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By: James Hendry

The Supreme Court of Canada took one step closer to testing the issue of whether individuals alleging a breach of customary international law can sue a Canadian corporation with overseas operations for a remedy at common law in Canada. In Nevsun Resources Ltd. v. Araya, the Court dismissed the appeal of Nevsun which had unsuccessfully sought to strike the claim of three Eritrean refugees who had sued it in its province of incorporation for damages based on domestic torts and for breaches of

customary international law alleged to have been suffered in the operations of Nevsun at a mine in Eritrea. This Journal commented on the motion at first instance allowing the case to proceed in case-comment-forum-non-conveniens-and-liability-for-alleged-human-rights-violations-the-nevsun-resources-ltd-case and case-comment-potential-corporate-liability-in-transnational-law, in the appeal which was dismissed case-comment-potential-corporate-liability-in-transnational-law-redux and about the tort issue generally in analysis-thoughts-on-a-customary-international-law-tort-and-the-canadian-legal-system. The reasons for judgment of the majority of the Supreme Court of Canada were written by Abella J. In dismissing the appeal, she set the scene for development of 'the application of modern international human rights law' which she said was meant to be more than 'theoretical aspirations' but moral imperatives and legal necessities' (para. 1).

Facts

According to the Court's recitation of the facts, the Bisha gold, copper and zinc mine in Eritrea was owned by Bisha Mining Share Company (BMSC), 40% owned by the Eritrean National Mining Corporation and 60% by Nevsun, a publicly traded BC corporation which the Chambers judge noted exercised effective and operational control over BMSC (para. 17). BMSC hired a South African company as general contractor which subcontracted with Mereb Construction Company controlled by the Eritrean Military and Segen Construction Company owned by Eritea's only political party, the People's Front for Democracy and Justice. Eritrea had a National Service Program under which conscripts were assigned to military service or construction projects in the public interest for an indefinite term. In fact, the three claimants were among conscripts forced to work for companies such as Mereb and Segen owned by senior military and party officials. They allege that they were forced to labour in long, harsh and dangerous conditions for years, were confined to camps, suffered severe punishment and threats to their families. (paras. 7-15).

They claimed damages for breach of the domestic torts of conversion, battery, false imprisonment, conspiracy and negligence. They also claimed damages for breaches of customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity. (para. 4)

Issues at the SCC

Nevsun argued that the 'act of state doctrine' precluded domestic courts, in a lawsuit against a private corporation, from judging sovereign acts of a foreign government which included the Eritrean National Service Program (para. 5).

Nevsun also argued that the customary international law prohibitions did not create claims for damages under Canadian law.

Other issues had been resolved at earlier phases of proceedings commented in the linked articles above.

Act of State

The majority concluded that the confusing act of state doctrine that had developed in English law has not played a role in Canadian law but has been subsumed in Canada by the principles of conflict of laws and judicial restraint (paras. 28,44,57). She noted that Canadian courts decide on the application of foreign laws according to private international law principles which call for deference but allow judicial discretion to decline to enforce such laws where they are contrary to public policy, including respect for public international law (para. 45). Canadian courts will exercise judicial restraint where findings purport to legally bind foreign states but may inquire into foreign law when necessary or incidental to resolve legal issues within the court's jurisdiction (paras. 47-9). She noted that Canadian courts frequently evaluate foreign law and legal systems in extradition and deportation cases considering the principle of comity, but such deference ends where an individual might be extradited or deported to a state where its law or conduct allowed a breach of fundamental human rights (paras. 50-4). Abella J cited authorities where surrender of an individual to foreign law that allowed a breach provisions of the Charter or where there were systemic human rights abuses prevented deportation or extradition, without resort to an 'act of state doctrine'.

Though her focus was on how Canadian courts dealt with the issues resolved in English law by the act of state doctrine, Abella J reviewed that doctrine relied on by Nevsun. She noted there was no single definition that encapsulated the act of state doctrine, but that it started with the proposition that courts of one country cannot adjudicate the lawfulness of the acts of a sovereign foreign state. It is a common law creation of subject-matter immunity for such acts where a foreign state is not a party, while the doctrine of sovereign immunity, which extends personal immunity to state officials carrying out official duties, is international law (paras. 29-33). She noted that the act of state doctrine developed numerous exceptions including where the foreign act breached human rights or other public policy such as acts that infringed established rules of international law. Thus, it was a doctrine that created considerable confusion, and Abella J characterized it as 'a doctrine which is largely defined by its limitations' (para. 42).

The act of state doctrine does not apply in Canada. It does not bar the claimants in this case (para. 59).

Customary International law

Abella J noted that the claimants seek damages for breaches of customary international law as incorporated into the law of Canada. She observed that the appeal was about whether the claim should be struck at this early stage of proceedings so that the Court did not have to offer a definitive answer to the question: whether there was no reasonable claim because it was plain and obvious that there was no reasonable prospect of success at trial. The rules for such a motion required the Court to proceed as if the facts were proved, unless they were manifestly incapable of being proven (para. 64) The second question on the motion to strike was whether the pleading was unnecessary, scandalous, frivolous, or vexatious, because it did not advance a claim known to the law, where it was obvious the

claim would not succeed, would serve no useful purpose or would waste the court's time (para. 65).

