Under International Law" (2015) 32:2 Am U Int'l Rev 570. While the *Nürnberg* trials did not embrace direct corporate criminal liability *per se*, it did indict "organizations" as "criminal," in particular, "economic defendants" which had backed Hitler's waging of "aggressive war." However, ultimate criminal liability was determined to be individual. See e.g. Telford Taylor, *The Anatomy of the Nürnberg* Trials (New York: Alfred A Knopf, 1992) at 78 *et seq.* ("The Defendants and the Charges: Krupp and the German General Staff").

60 ICJ Statute, *supra* note 45, art 38(1)(c).

would possibly bridge the paucity of state practice supporting the minority conclusion that the requisite elements of "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."[62] Thus, it may be open for subsequent judicial inquiry to consider a combination of international law sources to address and potentially affirm the issue of corporate liability on firmer ground.

Returning to the Brown/Rowe dissent more broadly, it evinces profound discomfort with judicial law-making by injecting international legal norms into domestic legal rules. Hence, they opine that "[t]he [d]octrine of [a]doption [d]oes [n]ot [t]ransform a [p]rohibitive [r]ule [i]nto a [l]iability [r]ule."[63] While agreeing with the majority that "where there is a right, there must be a remedy", they counter: "[t]he right to a remedy does not necessarily mean a right to a *particular form, or kind of* remedy." In this, form and content should fall to Parliament, not the courts.[64] Thus, it is not the job of courts to extend the limits of international law, particularly for domestic application.[65]

Then, relative to Justice Newbury's theory of the case engaging the recognition of new nominate domestic torts "*inspired* by international law: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity," Justices Brown and Rowe further opine that existing common law restraints for such recognition are not met here: "at a minimum [the proposed new tort] must reflect a wrong, be necessary to address that wrong, and be an appropriate subject of judicial consideration."[66] On their view of the matter, the international law antecedents were too open-ended, overlap with existing tort remedies and exceed the limits of appropriate incremental change that the courts should advance. Justices Brown and Rowe are definitively of this view with respect to the proposed nominate torts of cruel, inhumane or degrading

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61 For Canada and Ontario respectively, see e.g. *Canada Business Corporations Act,* RSC 1985, c C-44 (as amended), s 15(1); *Ontario Business Corporations Act*, RSO 1990, c B-16 (as amended), s 15 (corporate capacity equivalent to a natural person). The Corporations Canada website states: "In Canada, a corporation has the same rights as a real person. It can owe property, get loans, enter into contracts, sue or be sued, and even be found guilty of a crime", online: <www.ic.gc.ca/site/cd-dgc.nsf/eng/cs_06641.html> (visited 21 July 2020). For caselaw, see *Canadian Dredge & Dock Co v R*, [1985] 1 SCR 662, 19 DLR (4th) 314; *R v Church of Scientology* (1997), 33 OR (3d) 65, 116 CCC (3d) 1 (CA).

62 *Nevsun* SCC, *supra* note 3 at para 269.

63 *Ibid* at paras 192–213 and authorities cited herein.

64 *Ibid* at para 214.

65 *Ibid* at paras 224–231.

66 *Ibid* at paras 232–237 (emphasis in original at para 232).

treatment, and crimes against humanity.[67] They are less definitive with regard to the additionally proposed torts of slavery and forced labour, but opine that they nevertheless are doomed to fail in that, in this case, they attract "problems, both practical and institutional, with developing Canadian law based on conduct that occurred in a foreign state."[68] At bottom, their reservations relate to separation of powers concerns, causing them to defer to executive and legislative wills yet-to-be-expressed with respect to domestic legal liability.[69] Ergo, for the law to change, the process of effecting that change more properly falls to the other two branches of government acting separately or together.

We are left with the balance of the Côté/Moldaver dissent as an outlier opinion, two out of nine. It attempts to essentially give birth to the Act of State doctrine in Canada where it has never been applied before; this at the same time that the doctrine, as demonstrated in the majority opinion, finds little favour in other common law jurisdictions.[70] Again, the impetus for this effort is a strong perception of deference owed to the other branches of government with regard to interactions with, and pronouncements on, the legality of foreign state conduct which Justices Côté and Moldaver regard as non-justiciable, even as between private parties.[71]

Part of the Côté/Moldaver dissent focused on "how", in their view, "private litigation can interfere with the responsibility of the executive for the conduct of international relations."[72] For this proposition, Justice Côté refers to the US Federal District Court decision in *Presbyterian Church of Sudan v Talisman Energy Inc*[73] where a "foreign state had sent a diplomatic note" to the US State Department, as the case impleaded "a company incorporated and domiciled in the foreign state that had operations in Sudan." In this instance, the foreign state was Canada, and the defendant was a Canadian company domiciled in Calgary, Alberta. However, Justice Côté's use of this precedent is somewhat misleading. It was notorious and contentious in jurisdictional terms, but Justice Côté's reference to the SDNY's rejection of Talisman's initial motion to dismiss "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

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67 *Ibid* at paras 244–246.

