17th Annual Osgoode Cup

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Participant booklet

Tournament Contacts

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Welcome to the Osgoode Cup 2021!

Thank you for registering to be a part of the Osgoode Cup 2021! We hope you have a truly enjoyable experience and learn about the art of mooting.

Below you will find a memorandum on the case you will be mooting this year, along with helpful guidelines and tips for the competition. But before that, we would like to highlight a few things:

Schedule

Mooting will begin on Friday, March 5th, 2021. You will be required to attend at 8:15AM to begin the check-in process. At the end of the competition on Friday, there will be an additional competition day on Saturday. Final rounds for the competition will be held on Sunday, March 7th, 2021.

Competition Format

Each team will consist of two (2) speakers. Each speaker will have 7 minutes to make submissions, for a total of **14 minutes** per team. You may divide the issues between the two speakers however you wish, **but keep in mind our recommendations in the Issue section.**

In elimination rounds speaking times will be extended to 10 minutes. However, do not prepare for 10 minutes, this will be filled with extra questions.

This is not a research assignment, but rather an exercise in oral advocacy. You **are** expected to read, and be familiar with, the case and relevant sections of the Law Society's Codes of Conduct. You should find all of the information that you need to make an effective argument within this memo.

You are **not** expected to read any other cases referenced in the *Nevsun* decision in their entirety. The information about other cases provided within the decision itself is sufficient. The way to do well in this competition is to organize your submissions well, present them persuasively, and respond to questions from the judges effectively.

Ultimately, this is not an exam or test of your legal knowledge; it is a competition in oral advocacy.

Notes on Style

- Address the judges as “Justice(s)”
- Refer to opposing counsel as “my friends”
- Refer to your partner as “my colleague” or “my co-counsel”
- Your points are not “arguments” but “submissions”
- Try to avoid saying, “I think”, “I feel”, “I believe”, etc. Rather say “I submit” or better yet, just make your point
- Be appropriately respectful of the judges. Do not interrupt a judge who interrupts you to ask questions (and the judges will interrupt you!). Listen to the whole question, pause to collect your thoughts, and then answer.
- The best mooters do not lecture or talk at judges, but engage them in a structured conversation. Your job is to convince the judges of your position and therefore, you should pay attention to whether the judges are being persuaded by your position of if they are struggling with it and adjust accordingly
- Do not be afraid of questions. Welcoming questions and successfully responding to them is the most important part of nay moot since questions reflect what your bench actually cares about (see previous point)
- You must finish at the end of 7 minutes (you will be given a few time signals), unless you ask for, and are granted, a few extra seconds to finish up. Use this time to conclude quickly, do not begin another argument. Always ask for an extension if you see that time is up. Do not just keep talking.

Have fun! This is a great chance to gain experience speaking on your feet in a setting where there is absolutely nothing to lose.

Guide to Good Mooting

Preparation of the Argument

Preparation is crucial to success in any moot. Generally, the more preparation that is done prior to the moot, the less stressful the moot itself will be. The following notes are designed to be of help to those who have just received their moot problem, and don’t know where to begin. Bear in mind that this is by no means a complete guide to legal research.

Analyze the problem

Before any research or arguments can be developed the first task when you receive the moot problem is to analyze it, breaking it down into its constituent parts. With a moot problem, this means looking at the issues and deciding which facts and what areas of law are relevant.

It is important to remember that all submissions in a moot are submissions concerning issues of law and not the facts of the problem. Mooters should assume that the facts as presented in the problem have been found by the trial judge, and an appellate court will not review a finding of fact when it does not have access to witnesses or any other evidence.

Organizing

Once you have read and digested the case, you should begin to organize your submission. Keep the following points in mind:

- List your major submissions. Order your submissions from the strongest to the weakest.
- List what you want the court to accept. You should structure your arguments at all times bearing in mind the desired result.
- Flesh out your arguments with case authorities and any policy arguments you may have. Bear in mind that strong case authorities are likely to be more persuasive than policy arguments lacking support in law.
- Keep your authorities to a minimum. Don't cite every case you have read, choose the most relevant and authoritative.
- If you are faced with an authoritative case that is not in your favour, try to distinguish it (argue that the facts in that case are sufficiently different to the present facts to warrant a different decision).
- If you have a number of cases supportive of your position, but not directly similar to the facts at hand, try to use legal analogy (argue that the points of law in question are the same, even if the factual scenarios differ).

