Case Comment: Potential Corporate Liability in Transnational Law Redux

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The following case comment analyzes the British Columbia Court of Appeal decision in Araya v. Nevsun Resources Ltd, in which the plaintiffs allege Nevsun is liable for actions contrary to international law that occurred in Eritrea at a mining project in that country. The Court of Appeal unanimously dismissed Nevsun's appeal from the decision of the Chambers judge on the issues of forum non conveniens, the act of state doctrine and potential liability for breaches of customary international law, allowing the action to proceed to trial. The analysis of the Court of Appeal of the issues is detailed and could be read with the decision of the same court in Garcia v. Tahoe Resources Inc. that allowed a similar action to proceed.

The Chambers judge's decision in the case of *Araya v. Nevsun Resources Ltd.*[1] has been the subject of articles in this journal as a case in which we may be seeing a potential for a new direction in transnational law, an amalgam of international and domestic law.[2] Newbury JA writing for a unanimous British Columbia Court of Appeal (BCCA) on appeal from the Chambers judge's ruling, 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 that he had observed a fundamental change in public international law: from a legal system of regulating of states alone on the international stage, to a system that included regulating human rights

by international law which made individuals subjects of the system too and a system where courts showed a greater willingness to investigate the conduct of foreign states and other appropriate issues of public international law.[3] Newbury JA then commented that the “overarching question” for the BCCA here was whether Canadian courts should follow this trend or whether they should continue to keep their noses out of the conduct of foreign states, even when they violate peremptory norms of international law, *jus cogens*.

The *Araya* action was originally commenced as a representative action on behalf of Eritrean citizens who assert that Nevsun is legally responsible for the sufferings they alleged to have incurred at the Bisha Mine in Eritrea. Nevsun is a publicly-traded BC mining company, which the plaintiffs say owns 60% of the mine through subsidiaries.[4] The representative proceedings were struck out by the Chambers judge and his decision on this issue was not appealed.[5]However, the action remains complex.

Facts

The plaintiffs are 3 Eritrean refugees. They allege that Nevsun engaged the Eritrean military and corporations controlled by it and the political party in power, to build the Bisha mine near Asmara. The plaintiffs further allege that the military used them and others who were conscripts in the Eritrean National Service Program (NSP), even after their term of service, to do the work under conditions that breach their rights at international law. In their Claim filed with the BCSC, the plaintiffs allege that the sole defendant Nevsun was directly or indirectly liable for the use of forced labour, slavery, torture, inhuman or degrading treatment, and crimes against humanity at the mine on a number of theories of liability. They seek damages for private law torts as well as for breaches of peremptory principles of international law as incorporated into domestic BC law. Nevsun denied these allegations, though it admitted Bisha Mine Share Company (BMSC) owns and operates the mine, but that BMSC took precautions to prevent the alleged abuses. It pleaded that the terms of the plaintiffs’ employment by an Eritrean company should be disposed of in Eritrea. Most of its defenses became the bases for its interlocutory proceedings to stop the action.

Interlocutory proceedings

Nevsun alleged before the Chambers judge that the BCSC was not *forum conveniens* and that the plaintiffs’ evidence in response to the application was insufficient to allow the Chambers judge to properly assess the issues; that the common law act of state doctrine forbade BC courts from judging the Eritrean state action from which the alleged liability of Nevsun derived; that there was no domestic liability in Canada for breach of customary international law; and, that this was not a proper representative action.

The Chambers judge held that Nevsun had not proved that BC was *forum non conveniens* because there was sufficient first-hand and secondary contextual evidence in particular about its legal system to make that finding,[6] that the act of state doctrine might not apply, and that a court might award some remedy for a breach of customary international law, all at least within the tolerance of doubt necessary

to stop an action by interlocutory application. Though Abrioux J struck the representative proceedings, he allowed the named plaintiffs' proceedings to continue.

