

Analysis: Thoughts on a Customary International Law Tort and the Canadian Legal System

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In an earlier PKI Journal post, James Hendry summarizes the B.C. Supreme Court decision of Chambers Judge Abrioux in *Araya v. Nevsun Resources Ltd*.[1] on whether there might be a private law claim for breach of customary international law ("CIL").[2] Following an appeal by Nevsun, that decision was upheld by the B.C. Court of Appeal on November 21, 2017.[3]

Araya is a proposed representative action on behalf of refugees from the State of Eritrea alleging that Nevsun Resources Ltd., a British Columbia company, used forced labour and torture to build an Eritrean mine. The allegations include a claim that the conduct of Nevsun and others amounts to "a breach of customary international law", and gives rise to a private law cause of action for damages in Canada. On a preliminary application, Nevsun sought – but failed before both the B.C. Supreme Court and Court of Appeal – to strike out this portion of the claim on the basis that the pleadings disclosed no reasonable cause of action or that the claim had no reasonable prospect of success. At a minimum, the Courts' conclusions demonstrate that Nevsun was unable to meet the high bar needed to have a claim summarily dismissed without full consideration of its merits at trial. However, various authors suggest it may also reflect courts' new-found openness to transnational corporate liability for violations of international norms.[4]

This article explores some of the legal and policy considerations raised by the breach of CIL claim. The *Araya* action raises numerous novel legal issues, however the argument that there exists an independent private tort based on a breach of CIL may pose the greatest hurdle of all. Fortunately though, it is not dispositive of the case. Should the courts ultimately refuse to recognize a private law claim based on CIL, there exist analogous domestic torts which also form part of the plaintiffs' claim, for example, battery and unlawful confinement.

Balancing Canada's Dualist System and Observance of International Law

Canada's dualist system and observance of its international legal obligations are not easy companions. International law is largely developed through Executive action via negotiation of binding and non-binding international instruments, adoption of treaties, formal statements, etc. This means that from a strict constitutional perspective, neither Parliament nor Legislatures play a role in the development of conventional international law. (In January 2008, the federal government commenced tabling treaties prior to their ratification in the House of Commons, in order to have some level of Parliamentary involvement. While the House may debate and even pass a motion related to a particular treaty, its actions have no legal force. The Executive retains sole decision-making power on ratification.)[5]

Concomitantly, international laws are not pleaded directly in Canadian courts but must rather be converted into some form of domestic law. For example, legislative bodies may incorporate international commitments through the passage of domestic statutes.[6] Canada may also rely on existing laws and on common law to demonstrate conformity with international rules. For example, international human rights treaties may be ratified on the basis of existing protections in the *Canadian Charter of Rights and Freedoms*, tort law, labour laws and/or *Criminal Code* provisions.

From the judiciary's perspective, there appears to be an ongoing struggle to locate the balance between respect for international legal commitments and Canada's system of Parliamentary Sovereignty and constitutional democracy. The majority statement in *R. v. Hape* is often cited (including by the parties to the Araya action) to explain the interaction between domestic law and Canada's international legal commitments:

[F]ollowing the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be *incorporated into domestic law* in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law *to aid in the interpretation* of Canadian law and the development of the common law. (my emphasis)[7]

There is a significant difference between incorporating a customary international law rule into domestic law versus using that same rule to aid in the interpretation of Canadian law and development of

common law. Other judicial pronouncements on the interaction of domestic and international law have served to muddy the waters further.[8]

Consideration could also be given to whether direct incorporation into domestic law is warranted in the context of *jus cogens* norms, given that they represent peremptory norms from which derogation is never possible. It would also reflect the serious opprobrium associated with offences such as torture, slavery and forced labour, which according to the plaintiffs' brief, was an impetus for a tort claim based on a breach of CIL.[9]

Fortunately, the plaintiffs may be able to take advantage of both approaches mentioned in *Hape* by arguing for a distinct common law tort of breach of customary international law, or alternatively, by using such international norms to inform the scope and interpretation of existing domestic torts which are also pleaded in this case.

Do CIL Norms include a Right to a Civil Remedy

Another question related to the plaintiffs' transnational claim is whether CIL norms include a right to civil redress. It is broadly accepted that CIL is established where it can be demonstrated that most states act in accordance with a specific rule (referred to as "state practice"), and that they do so out of a sense of legal obligation ("*opinio juris*").

There is also little dispute that torture, slavery, forced labour and crimes against humanity fall within the realm of CIL. In fact, they are typically considered to be jus cogens norms. However, these norms are also typically phrased as "prohibitions against" torture, slavery, etc. As such, they clearly prohibit States and State actors from committing the stipulated acts, and may also oblige States to prohibit such acts by all private actors within their jurisdictions. The plaintiffs' argue that, in addition, CIL directly prohibits private actors from committing these odious acts, without any intervening action of the State.