Practice

Brainstorm the questions you expect to get from judges. If you are able to practice in front of judges, have your mooting partner record all the questions asked of you by the judges during practice; this way you will be able to go back, review, and think up great answers for the next time you face the same question (and you will ultimately face the same questions several times during the practice rounds)
Take note of all the feedback you get from the judges – it should help you hone your skills as you continue practicing

Presentation of the Argument & Courtroom Etiquette

A good portion of the evaluation is allocated to speaking ability and delivery. Even the most ingenious of legal arguments can fail if counsel lacks the capacity to communicate those arguments effectively. The following notes cover most aspects of the presentation of the moot itself, from what to expect when you first enter the courtroom, to tips on style and etiquette.

Style

Some people have a natural talent for public speaking, while others have to strive a little harder to achieve the same level of competency. Keep the following points in

mind when presenting your submissions:

- Speak **SLOWLY**! While you might (possibly) have a thorough knowledge of the legal issues involved in the problem, the moot judge only has a few minutes to comprehend your arguments. If the judge doesn't comprehend your argument, you don't stand a good chance of winning the moot!
- Maintain eye contact. Make your submissions to the judge, not the lectern.
- Don't read your submission word for word. This is a problem for novices who prefer the security of reading a prepared speech. Not only does reading make eye contact difficult, but it is very easy to lose your place should the judge decides to ask any questions. Try summarizing your submissions in point form, and speak from memory to the best of your ability.
- Try not to fidget. Aside from the odd gesture for emphasis, try not to make any distracting movements.
- The use of humour is ill-advised; it may be interpreted by the judge as a sign of disrespect.
- Watch strong language like "totally", "completely", "obviously." Using softer language will make you appear more credible.
- Pause... often. Pause before answering questions from the bench and after you make key points.

Format of the 2021 Osgoode Cup: Virtual Hearings.

The 2021 Osgoode Cup will utilize two different video conferencing methods at times. These will be (1) google meetings ('google meet') and (2) zoom.

You will be notified of the link(s) to go to for different events.

Mooting over Video

Mooting over video can pose challenges for both new and seasoned mooters. We recommend the following tips below to maximize your success in mooting on Zoom:

- **Mute your microphone** when you are not speaking in order to keep background noise (such as typing) to a minimum. This ensures that the speaker can be heard by everyone.
- **Practice speaking into the camera, not the screen.** Our tendency may be to look at the screen when we are speaking, however, looking into the camera will increase engagement with the other participants and will make them feel as if you are speaking directly to them. You should try your best to know your material well enough to not read your submissions. This will ensure that you are engaging with the bench and not appearing to be "scripted".
- **Be mindful of your background noise** when you are speaking and avoid activities that could create additional noise such as shuffling papers. Some

background noise may be unavoidable, and this is okay, just try to control the background noise that you can.

- **Position your camera properly** both when speaking and when not speaking. If you are using a camera, make sure that it is positioned at eye level, this helps create a more direct sense of engagement with the judges.
- **Limit Distractions** such as notifications, cell phones, and internet pages. This will help create a more direct sense of engagement with the judges and other mooters. This will also help you focus more on the moot.
- **Have a clean background.** The judges and mooters are not just seeing you, they are also seeing your surroundings. A messy background can be distracting to the judges and other mooters.
- **Dress appropriately**. Although the moot is taking place virtually, it is still a professional competition. Mooting is a formal exercise in oral advocacy. Ensure that you dress the part, that is, dress in business attire!
- **Prepare your materials ahead of time**. Before the moot, make sure you have your submissions ready and in front of you. The Osgoode Cup is run on a very tight schedule. This will ensure that you are not scrambling to find your submissions and will allow the moot to start and proceed in a timely fashion.
- **Consider using your phone for audio:** Both google meetings and zoom allow for you to have your audio through your phone. This is a significantly more reliable method of having audio as it makes your audio and video signals from different sources.
    - **How to set up audio by phone for Google meetings:** https://support.google.com/meet/answer/9518557?hl=en
    - **How to set up audio by phone for Zoom:** https://support.zoom.us/hc/en-us/articles/201362663-Joining-a-meeting-by-phone (the 'call me' option is often easiest).
    - Do not however call in and also have a video as separate 'logins'. You should appear in the moot only once.