68 *Ibid* at paras 251–254; *Ibid* at para 254.

69 *Ibid* at paras 255–259.

70 See *ibid* at paras 274–285 (regarding "substantive foundation of the Act of State Doctrine"); *Ibid* at paras 286–293 (on the non-judiciability branch" of the doctrine); See also *ibid* at 294–305 (on the "non-judiciability branch" of the doctrine).

71 *Nevsun* BCCA, *supra* note 18 at para 286.

72 *Nevsun* SCC, *supra* note 3 at para 299.

73 *Supra* note 9.

been barred"[74] requires further elaboration. Canada's policy concern was not rooted in alleged interference with Canada-Sudan relations, but in its concern for extraterritorial assertions of jurisdiction by US courts over Canadian companies operating abroad, with no meaningful connection to the United States.[75]

As it happens, Talisman succeeded, not on jurisdiction, but by way of summary judgment on the merits. On the plaintiffs' subsequent appeal to the Second Circuit, Canada submitted an *amicus* brief along with similar briefs from several Canadian business organizations, repeating jurisdictional, together with *forum non conveniens*, arguments from the court below. However the Second Circuit did not opine on the jurisdictional arguments, opting instead to simply affirm the District Court on its summary judgment ruling that the plaintiff's claims brought under the *Alien Tort Statute* required a finding of intent by Talisman to violate international human rights norms on point. In the SDNY's view, the plaintiffs had failed to meet that burden.[76]

The foregoing digression on a passing judicial comment illustrates that the dispute at play in *Talisman* and *Nevsun,* respectively, ultimately did not and does not at any stage involve the Court interfering with a foreign sovereign's jurisdiction in its own territory. In *Nevsun*, moreover, the foreign sovereign country was never impleaded, only the private party on its own account for domestic operational decision-making allegedly in violation of customary international law.

The final element of the Côté/Moldaver dissent addressed the issue of whether the *Nevsun* claims required a determination central—rather than merely incidental—to those claims that a foreign state had violated international law; if so, common law authority suggested that the claims were not properly justiciable.[77] Based on their finding of that centrality, Justice Côté concluded: "[i]t 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."[78]

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74 *Nevsun* SCC, *supra* note 3 at para 299, quoting *Presbyterian Church of Sudan v Talisman Energy, Inc*, 2005 WL 2082846 at para 5 (SDNY) (parenthetical by Côté J).

75 This discussion is informed by this writer's direct knowledge of the Talisman litigation as counsel for *amicus curaie* before the Second Circuit.

76 *Ibid.*

77 *Nevsun* SCC, *supra* note 3 at paras 306–312.

78 *Ibid* at paras 313.

4. Conclusion and Prospectus

Returning to where this *Comment* began, the significant distance travelled in the application of international law as a tool for refashioning Canadian domestic law, as between *Hape* and *Nevsun*, should not be underestimated. In the former case, while recognizing international custom as a part of Canadian common law, it was employed as an interpretive device for judicial restraint. *Nevsun*, however, purports to significantly expand Canadian law, utilizing international law as a sword rather than a shield, for purposes of creating domestic legal accountability for acts committed abroad in complicity with foreign sovereigns. That outreach is extended by the majority, but is curtailed by a substantial plurality of the *Nevsun* Court as one that exceeds the appropriate grasp of Canadian justice. Taken together, the majority and dissenting reasons for judgment constitute a benchmark precedent, setting Canadian law on a more expansive course into the hybrid sea of "transnational law", undoubtedly, with many twists and turns to come.