The Court of Appeal

Newbury JA commenced her reasons for the unanimous Court of Appeal with a note of caution about the complexity of the issues arising from the parties' different theories of the case.[7]

Nevsun argued that any of the liability against it could arise only from a finding that the Eritrean state had engaged in breaches of international human rights which was an inquiry the BC courts should not engage in according to the common law act of state doctrine which it argued prevented them from becoming "roving commissions" looking into a foreign state's governance and legal system.[8] The plaintiffs responded by saying that the case was not about attaching legal consequences to Eritrean state actions, but that the liability of Nevsun they alleged would flow from the simple existence of the conduct alleged to be wrong, irrespective of Eritrea's legal responsibility for it. Newbury JA felt compelled to say that the plaintiffs' case was not a simple one. Nevsun argued that, on the pleadings, it would be liable "if and only if" it were proved that Eritrea had engaged in international wrongs and that Nevsun was complicit in them. She inferred that this is why Nevsun argued that the act of state doctrine applied to prevent a BC court's "judgment" of Eritrea's actions (while state immunity protected Eritrea itself). It is not clear why she anticipated the issue of the application of the act of state doctrine in such detail so early in her reasons, other than to frame this as the central issue and to prepare her readers for the significant analysis of the issue ahead.[9]

The Evidence

The first issue to engage the Court of Appeal was the Chambers judge's reliance on reports of third parties. Nevsun was concerned that the Chambers judge let in too much secondary evidence and then gave it credence beyond using it as context, which was the reason he admitted it.

Accordingly, Nevsun objected to a number of secondary reports including one by the UN Commission for Inquiry into Human Rights in Eritrea in 2015 and 2016, the Report of a Special Rapporteur, a Report prepared by the European Asylum Support Office on Eritrea, Human Rights Watch World Reports from 2006 to 2015, and a report of the US Department of State. The objections were that the reports offered opinions on central issues, they were not the subject of judicial inquiry, they contained hearsay, and that it was not possible to cross-examine on the facts and opinions expressed. Newbury JA responded that the "social" evidence in the reports could only be adduced in reports of this kind which represent collations by experts of information from a variety of sources common to such reports.[10] She was willing to find that "the conditions of reliability and necessity that favour a court's accepting such evidence in constitutional cases" applies to this kind of application as well.[11] The plaintiffs provided eyewitness evidence as well as the reports accepted by the Chambers judge as context and not to prove the central issues that would have to meet the scrutiny of a trial court. Newbury JA held that the Chambers judge was not wrong to have allowed in this contextual social evidence and that he did not use it to make findings on the substantive issues between the parties. She was of the same

view about the evidence offered by a researcher and student of Eritrea, Dan Connell, whose evidence seemed more directed at substantive issues, but in her view, had been used by the Chambers judge as evidence of context.

Forum Non Conveniens

Newbery JA considered three arguments about the weight given by the Chambers judge to the factors in s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*.[12] That provision says:

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

Applying a deferential standard of review, Newbury JA rejected Nevsun's argument that the evidence accepted by the Chambers judge on the real risk of not getting a fair trial in Eritrea was too broad, recalling the statement by the Court in *Garcia*[13] that broad assertions of judicial corruption should be given limited weight in the *forum conveniens* analysis, while specific evidence should carry greater weight. Here the evidence was only corroborative of the detailed and specific evidence of first-hand witnesses.

One of the issues was how evidence of the real risk of not being able to get a fair trial fit into the analysis because it is not specifically mentioned in s. 11. Newbury JA noted that the Chambers judge properly considered this evidence as one of the s. 11 factors, alone, or an aspect of the convenience concept, presuming that the Chambers judge thought that the risk of an unfair trial was not convenient.[14]

Newbury JA also rejected Nevsun's argument that the Chambers judge gave undue weight to the evidence of the risk of an unfair trial in light of the derivative nature of the case against Nevsun which