What to Wear

There is no formal dress code for the Osgoode Cup, but you should dress in a manner appropriate to the nature of the event. We suggest business attire -- a suit for men and skirt/pants suit for women. Neither advocates nor judges will wear robes.

Order of Appearances

Counsel need not argue in the order in which their names appear on the schedule. It is up to each team to decide the order in which the two oralists will appear. You should give this information to the timekeeper before the oral argument begins.

Other Tips

- Always stand when speaking to the judge. Only one person should be standing at any one time.

- As counsel, your opinions carry little weight in court. **Always** couch your arguments in terms of “I submit ...”, “It is respectfully submitted that ...” or “It is my submission that ...” but do not use phrases such as “In my opinion ...”, “I find that ...”, or “I think ...”
- Both sides should make a self-contained argument that stands on its own, and neither should make the other side's argument for it.
- That said, the Respondent's oral argument should be responsive to the Appellant's oral argument. For example, the Respondent might exploit concessions made by the Appellant, or show why the Appellant's arguments are incorrect or undesirable. But a Respondent must have its own story to tell and will seldom win just by criticizing the Appellant's argument.
- Unlike the Respondent, the Appellant cannot respond directly to the Respondent's oral submissions, because it has not heard the Respondent's argument yet. On the other hand, if there are key weaknesses in the Appellants argument that the Respondent is bound to exploit, the Appellant should face up to these weaknesses directly without waiting for the Respondent to raise them.

How to Begin Your Submission

Generally, you would begin your submission with an introduction such as
“Good morning Members of the Court my name is Jane Doe and I am counsel for the Appellant”

If you are the Appellant, you want to ask the Court if they want a recitation of the facts – they won’t – if you go into a recitation of the fact they will probably ask you to move on.

You might want to have a punchy opener
“This case is all about …”
Begin with your roadmap
“I have two submissions for the Court today. My first submission is …..”

Watch some actual litigation before the Supreme Court of Canada and past Osgoode Cup’s:

CPAC has clips online of actual litigation before the SCC. Watching the dialogue between lawyers and the bench is super helpful. (*Note the videos play better in Explorer)

The January 21, 2010 clip features Osgoode's former Dean speaking second.
http://www.cpac.ca/forms/index.asp?dsp=template&act=view3&pagetype=vod&lang=e&clipID=3612

Recorded moots from the Osgoode Cup: http://www.osgoodecup.com/recordedmoots/

2016 Osgoode Cup Final Round: https://youtu.be/RKsb1yooF2c

2017 Osgoode Cup Final Round:
https://www.youtube.com/watch?v=HSl7P0gLjpI&t=26s

2018 Osgoode Cup Final Round:
https://www.youtube.com/watch?v=5IxN5aDUQy0

Case Memo: 2021 Osgoode Cup

Introduction

The case to be mooted this year in the Osgoode Cup Moot is an appeal from the Supreme Court of Canada decision, *Nevsun Resources Ltd. v Araya, 2020 SCC 5 [Nevsun].* For the purposes of this moot *Nevsun* has been appealed to the fictional **Supreme Court of Osgoode Hall.** The Appellant team will represent Nevsun Resources, and the Respondent team will represent Mr. Araya et al.

Facts

This case was brought to the court by three Eritrean refugees living in Canada, Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle ("the workers"), all of whom had worked in the Bisha mine in Eritrea during the period in question. Bisha mine is owned and operated by Bisha Mining Share Company ("BMSC"), an Eritrean mining company, which is 40 percent controlled by Eritrean National Mining Corporation and 60 percent controlled by the Appellant Nevsun Resources Ltd. ("Nevsun"), a Canadian mining company incorporated in British Columbia.

Pursuant to its operation of Bisha mine, BMSC hired SENET, a South African company, to manage construction of the mine. On BMSC's behalf, SENET entered into various subcontracts, two of which were with Eritrean construction companies. The first company, Mereb Construction Company ("Mereb"), was controlled by the Eritrean military and the second, Segen Construction Company ("Segen"), was owned by the People's Front for Democracy and Justice, Eritrea's only political party.