Regardless of whether CIL has direct application to private actors, a key question is whether these CIL norms extend beyond prohibitions to an obligation on States to provide civil redress mechanisms. Nevsun argues that based on States' practice, such cannot be the case. Araya argues that once the CIL violation is established, domestic common law determines the form of the liabilities and remedies.[10]

On a related matter, it should be noted that international norms, including CIL, are often phrased in general terms. The procedures, elements and defenses associated with particular international norms are often left to States and national laws to determine, in whole or in part. Acceptance in Canada of a CIL-based tort claim would be frontier-breaking and would need to be accompanied by an equally innovative determination of the justiciable components of each CIL-based claim.

A Pressing Need

Civil actions are of value to plaintiffs as a means of addressing serious human rights abuses, establishing truths and assisting in some form of closure.[11] However, the siren call in *Araya* and related litigation is the absence of any real governance regime over the operation of transnational companies, particularly in regards to basic human rights.[12] Often such companies operate in countries whose economic and political circumstances render their inhabitants prone to abuse, at the same time as their legal systems offer no real hope of redress. The need for standards – CIL being an indisputable starting point – and accountability is urgent.

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Irit Weiser has spent most of her career with the federal Department of Justice. She was Senior General Counsel and Head of Legal Services for Health Canada and the Public Health Agency of Canada. She provided legal, policy and strategic advice to senior levels of government in regard to various health-related matters, including the Canada Health Act, food and drug regulation, quarantine, and tobacco. Prior to heading up Health Legal Services, Irit was General Counsel and Director of the Human Rights Law Section of the Department of Justice. She provided legal and policy advice, and litigation support on the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and international human rights law. Before joining the Department of Justice, Irit worked for the Lawyers Committee for Human Rights in New York. She has also taught International Human Rights at the Faculty of Law of the University of Ottawa. Finally, she has written articles and presented papers on international human rights matters, the Canadian Charter of Rights and Freedoms, and health law. Since retiring, Irit has become involved in a number of pro bono activities, including providing legal assistance to private sponsors through the Refugee Sponsorship Support Program. She is also a member of the Research Ethics Board of the Ottawa Health Science Network, the Strategic Governance Committee of the Royal Ottawa Hospital, and the Council of the Royal College of Physicians and Surgeons of Canada.

References

1. 2016 BCSC 1856.
2. James Hendry, “Potential Corporate Liability in Transnational Law” (2017) 1 PKI Global Just J.
3. *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401.

4. See for example, Jason MacLean, *The Enduring Evil of Slavery and the Emergence of Transnational Corporate Law: Araya v. Nevsun Resources Ltd*, https://c.ymcdn.com/sites/tlaonline.site-ym.com/resource/resmgr/toronto…).

5. An excellent explanation of Canada's treaty-making and implementation process can be found at Library of Parliament, *Canada's Approach to the Treaty-Making Process* (2012) Background Paper† No. 2008-45-E, https://lop.parl.ca/content/lop/ResearchPublications/2008-45-e.htm.

6. Examples of legislation directly implementing an international treaty include *the Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, implementing the Rome Statute of the International Criminal Court; and the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, implementing the Geneva Conventions for the Protection of War Victims.

7. 2007 SCC 26 at para. 39 (While this paragraph considers only international customary law, similar judicial ambivalence exists in regard to ratified treaties that have not been expressly incorporated into Canadian law.)

8. See, for example, Craig Forcese, *Supreme Court of Canada Clouds Rules Governing Role of Customary International Law in Domestic Law and of International Law in Interpreting Canadian Charter*, http://craigforcese.squarespace.com/public-international-law-blog/2009/2/1/supreme-court-of-canada-clouds-rules-governing-role-of-custo.html; Jutta Brunnee and Stephen J Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts", Canadian Yearbook of International Law (Volume 40) (2002) at 5.

9. Written Submissions of the Plaintiffs Re: Application to Strike Plaintiffs' Customary International Law Claims as Disclosing No Reasonable Claim, para. 171 [Plaintiffs' Written Submissions].

10. Plaintiffs' Written Submissions, at paras. 156-7.

11. Noah Benjamin Novogrodsky, *Immunity for Torture: Lessons from Bouzari v. Iran*, EJIL (2007), Vol 18 No. 5, 939 at 950.

12. Justice Ian Binnie, Speaking Notes for a speech to the CBA on "Confronting Corporate Complicity in Human Rights Abuses", May 6, 2010, http://www.cba.org/cba/cle/PDF/INTL10_Binnie_Speakingnotes.pdf.