anticipated the legal doctrines based on international comity and order that create obstacles to a BC court's consideration of acts of state on which any liability of theirs depended. She also rejected the argument on the logistical difficulties of the case. The plaintiffs argued that the Chambers judge considered the logistical problems, but was concerned about the fact that the plaintiffs might be considered traitors if they returned, that witnesses might be intimidated, the military's refusal to cooperate, the lack of evidence law, and the lack of a framework for tendering foreign testimony. Newbury JA noted that the Chambers judge was faced with a "stark choice": logistical complexity, versus no trial, or an Eritrean trial "…possibly presided over by a functionary with no real independence from the state (which is implicated in the case) and in a legal system that would appear to be actuated largely by the wishes of the President and his military supporters (also implicated)".[15] She also noted the "underlying" issue which concerned the grave human rights issues at stake that authority suggested should lessen the concern about logistical complexity.[16] The Chambers judge and Newbury JA ultimately both relied on the fact that the onus of proving *forum non conveniens* was on Nevsun which failed to meet it. Also, both held that the benefits of having the trial in a "fair and impartial" proceeding weighed against a jurisdiction where this was unlikely carried the day.

Newbury JA also rejected the argument that the evidence about the first-hand testimony about the Eritrean judicial system was out of date. The Chambers judge noted that evidence of a former Eritrean judge dismissed in 2007 was supplemented by his being an observer until he left Eritrea in 2014.[17]

Act of State?

- **Initial trepidations**

Newbery JA admitted to "some trepidation"[18] as she started her analysis of the application of the act of state doctrine. Her concern shows in the extensive review of the evolution of the legal landscape of the common law cases that were concerned about the propriety of the courts of one country to concern themselves with the sovereign activities of another. The nature and scope of the doctrine had not been completely clarified by the split UKSC in the recent decision in *Belhaj v. Straw*[19] and the BC authority held by the Chambers judge to have recognized the doctrine in Canada in *United Mexican States v. British Columbia (Labour Relations* Board)[20] was *obiter*. Early cases such as *Duke of Brunswick v. King of Hanover*where the Lord Chancellor wrote that "no court in [England] can entertain questions to bring Sovereigns to account for their acts done in their Sovereign capacities abroad"[21] suggested that some form of the doctrine was adopted in BC in 1858.[22]But this statement and others like it about bringing a foreign sovereign to account, sound more like a concern about the jurisdiction of an English court to attach legal consequences to the acts of a foreign sovereign in their own country rather than attaching legal consequences to actions for which a BC corporation might be liable because of their alleged involvement in them. But however the legal side of the doctrine were to be worked out, there was still the diplomatic issue of how one country would respond to the courts of another casting aspersions on its acts of state.

- **A Final or Interlocutory Decision?**

Having surmounted her trepidations, Newbury JA then determined that the issue before the Chambers judge was not whether it was an arguable case that the act of state doctrine might apply in an interlocutory application, but whether it does apply.[23] Without deciding whether the act of state doctrine is jurisdictional, she held that the "plain and obvious" test was not suitable to the act of state doctrine, because it was "extremely inefficient" to subject a foreign state to trial before knowing whether or not it should have had to participate in the first place.[24] Newbury JA wrote that if the issue of the act of state doctrine is raised at the pleading stage, it should be determined there.[25] Presumably, if the pleadings are sufficient to allow the court to make the final determination she requires, then they become the basis of the final determination of the application of the doctrine. She does not elaborate on the need for evidence if something more were required to come to the final decision on the issue.

The "Public Policy" Exception

In Newbury JA's summary of the arguments, she noted that Nevsun concentrated on the public policy exception to the act of state doctrine rather than the doctrine itself, arguing that it was applied in *Belhaj* because the Court assumed the truth of the seriousness of the allegations of kidnapping, arbitrary detention and torture of the plaintiff in the rendition to Libya in issue in that case, while no Canadian court had similarly acted on allegations alone, but required a clear violation of fundamental human rights before considering the exception which had not been shown here.[26] Further, it argued that the plaintiffs' claims required a BC court to judge the actions of the Eritrean State, its military and private actors, in substance, even though they were not named as defendants contrary to the act of state doctrine. This would be avoided by an action before an Eritrean court.