Since 1995, Eritrea has implemented a compulsory national conscription program that requires all Eritreans to complete military training and service at the age of 18. This military service can include assisting in construction projects that are deemed to be in the national interest. In 2002, the government of Eritrea extended the 18-month service period under the national conscription program to an indefinite period of time, thus forcing conscripts to provide labour at low wages for various Eritrean companies owned by senior Eritrean military and party officials. Mereb and Segen are among those companies which received military conscripts for their work with the Bisha mine.

The workers, all conscripts under the national program, were sent to work in the Bisha mine at different times between 2008 and 2010. Each alleges that they were forced to provide labour in harsh and dangerous conditions, including twelve-hour workdays in temperatures that climbed to close to 50 degrees Celsius. The

workers also claim that they were subject to various forms of severe punishment and the threat of retribution against their families if they fell ill and were unable to work or tried to leave the mine.

After arriving in Canada as refugees, the workers initiated class proceedings in British Columbia against Nevsun for the alleged human rights abuses that they experienced working in the Bisha mine. The class action proceedings represented individuals compelled to work at the Bisha mine between 2008 and 2012 and sought damages for breaches of domestic torts including conversion, battery, false imprisonment, conspiracy, and negligence. Damages were also sought for breaches of customary international law's prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

Nevsun responded to the proposed class action by bringing an early motion to strike the workers' pleadings on the basis of the "act of state doctrine", which the Appellant argues would deny Canadian courts subject matter jurisdiction to rule on the acts of foreign governments, including decisions with respect to Eritrea's national conscription program. Nevsun's motion also advanced the argument that the workers' claim based on customary international law had no reasonable prospect of success and should be struck for this reason.

Judicial History

British Columbia Supreme Court

The Eritrean workers began class action proceedings in British Columbia against Nevsun Resources. Nevsun subsequently brought a series of applications against the Eritrean miners to strike the proceedings. The Chambers Judge, Abrioux J., denied Nevsun's *forum non conveniens* application, concluding Nevsun had not established that convenience favours Eritrea as the appropriate forum.

On Nevsun's application that the act of state doctrine prevented British Columbia from exercising jurisdiction, Abrioux J found that the act of state doctrine, while never applied in Canadian law, nonetheless formed part of Canadian common law. However, he found it did not apply in this case.

Finally, Abrioux J rejected Nevsun's argument that there is no reasonable prospect at trial that the court would recognize either "claims based on breaches of [customary international law]". In Abrioux J's view, the claims against Nevsun for breaches of customary international law should proceed to trial.

British Columbia Court of Appeal

Nevsun appealed the decision to the British Columbia Court of Appeal. Writing for a unanimous court, Newbury J.A. upheld Abrioux J's ruling on *forum non conveniens.* On the issue of the act of state doctrine, Newbury J.A. found the doctrine had been adopted in British Columbia by the *Law and Equity Act,* which recognized that the common law of England as it was in 1858 is part of the law of British Columbia. She concluded, however, that the act of state doctrine did not apply in this case because the Eritrean workers' claims were not a challenge to the legal validity of a foreign state's laws or executive acts. Even if the act of state doctrine did apply, it would not bar the Eritrean workers' claims since one or more of the doctrine's acknowledged exceptions would apply.

On the issue of customary international law, Newbury J.A. concluded that the fact that aspects of the Eritrean workers' claims were actionable as private law torts, did not mean that they had no reasonable chance of success on the basis of customary international law. Newbury J.A. held that because the law in this area is developing, it cannot be said that the Eritrean workers' claims based on breaches of customary international law were bound to fail.

Supreme Court of Canada

The Supreme Court of Canada faced two issues on appeal:

(1) Does the act of state doctrine form part of Canadian common law?

(2) Can customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law?

SCC Majority (Per Abella J)

The majority at the Supreme Court of Canada dismissed the appeal and upheld the conclusions reached by the Court of Appeal.