The essential difference explaining the Supreme Court's divide in *Nevsun*, is the majority's willingness to clear the way for a potentially profound development, and possible expansion, of the Canadian common law versus the minorities' fears that to do so transgresses the frontiers of the judicial function. This divide widened to a chasm due to the sources appealed to for the proposed common law venture into unchartered waters: norms of customary international law already admitted into the law of Canada, but heretofore neither shaped into novel common law remedies, nor directly applied by Canadian courts. For the majority, such claims are not inherently bound to fail, but remain to be developed, perhaps with a myriad of hiccups and necessary qualifications along the way. The two minority opinions, on the other hand, fear letting this particular genie out of its bottle. There are good reasons for caution. Many of the *Nevsun* claims are founded on alleged criminal conduct and the violation of human rights norms with the status of *jus cogens*. This genesis raises key issues over applicable burdens of proof: whether such cases properly belong to the realm of negligence, or require proof of some element of intention on the part of the alleged tortfeasor. Indeed, a host of important issues remain to be addressed and decided over time. Nevertheless, appropriate judicial restraint should not lead to judicial paralysis.

A majority of the Supreme Court of Canada has already made the leap endorsed by the UK Supreme Court before it, admitting the hybrid field of "transnational law" that is fed by customary international law norms already incorporated into Canadian common law. In rejecting this tentative embrace, the dissenting justices appear to sell the common law

short. Revolutions can begin and end within its confines. One need only look to the transformation of private international law wrought by the Supreme Court in *Morguard Investments v De Savoye*,[79] which belatedly confirmed the greatly reduced burden of recognizing and enforcing foreign judgments, suggested by *Morguard* and adopted over a decade later in *Beals v Saldanha*.[80] There was extensive internal dislocation inbetween, but vindication by subsequent international treaty law-making, and Canadian statutory developments, have confirmed that the Canadian common law got it right.[81]

Where does *Nevsun* leave us? In no respect does the majority judgment posit a necessarily successful result on the merits for the *Nevsun* plaintiffs. Rather, while it is no longer open to argue that international human rights-based tort claims "plainly" and "obviously" will fail, Canadian trial judges in future cases will continue to have their work cut out for them.[82]

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79 [1990] 3 SCR 1077, 76 DLR (4th) 256.

80 2003 SCC 72.

81 See and compare: H Scott Fairley, "Enforcement of Foreign Judgment by Canadian Courts: A New Age of Uncertainty" (1996) 2 Can Int'l Law 1; Joost Blom, "Reform of Private International Law by Judges: Canada as a Case Study," in James Fawcett, ed, *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (New York: Oxford University Press, 2002) at 31–47; H Scott Fairley, "In Search of a Level Playing Field: The Hague Project on Jurisdiction and the Recognition and Enforcement of Foreign Judgments," in Chi Charmody et al, eds, *Trilateral Perspectives on International Legal Issued: Conflict and Coherence* (Baltimore, MD: American Society of International Law, 2003); H Scott Fairley and John Archibald, "After the Hague: Some Thoughts on the Impact on Canadian Law of the Convention on Choice of Court Agreements" (2006) 12 ILSAJ Int'l & Comp L 417; See also Uniform Law Conference of Canada, *Hague Convention on Choice of Court Agreements Act* (2010) (as amended 2019) ULCC Annual Meeting, St. John's Nfld. 9–13 August 8, 2019: *Resolutions* (*inter alia* adopting and recommending for adoption the updated *Uniform Act to Implement the Convention on Choice of Court Agreements, 2019* (Annex 7)).

82 In October 2020, an out-of-court settlement was reached between the plaintiffs and the defendant company. The terms of the settlement are confidential. For further details, please see the website of Amnesty International (the organization was granted the status of *amicus curiae* in the proceeding before the Supreme Court of Canada): Amnesty International Canada, "Amnesty International applauds settlement in landmark Nevsun Resources mining case", (October 23 2020), online (blog): <amnesty.ca/news/amnesty-international-applauds-settlement-landmark-nevsun-resources-mining-case>. For further coverage, please see the CBC news report: Yvette Brend, "Landmark settlement is a message to Canadian companies extracting respires overseas: Amnesty International", *CBC News* (October 23 2020), online: <www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910>. While the tasks of interpretation and application of the Supreme Court ruling are no longer necessary within

If the courts got it wrong, it remains open for the legislative branches, federal and provincial, to intervene and either correct or affirm and expand on what the courts in fact may do. In any event, the international human rights imperatives at stake, and already incorporated into Canadian law, provide a compelling justification for the common law to go forward. The Supreme Court of Canada is to be commended for allowing it to do so.

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the four corners of the instant case, the challenge of doing so is essentially unaltered for trial judges in future cases.