Newbury JA summarized the plaintiffs' arguments that the act of state doctrine as stated by the UKSC in *Belhaj* was so narrow that it would not apply at all. Alternatively, the public policy exception in favour of international human rights law would apply as it was by 5 of 7 judges in *Belhaj*. The plaintiffs looked to 4 of the rules of the act of state doctrine tentatively noted in the majority opinion of Lord Neuberger:

121. The first rule is that the courts of this country will recognise, and will not question, the effect of a foreign state's legislation or other laws in relation to any acts which take place or take effect within the territory of that state.
122. The second rule is that the courts of this country will recognise, and will not question, the effect of an act of a foreign state's executive in relation to any acts which take place or take effect within the territory of that state.
123. The third rule has more than one component, but each component involves issues which are inappropriate for the courts of the United Kingdom to resolve because they involve a challenge to the lawfulness of the act of a foreign state which is of such a nature that a municipal judge cannot or ought not rule on it. Thus, the courts of this country will not interpret or question dealings between sovereign states. [Eg. war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory, legality of acts of a foreign government in the conduct of foreign affairs, "This third rule is justified on the ground that domestic courts should not

normally determine issues which are only really appropriate for diplomatic or similar channels…”]

124. A possible fourth rule was described…, as being that “the courts will not investigate acts of a foreign state where such an investigation would embarrass the government of our own country: but that this doctrine only arises as a result of a communication from our own Foreign Office”.[27]

The plaintiffs argued that the first rule is based on a foreign state’s legislation, none of which was identified by Nevsun. In fact, Newbury JA noted that Nevsun had argued that the evidence was that torture and forced labour were not based on Eritrean law and were in fact unlawful there because Eritrea was bound by conventions against forced labour.[28] The plaintiffs argued that Lord Neuberger’s second rule was inapplicable because of his suggestion that the rule might not apply to unlawful executive acts, of which the administration of the NSP was one.[29] The plaintiffs also argued that a “clear violation” of international law need not be proved, but even if it was, the UN reports tendered in evidence demonstrated torture, forced labour, slavery and crimes against humanity associated with the NSP, confirmed by findings of immigration tribunals in Canada and elsewhere.[30] Finally, in Newbury JA’s summary, the plaintiffs said that if a balance need be shown, which they denied, the public policy considerations here outweighed considerations of international comity. They reiterated that the conduct of Eritrea and its agents was secondary to the primary allegations of Nevsun’s complicity in them. The allegations of the breach of *jus cogens* almost always engaged the public policy limitation.[31]

- **The Act of State Doctrine does not Apply**

Newbury JA held that the act of state doctrine did not apply.

Assuming Lord Neuberger’s first rule applied to individuals as well as property, something he was not willing to commit to in his reasons, Newbury JA noted that the plaintiffs did not challenge Eritrean legislation or other laws or the effect of executive action in Eritrea. There was no legislation in issue, and even if the effect of an executive act was “questioned”, the acts would be unlawful in breach of fundamental preemptory norms. She wrote that the plaintiffs only sought compensation for acts of Nevsun in connection with alleged wrongs that occurred in Eritrea that were not contemplated by legislation or official policy.[32] Even applying Lord Sumption’s formulation of the act of state doctrine, the lawfulness, validity, effect of, or motives underlying sovereign Eritrean acts would not be questioned in BC. In Newbury JA’s view, the action challenged only Nevsun’s alleged complicity in acts that were unlawful under domestic and international law.[33] The future trial court would only decide this issue on evidence adduced at trial. Other formulations of the act of state doctrine would not apply either: no challenge was made to official and government acts of Eritrea, no challenge was being made to Eritrean ownership or possession of property. There was no suggestion of any impact on Eritrea “or its legal position in general” that would result from a judgment in the plaintiffs’ favour.[34]

In any event, Newbury JA held that the public policy exception would clearly apply.[35] The grave wrongs alleged could not be justified. They would be contrary to *jus cogens*. States cannot claim immunity from acts they have agreed in international conventions are wrong.

Newbury JA also held that if the act of state doctrine did apply, then the *Kirkpatrick*[36] exception would apply. This exception distinguishes between proof of the "existential" fact of certain conduct (that the conduct occurred) and the legality, validity or effectiveness of the laws or conduct of a foreign state. She repeated that if the alleged conduct is proved, then the question is not the validity or the wrongfulness of the state conduct which by its nature is wrongful, but whether Nevsun aided or abetted, condoned or was complicit in it.[37]

The Claims in Customary International Law

The last major question on appeal was whether the Chambers judge was wrong because he did not strike the plaintiffs' claims based on customary international law as adopted into Canadian law, either because they failed to disclose a reasonable private law cause of action or they were unnecessary because of the availability of torts under domestic law.