The Act of State Doctrine

A majority of the Supreme Court ruled the act of state doctrine did not exist as a bar to the Eritrean workers' claims. The majority held the doctrine historically played no role in Canadian law. The majority further held Nevsun's argument that the doctrine was part of the English common law received into British Columbia law in 1858 and should now be imported into Canadian law would overlook the

development that its underlying principles have received through considered analysis by Canadian courts. Thus, the English act of state 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.

Customary International Law

Abella J, writing for a five-judge majority, held the Eritrean workers' claims should not be dismissed on the basis that it is "plain and obvious" they would not succeed. In her decision she writes at para 132, "Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed."

SCC Dissent (Per Côté J)

Writing for the dissent, Justice Côté disagreed with the majority on both of the above issues.

The Act of State Doctrine

The Dissent undertook a comprehensive analysis of the act of state doctrine and concluded that the majority overlooked the non-justiciability prong of doctrine which concerns itself with questions of judicial abstention regarding the lawfulness of actions of foreign states. The Dissent found that the key allegation underpinning the respondents' claim required the court to come to a determination as to the legality of Eritrea's national service program, and that this issue would require the courts to come to a conclusion as to whether Eritrea had violated international law. Based on the non-justiciability prong of the act of state doctrine. Justice Côté found that there is a key distinction between "jurisdiction" and "justiciability". "Justiciability" is concerned with how appropriate it is that matter be determined judicially, and the current matter is not justiciable.

Customary International Law

The Dissent agreed with Justice Abella's preliminary finding that international law does indeed "move" but found that customary international law will only "move" so far as state practice will allow. In this case, the widespread, representative, and consistent state practice and *opinio juris* required to establish a customary rule are clearly lacking. Justice Côté found that the majority's position was based on purely normative foundations, and that a court cannot abandon the established test for international custom in order to recast international law in a form more compatible with its own preferences.

Relief Sought

The Appellant is requesting that the appeal should be allowed, and the Eritrean workers' claims be struck.

The Respondent is requesting that the Court dismiss the appeal and uphold the judgment of the Supreme Court of Canada.

Potential Questions

Here is a list of potential questions that you may be asked regarding the case. This list is not exhaustive but is rather meant to get you thinking about the type of questions that may be asked and how you intend on answering them.

- Does the act of state doctrine form part of the Canadian common law?

- Can the customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity ground a claim for damages under Canadian law?

- Whether the act of state doctrine forms part of Canadian common law and whether this precludes the court from assessing the lawfulness of the Eritrean National Service Program.

- Whether civil claims based on customary international law may have a reasonable prospect of success in domestic (Canadian) courts.

- Whether the Appellant's motion to strike should be successful based on one or both of the above findings.

Summary of the Law

All legal arguments you will need for this moot are found within the text of the case. Participants should rely on the case and the tools provided to craft their submissions. This memo is meant to highlight major areas of disagreement in the Court's decision and provide some assistance for competitors. This memo is an aid in reading and reflecting on the actual decision. It is not intended to replace the Supreme Court of Canada's case. If there are errors between this memo and the case, please notify the Osgoode Cup Committee.

The Osgoode Cup Committee will not entertain questions regarding the substantive legal matters outlined in this memo.

Legislation & Jurisprudence

Act of State Doctrine

The act of state doctrine is an old English doctrine that precludes domestic courts from evaluating the sovereign acts of a foreign government. This doctrine is meant to recognize the independence of sovereign States. The doctrine has been applied in Australia but not explicitly by any Canadian court. The doctrine was effectively adopted in British Columbia by virtue of what is now s. 2 of the Law and Equity Act, R.S.B.C. 1996, c. 253, which recognizes that the common law of England as it was in 1858 is part of the law of British Columbia.

The English act of state doctrine has developed a number of qualifications and limitations, and it no longer includes the sweeping proposition that domestic courts cannot adjudicate the lawfulness of foreign state acts (see *Oppenheimer v. Cattermole*).

Blad v. Bamfield (1674), 3 Swans 604, 36 E.R. 992

Early example of application of Act of State Doctrine in England.

Facts: Danish man, Blad, had seized property of English subjects (including Bamfield) in Iceland on the authority of letters patent granted by the King of Denmark. Blad was sued in England for this allegedly unlawful act. He sought an injunction to restrain the proceeding.