Abella J agreed with the Chambers judge and the Court of Appeal that the issue of whether the claims arising from a breach of jus cogens or the preremptory norms of customary international law may form the basis of a civil proceeding and whether a corporation could be liable for such a claim were novel and the law unsettled, but that Nevsun had not shown they have no chance of success and so the matter should proceed to trial (para. 69). She emphasized the important role of the courts in developing international law and so 'there was no reason for Canadian courts to be shy' about advancing international law in the domestic sphere as other national courts have done (paras. 70-2).

Abella J thought that the Court had to start by determining whether the claims made in the case based on the prohibition of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity are part of Canadian law and capable of remedy.

This had to start with determining whether they were part of customary international law. She found that the task was not onerous because these norms arose from modern international law (para. 75). Article 38(1) of the Statute of International Court of Justice listed four sources: conventions; custom as evidence of general practice accepted as law; general principles of law recognized by civilized nations; and judicial decisions and expert authority. She noted that the norms of customary international law required widespread state practice undertaken because of *opinion juris* – a sense of legal right or obligation (para. 78). She then noted that the judicial decisions of national courts are also evidence of general practice or *opinio juris* and so are crucial in shaping these norms (para. 79). Once part of customary international law, they bind all nations. *Jus cogens* forms a subset of norms from which there can be no derogation because they are fundamental to the international legal order (para. 84).

Abella J then held that customary international law becomes part of domestic common law in Canada by being automatically adopted (as the term is in Canada) without need for legislative action, but subject to override by legislation (para. 86). She found authority for this adoption of prohibitive norms in paragraph 39 of R v. Hape. She dealt with the statement there that "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", by saying that the word 'may' did not detract from other statements that refer to such adoption in a long line of cases and other wording in the paragraph more affirmatively such as "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." She also quoted from a later extra-judicial article by LeBel J, the author of the majority reasons in *Hape* as explaining that 'may' was not meant to undermine the clear statement of the adoption doctrine (para. 91, 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). She also reasoned that the use of the adjective 'prohibitive' was not meant to create a second category of customary international law or separate analytic factor unique to Canada by again referring to the article by LeBel J at p. 17 where he said 'prohibitive' meant 'mandatory' or binding (paras. 92-3).

Thus, the rule is that by adoption, those norms that satisfy the requirements of general practice and *opinio juris* are 'fully integrated into, and form part of, Canadian domestic common law, absent conflicting law.' This was a longstanding rule and one accepted by 'most countries' (para. 94). It was to be judicially noticed as law, not fact as other foreign law (paras. 97-8).

In this case, Abella J held that the Court may take judicial notice of the established norms of customary international law and particularly as *jus cogens*. Accepting proof of new customary international law makes it somewhat different from domestic law but does not derogate from its nature as 'law'. It is not in issue in this case because the plaintiffs plead *jus cogens* violations (para. 99). She relied on scholarly articles, Statements of the UN Commissioner for Human Rights and the international Labour Organization, and numerous conventions to support the proposition that crimes against humanity, slavery, forced labour and cruel, inhuman and degrading treatment are *jus cogens* (paras. 100-3).

Corporate liability

Abella J held that the claimants' action based on these customary international norms form part of Canadian common law and potentially apply to Nevsun (para. 116).

Abella J was of the view that modern international law's norms of liability have evolved so that they are not restricted to specific categories of actors. While some such as those governing treaties apply strictly to states, others prohibit conduct of states and other persons (paras. 105-6). She noted the proliferation of conventions and normative instruments that reflect a transformative concern with international individual human rights (paras. 107-9). She recognized that individual rights do not exist simply in contract with the state but are "discrete legal entitlements, held by individuals, and are 'to be respected by everyone'" (para. 110). She quoted one scholar as observing these "norms are routinely applied to private actors" and concluded that there was no reason in principle why 'private actors' should not include corporations (para. 111, (Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 B.J.I.L. 45, 73). She quoted another who wrote that it did not make 'common sense' that corporations could be held liable for international criminal offences, but not incur civil liability (para. 112, Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 J.I.E.L. 263, 265).

Accordingly, it was not plain and obvious that corporations are excluded from direct liability for violations of international law. She did note though that some norms were strictly binding on states and that a trial judge would have to sort this out (para. 113).

Abella J could not find any Canadian legislation that conflict with the adoption of the norms underlying the claims in the case. Rather, Canadian government policy was to ensure that corporations obey these norms in conducting business abroad (para. 115).

Civil liability for breaches of adopted common law

Abella J held that recognizing the possibility of a remedy for a breach of these norms adopted into the common law was a necessary development of the common law (para. 118). She referred to General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant for a statement by the Human Rights Committee specifying that states party to the International Covenant on Civil and Political Rights must protect individuals against violations of rights by states and private persons and entities and that at paragraph 15 "[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. 119).

She also invoked the principle that where there is a right there must be a remedy. There was no legislative bar against the claims in this case as there was in Kazemi Estate v. Iran under the State Immunity Act which she noted, immunizes states, not corporations (para. 121).