In agreeing that the "plain and obvious" test and the well-known guidance provided by the SCC in *Hunt v. Carey*[38] that novel causes of action should not necessarily be struck applied, Nevsun argued that the international law claims made by the plaintiffs were way beyond merely novel and would be a radical transformation of the law.[39] Nevsun argued that international law and domestic law, while interacting in some areas on the periphery of the law, remained distinct.

Newbury JA noted that courts in the UK and Canada have declined to recognize a private cause of action for a breach of *jus cogens*, such as the prohibition against torture. She also noted that the law balanced the condemnation of torture with the rule of sovereign immunity.[40]

In *Bouzari*[41], the Ontario Court of Appeal upheld the dismissal of an action for torture against Iran. Though the Court agreed that customary international law was adopted into the common law, legislation to the contrary such as the *State Immunity Act*[42] overrode it and provided Iran complete immunity. In that case, at trial, two experts took opposing positions on whether the *Convention Against Torture* required Canada to provide an action for damages for torture committed overseas or only for torture committed in Canada. The trial judge accepted the latter position which was based on broad state practice. The Court of Appeal accepted it as well adding that customary international law did not create a civil remedy because the sovereignty of states outweighed condemning the wrong. The Court of Appeal noted that international law might change in the future, but it was not for a common law court to create an exception to the *State Immunity Act* or find a widespread state practice that did not exist.

Further, the SCC held in *Kazemi*[43] that the *Convention Against Torture* did not require parties to provide civil remedies for torture committed outside their territories. LeBel J wrote that *jus cogens* did not require this either.[44] He went on to say that the common law should not jump to create such a remedy without a strong legal evidence that a new consensus is developing in international law. He held further, that the current international consensus was against allowing a personal action against state officials as a way around the *State Immunity Act*.[45] Abella J's dissenting analysis however led her to conclude that an individual's right to a remedy for a breach of human rights was now a principle

of international law.[46]

Newbury JA noted that she was not deciding a case brought against a sovereign nation nor their servants or agents and so the *State Immunity Act* did not apply. This was an action against a BC company so did not require the same concern about other states' sovereignty.[47]

However, the fact the action was against a company and not a state downgraded the important consideration of state sovereignty did not answer the next question which concerned the application of international law to non-state actors such as corporations. Nevsun argued that it was a company and not a subject of international law. It noted that work had been done at the international level on a framework for corporate governance based on the theory that states had the duty to implement their international obligations by regulating their companies under domestic law. Their point was that international law still operated at the state and not the corporate level. The plaintiffs argued that prohibitive norms of international law are automatically adopted into Canadian law unless contrary to legislation, citing LeBel J in *Hape*.[48] They noted that there was no Canadian legislation permitting forced labour, torture or crimes against humanity. They made the point that just because these offences were international crimes did not mean that there was no parallel civil remedy. They also noted the public policy exception in the act of state doctrine cases favoured human rights protection over sovereign immunity. This could support a development of civil remedies as well as criminal prohibition.

Countering the argument about the exclusive concern of international law with states, the plaintiffs argued that non-state actors had been involved in international processes for a long time. Historically, international laws of piracy were aimed at individuals and German corporations were found to have violated international law in the Nuremburg trials.

Newbury JA did not pursue the philosophical and historical arguments further and contented herself with citing the plaintiffs' argument that the common law may well develop to incorporate international norms, noting that Nevsun agreed that international law's interrelationship with the common law was in a state of development.[49] Nevsun countered by arguing that the plaintiffs' claims would require a complete revision to domestic law.[50]

Newbury JA concluded by saying that the plaintiffs faced many obstacles in their suit, including international comity and the courts' role in developing the law, but at the same time, recognized a domestic cause of action against torture would not likely bring "the entire system of international law crashing down" and even suggested that the strength of the prohibition against torture and the fact that states are not involved might well make this case an incremental first step in the resolution of these legal issues.[51] The plaintiffs' claims were not bound to fail in the context of the "flux" of international law and transnational law development, especially where human rights violations are not effectively addressed by international mechanisms. She cited other jurisdictions that had made companies responsible and the act of state doctrine limited by public policy considerations. She was not persuaded that the claims were beyond the pale.