Held: The High Court of Chancery allowed a stay of the proceeding against Blad because the English subjects' defence against the injunction was premised on a finding that the Danish letters patent were inconsistent with articles of peace between England and Denmark. Lord Nottingham reasoned that a misinterpretation of the articles of peace "may be the unhappy occasion of a war", and that it would be "monstrous and absurd" to have a domestic court decide the question of the legality of the Danish letters patent, the meaning of the articles of peace or the question of whether the English had a right to trade in Iceland.

Buttes Gas and Oil Co. v. Hammer (No. 3), [1982] A.C. 888

Facts: In a defamation action, issues arose as to two conflicting oil concessions which neighbouring states in the Arabian Gulf had granted over their territorial and offshore waters. The foreign relations of the United Kingdom and Iran were also involved in the dispute.

Held: House of Lords held that Occidental's claim was not justiciable. The court identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation. Issues which were non-justiciable in English courts and should therefore be stayed. The motives of governments are

not justiciable and courts should refrain from adjudicating upon them.

Oppenheimer v. Cattermole [1976] A.C. 249
English House of Lords decision. House of Lords declined to recognize a nazi decree that deprived Jewish people of their German citizenship, leading to the confiscation of all their property on which the state could "lay its hands". Lord Cross held that such a discriminatory law "constitutes so grave an infringement of human rights that the courts of this country ought to refuse to recognise it as a law at all", noting that it is "part of the public policy of this country that our courts should give effect to clearly established rules of international law".

Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5), [2002] UKHL 19
Iraq had issued a decree expropriating aircrafts of the Kuwait Airways Corporation which were then in Iraq. The House of Lords held that the Iraqi decree was a clear violation of international law and that the English courts were therefore at liberty to refuse to recognize it on grounds of public policy. This shows how international law informs the public policy exception of the choice of law branch.
Held: the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. Foreign laws "may be fundamentally unacceptable for reasons other than human rights violations.

State Immunity Act, R.S.C., 1985, c. S-18
Legislation that codifies the international law concept of "state immunity". This legislation prohibits a Canadian court from recognizing a private action against a foreign *government*, with some exceptions.

Hunt v. T&N plc [1993] 4 S.C.R. 289
Issue was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute.
Held: there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally."

Customary International Law
What is it?: Customary international law are those rules of international law that derive from and reflect general state practice accepted as law, which is assumed state consent, and not the product of case law.
Binding on All: Customary international law is understood to bind all states, new and old, whether they have (a) participated in its generation or (b) directly or indirectly consented.

Test: Requires two elements
First Element: General State Practice: Objectively Element: requires states to have consistently practiced in a particular uniform way for a specific amount of time; creates a web of precedents and a pattern of conduct.

1. Uniformity: number of states, characteristics of states, consistency of action, period of time
   Sufficiency Burden: Need not be unanimous, but it must be extensively widespread and representative
      Factors: Participation must be:
      (1) quantitatively high: no exact number, but any remaining inconsistent practice will be marginal and without direct legal effect"
      (2) broadly representative (see Specially Effected States)

2. Continuity: For a rule to be established as customary, the corresponding practice need not be in absolutely rigorous conformity with the rule (Military Activities In and Against Nicaragua)
   a. Sufficient Burden: Must either (a) coincides with this practice, (b) justify actions under another rule, or (c) is condemned (i.e. inconsistent State conduct are seen as breaches) (Legality on the Use of Force)

3. Frequency: Provided that practice is (a) general and (b) consistent, there is no specific requirement, as "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law" (North Sea Continental Shelf)
   a. Requirement: Chance for any detractors to object

Second Element: The practice must be Accepted as Law (*Opinio Juris Sive Necessitatis*): Subjective Element: The internal compulsion of the practice in question must be undertaken with a sense of legal right or obligation," not as a voluntary "mere usage or habit"

- Determining Belief: Have they been behaving in a particular way just because of habit/convenience/tradition OR because of a belief in the normativity of the practice?

Jus Cogens International Peremptory Norms

Think of *jus cogens* as constitutional customary international law. *Jus Cogens* are peremptory norms which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (Vienna Convention on the Law of Treaties Art. 53).