So it was not plain and obvious that the courts could not develop a remedy for a breach of international norms in this case.

Tort law

Abella J held that it was important to recognize the differences between domestic torts and the alleged breaches of international norms (para. 125). Nevsun argued that the harms complained of can be remedied by the domestic torts of conversion, battery, unlawful confinement, conspiracy and negligence as pleaded. However, she held that refusing to acknowledge the difference between domestic and international norms might undermine the court's ability to adequately address the heinous nature of the harms of the breaches of international norms which is qualitatively different from breaches of private law torts because of its public nature, the importance of the rights, the gravity of their breach, the impact on domestic and international rights objectives and the need to deter future breaches (paras. 126, 129).

The claims left space for a trial judge to fashion appropriate remedies for the breaches of international norms. It was not plain and obvious that the claims could not be remedied by some direct form of liability. The doctrine of adoption might be adversely affected if it were necessary to develop new torts to remedy the breach of international norms adopted into the common law (para. 128).

These were novel claims but within the competence of Canadian courts to work out.

The dissents

Brown and Rowe JJ agreed with the majority on the act of state doctrine but would have allowed Nevsun's appeal on the 'use of customary international law in creating tort liability' (para. 135). They unpacked the majority's theory of the case that the adoption into the Canadian common law resulted in a cause of action for its breach that could result in a remedy. But, while agreeing with *Hape* that

prohibitive rules of customary international law are incorporated into Canadian law, this did not give rise to a liability rule. They were of the view that the doctrine of adoption would have to be changed to allow this because the courts should not make more than incremental changes to the common law. The principle of legislative supremacy requires an act of Parliament or a legislature to change Canadian law to create such a liability rule. This is because only legislators have the right to control the effect of the adoption of rules into Canadian law by exercising their constitutional right to accept or deny effect to customary international law because of the principle imbedded in the doctrine of incorporation that legislation trumps adoption (paras. 148,153,167).

The dissenting justices noted the procedural difficulty for trial judges in identifying customary international law and proposed a process. First, determine state practice and *opinio juris*. Second, determine how the norm should be given effect. Third, determine whether there is conflicting legislation, and if no, implement that change to the common law (para. 175) Where there is no dispute about the norm, then courts may take judicial notice (para. 179). The dissenting justices had no quarrel with the majority that there are prohibitions at international law against crimes against humanity, slavery, the use of forced labour, and cruel, inhuman, or degrading treatment; these prohibitions have the status of *jus cogens* (except possibly forced labour); 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; individuals are beneficiaries of these prohibitions; and the principle in domestic law that where there is a right there must be a remedy (paras. 185-6,179).

However, in their view, there was no way for a court to create direct civil liability for corporations for breaches of customary international law and so this part of the claim was bound to fail at trial (para. 191). The dissenting justices' dispute with the majority was about how adoption changes Canadian law in response to the recognition of a rule of customary international law (para. 206). Corporations are not civilly liable by the norms of customary international law (paras. 202-3). Their view was that the law of adoption cannot be changed to ignore this because the courts may change the law only incrementally (paras. 204-5,224-5). Therefore, it is up to legislators to determine whether a path to civil liability should be created (para. 229,262-3). Further, a new remedy was not necessary because domestic law already furnishes an appropriate cause of action (para. 216).

Moldaver and Côté JJ dissented on two grounds. First, that customary international law does not allow corporate liability for their breach (para. 269). Second, the claim that Eritrea has breached customary international law through its National Service program cannot be decided by Canadian courts by a principle of justiciability that is either a branch of the act of state doctrine or a specific aspect of the law of justiciability, because the claim involves a matter of foreign policy for the executive to deal with according to the doctrine of the separation of powers (paras. 276,286,293,296,305). As the determination of the legality of Eritrean law about whether the National Service Program is an illegal system of forced labour is central to the international law claim, it is plain and obvious that it will fail (paras. 310-3).

Conclusion

The conclusion of the majority will allow the BC trial courts to hear and determine the claims made by the plaintiffs in this case about liability arising from the adoption of rules of customary international law as well as the tort claims based on domestic law. Seven justices appeared to agree on the applicable rules of customary international law in play (paras. 185-6). The full discussion of the issues of international and domestic law in the Court that the trial judge will have to resolve will map out the issues of fact and law that will have to be decided and the choices that he or she will have to make. It is interesting that Brown and Rowe JJ quote Professor O'Keefe writing: " …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. 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]" (para. 229, 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."

Newbury JA writing for a unanimous British Columbia Court of Appeal on appeal from the Chambers judge's ruling below, commenced her reasons for judgment that allowed the action to proceed against Nevsun, with a quotation from Lloyd Jones LJ at the Court of Appeal for England and Wales in Belhaj v. Straw, who wrote at paragraph 115: "First, a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place…These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to address and investigate the conduct of foreign states and issues of public international law when appropriate."

The majority in *Nevsun* seems to agree with Lloyd Jones LJ. Perhaps we shall see a new Donohue v. Stevenson.

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