Conclusion

The conclusion that is suggested by this case and the earlier decision in *Garcia* is that the *forum conveniens* analysis favouring a fair and impartial trial, the trump that the public policy exception plays in the act of state doctrine as well as the narrowing of the doctrine when plaintiffs are attempting to make companies liable for the bare or existential actions of foreign states in which they are alleged to be complicit, and the recognition that the reality of globalization may require more tools for regulating the cost of doing business for companies exploiting the resources of developing nations, all lead to a favourable legal ooze out of which a doctrine of corporate liability for serious breaches of international human rights might evolve.

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References

1. 2016 BCSC 1856.
2. Pearl Eliadis, “Forum non Conveniens and Liability for Alleged Human Rights Violations: The *Nevsun Resources Ltd. Case*” (2017) 1 PKI Global Just J 4; James Hendry, “Potential Corporate Liability in Transnational Law” (2017) 1 PKI Global Just J 6; Irit Weiser, “Thoughts on a Customary International Law Tort and the Canadian Legal System” (2017) 1 PKI Global Just J 17.
3. 2017 BCCA 401 para. 1, quoting from *Belhaj v. Straw* [2014] EWCA Civ 1394 at para. 115 (*aff’d* [2017] UKSC 3).
4. Para. 2. All references to paragraph numbers alone are to *Nevsun*, unless otherwise indicated.
5. Para. 17.
6. Paras. 20, 25 and 28.

7. Para. 85.
8. Para. 86.
9. Para. 91-92.
10. Para. 98.
11. Para. 100.
12. *Court Jurisdiction and Proceedings Transfer Act*, SBC, c. 28.
13. *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045, reversed 2017 BCCA 39 at para. 125, leave to appeal refused [2017] SCCA No 94.
14. Though the Chambers judge in *Garcia* had held that the plaintiffs had to prove a real risk of not getting a fair trial as a secondary burden following the English law, the BCCA held in that case that the Chambers judge was wrong and that the onus of proving this real risk was on the party seeking the change in forum.
15. Para. 118.
16. Id. referring to *Belhaj* at the Court of Appeal of England and Wales at para. 159.
17. Para. 121.
18. Para. 123.
19. [2017] UKSC 3.
20. 2015 BCCA 32.
21. Para. 123, (1848) 2 HLC 1, 9 E.R. 993.
22. Para. 123.
23. Para. 129.
24. Para. 125 citing *Schreiber v. Canada (Attorney General)* (2001), 2001 CanLII 23999 (ONCA), 152 CCC (3d) 205, but not fully affirmed according to Newbury JA, 2002 SCC 62 (on the state immunity doctrine, which she found analogous in this respect to the act of state doctrine). See also para. 129.
25. Para. 129.
26. Paras. 154-156.
27. *Belhaj*, UKSC, Lord Neuberger refers to these as “possible rules” at paras. 121 -124.
28. Para. 161.
29. Para. 162 referring to Lord Neuberger in *Belhaj* (UKSC) at paras. 136-143.
30. Para. 163.
31. Para. 164.
32. Para. 166.
33. Para. 167.
34. Para. 168.
35. Para. 169.

36. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International*, 493 U.S. 400 (1990).
37. Para. 172.
38. *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959.
39. Para. 179-180.
40. Para. 182.
41. Paras. 183-185.
42. RSC 1985, c. s-18.
43. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.
44. *Kazemi* at para. 157.
45. *Kazemi* at paras. 107-108.
46. *Kazemi* at para. 199.
47. Para. 188.
48. *R v. Hape*, 2007 SCC 26 at para.39.
49. Para. 195.
50. Para. 195.
51. Para. 196.