Jus Cogens norms are of fundamental importance (i.e. constitutional) to the international order and give substance to the goals of the international order, which is why they are given some higher, dominant order

- Established Norms: (1) Prohibition Against the Use of Force; (2) Genocide; (3) Slavery; (4) Apartheid and Racial Discrimination; (5) Crimes Against Humanity; (6) Torture; (7) Self-Determination; (8) Basic Rules of International Humanitarian Law

R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45
Sets standard for motion to strike.
Test: A pleading will only be struck for disclosing no reasonable claim if it is "plain and obvious" that the claim has no reasonable prospect of success.
When considering an application to strike under this provision, the facts as pleaded are assumed to be true "unless they are manifestly incapable of being proven"

Doctrine of Adoption
Norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary. This means that new international torts, on the basis of customary international law, do not have to be recognized domestically in Canada in order for a claim to be successful.

Chung Chi Cheung v. The King [1939] A.C. 160 (P.C.)
In this case, the Privy Council considered whether the jurisdiction of the British Court had been validly exercised and whether the crew of a foreign ship was immune from prosecution based on the ship being an extension of the territory from which it belonged. The appellant argued that the British Court did not have jurisdiction over him.

In this case, the appellant, a British subject, shot and killed the captain of the ship where he was employed as a cabin boy while the ship was in the territorial waters of Hong Kong.

The court held that the appellant could not invoke any rights under the rule of international law which required a state to receive its own national since that rule was inconsistent with domestic law and hence the jurisdiction of the British Court was validly exercised.

R. v. Hape (2007)
The SCC examined whether evidence obtained by the RCMP was in contravention of his s.8 *Charter* rights to be secure from unreasonable search and seizure. The appellant, Hape was a Canadian businessman under the investigation of the RCMP for money laundering. On two occasions, the RCMP tracked the movement of money through an investment company in Turks and Caicos before being deposited in a bank account set up by Canadian police in the Netherlands.

In considering whether s.8 applied, the SCC examined the nature of s.32(1) of the

Charter to determine the territorial limits of the *Charter* and held that when Canadian actors go abroad, they take their *Charter* rights with them. in making this decision, the SCC did not defer to Parliament to sketch out how to reconcile Canadian constitutional obligations with international commitments, rather, the SCC stated that it is up to the courts to do so. The SCC held that the doctrine of adoption applies in Canada, stating that "the courts may adopt rules of customary international law as common law rules in order to base their decisions upon them, provided there is no valid legislation that clearly conflicts with the customary rule" (para 36).

Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62
In this case, the SCC considered whether Canadians have the right to sue foreign governments for damages resulting from acts of torture.

The SCC denied the victims' claim for a civil action, finding that acts of torture are not exceptions to the general rule of sovereign immunity on the basis that the *State Immunity Act*, RSC 1985, c S-18, which grants immunity to foreign states from the jurisdiction of domestic courts in civil matters. This case reinforces the principle that customary international law will be adopted into domestic law unless legislation dictates otherwise.

Policy Considerations

Please feel free to explore other policy considerations that you feel are relevant to these arguments. You are not confined to making the same policy arguments as were made by the parties in this case. However, you may not rely on external legislation or case law in support of your arguments.

One of the major policy considerations is the potential overreach of the judiciary into the affairs of the executive branch of government. The executive is responsible for conducting international relations, and although courts have the institutional capacity to consider and adjudicate cases involving issues of international law, a question arises as to whether the courts should adjudicate claims between private parties that are premised on allegations that a foreign state violated international law? To some, if Canadian courts were to pass judgment on the alleged wrongful acts of foreign states they would inevitably be wading into the realm of foreign affairs and encroaching on the role of the executive. This encroachment could lead to unforeseeable diplomatic consequences for the government and Canadian companies operating abroad. These are all valid considerations which may persuade a court to find that given the sensitive consequences of such an encroachment it is prudent to exercise judicial restraint and to respect the separation of powers.

Although not expressly considered, Justice Abella's majority decision does send a

clear signal to Canadian companies doing business abroad that they cannot both benefit and seek shelter behind the acts of a foreign state. The actions of said state certainly engage human rights norms, and a violation of these norms can lead to costly litigation and liability in Canada if a company benefits from wrongful acts. This further promotes international human rights and strengthens corporate accountability.