



SUPREME COURT OF CANADA

CITATION: *Nevsun Resources Ltd. v. Araya*,
2020 SCC 5

APPEAL HEARD: January 23, 2019
JUDGMENT RENDERED: February 28, 2020
DOCKET: 37919

BETWEEN:

Nevsun Resources Ltd.
Appellant

and

Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle
Respondents

- and -

**International Human Rights Program, University of Toronto Faculty of Law,
EarthRights International, Global Justice Clinic at New York University School
of Law, Amnesty International Canada, International Commission of Jurists,
Mining Association of Canada and MiningWatch Canada**
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown,
Rowe and Martin JJ.

REASONS FOR JUDGMENT: Abella J. (Wagner C.J. and Karakatsanis, Gascon and
(paras. 1 to 133) Martin JJ. concurring)

JOINT REASONS DISSENTING IN PART: Brown and Rowe JJ.
(paras. 134 to 266)

DISSENTING REASONS: Côté J. (Moldaver J. concurring)
(paras. 267 to 313)

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NEVSUN RESOURCES LTD. v. ARAYA

Nevsun Resources Ltd.

Appellant

v.

**Gize Yebeyo Araya,
Kesete Tekle Fshazion and
Mihretab Yemane Tekle**

Respondents

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**International Human Rights Program, University of Toronto Faculty of Law,
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2020 SCC 5

File No.: 37919.

2019: January 23; 2020: February 28.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

Public international law — Human rights — Act of state doctrine — Customary international law — Jus cogens — Peremptory norms — Doctrine of adoption — Direct remedy for breach of customary international law — Eritrean workers commencing action against Canadian corporation in British Columbia — Workers alleging they were forced to work at mine owned by Canadian corporation in Eritrea and subjected to violent, cruel, inhuman and degrading treatment and seeking damages for breaches of customary international law prohibitions and of domestic torts — Corporation bringing motion to strike pleadings on basis of act of state doctrine and on basis that claims based on customary international law have no reasonable prospect of success — Whether act of state doctrine forms part of Canadian common law — Whether customary international law prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment and crimes against humanity can ground claim for damages under Canadian law — Whether claims should be struck.

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Willcock and Dickson JJ.A.), 2017 BCCA 401, 4 B.C.L.R. (6th) 91, 419 D.L.R. (4th) 631, 12 C.P.C. (8th) 225, [2017] B.C.J. No. 2318 (QL), 2017 CarswellBC 3232 (WL Can.), affirming a decision of Abrioux J., 2016 BCSC 1856, 408 D.L.R. (4th) 383, [2016] B.C.J. No. 2095 (QL), 2016 CarswellBC 2786 (WL Can.). Appeal dismissed, Brown and Rowe JJ. dissenting in part and Moldaver and Côté JJ. dissenting.

The judgment of Wagner C.J. and Abella, Karakatsanis, Gascon and Martin JJ. was delivered by

ABELLA J. —

[1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

[2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases.

[3] Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle are refugees and former Eritrean nationals. They claim that they were indefinitely conscripted through their military service into a forced labour regime where they were required to work at the Bisha mine in Eritrea and subjected to violent, cruel, inhuman and degrading treatment. The mine is owned by a Canadian company, Nevsun Resources Ltd.

[4] The Eritrean workers started these proceedings in British Columbia as a class action against Nevsun on behalf of more than 1,000 individuals who claim to have been compelled to work at the Bisha mine between 2008 and 2012. In their pleadings,

the Eritrean workers sought damages for breaches of domestic torts including conversion, battery, “unlawful confinement” (false imprisonment), conspiracy and negligence. They also sought damages for breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.¹

[5] Nevsun brought a motion to strike the pleadings on the basis of the “act of state doctrine”, which precludes domestic courts from assessing the sovereign acts of a foreign government. This, Nevsun submits, includes Eritrea’s National Service Program. Its position was also that the claims based on customary international law should be struck because they have no reasonable prospect of success.²

[6] Both the Chambers Judge and the Court of Appeal dismissed Nevsun’s motions to strike on these bases. For the reasons that follow, I see no reason to disturb those conclusions.

Background

[7] The Bisha mine in Eritrea produces gold, copper and zinc. It is one of the largest sources of revenue for the Eritrean economy. The construction of the mine began in 2008. It was owned and operated by an Eritrean corporation, the Bisha Mining Share Company, which is 40 percent owned by the Eritrean National Mining Corporation and, through subsidiaries, 60 percent owned by Nevsun, a publicly-held

¹ Eritrean workers’ amended notice of civil claim, at paras. 7, 53, 56(a), 60, 63, 66, 70 and 71 (A.R., vol. III, at p. 159).

² Nevsun’s notice of application: application to strike workers’ customary international law claims as disclosing no reasonable claim (A.R., vol. III, at p. 58).

corporation incorporated under British Columbia's *Business Corporations Act*, S.B.C. 2002, c. 57.

[8] The Bisha Company hired a South African company called SENET as the Engineering, Procurement and Construction Manager for the construction of the mine. SENET entered into subcontracts on behalf of the Bisha Company with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company which was owned by Eritrea's only political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's National Service Program.

[9] The National Service Program was established by a 1995 decree requiring all Eritreans, when they reached the age of 18, to complete 6 months of military training followed by 12 months of "military development service" (2016 BCSC 1856, at para. 26). Conscripts were assigned to direct military service and/or "to assist in the construction of public projects that are in the national interest".

[10] In 2002, the period of military conscription in Eritrea was extended indefinitely and conscripts were forced to provide labour at subsistence wages for various companies owned by senior Eritrean military or party officials, such as Mereb and Segen.

[11] For those conscripted to the Bisha mine, the tenure was indefinite. The workers say they were forced to provide labour in harsh and dangerous conditions for years and that, as a means of ensuring the obedience of conscripts at the mine, a variety of punishments were used. They say these punishments included "being ordered to roll

in the hot sand while being beaten with sticks until losing consciousness” and the “‘helicopter’ which consisted of tying the workers’ arms together at the elbows behind the back, and the feet together at the ankles, and being left in the hot sun for an hour”.

[12] The workers claim that those who became ill — a common occurrence at the mine — had their pay docked if they failed to return to work after five days. When not working, the Eritrean workers say they were confined to camps and not allowed to leave unless authorized to do so. Conscripts who left without permission or who failed to return from authorized leave faced severe punishment and the threat of retribution against their families. They say their wages were as low as US\$30 per month.

[13] Gize Yebeyo Araya says he voluntarily enlisted in the National Service Program in 1997 but instead of being released after completing his 18 months of service, was forced to continue his military service and was deployed as a labourer to various sites, including the Bisha mine in February 2010. At the mine, he says he was required to work 6 days a week from 5:00 a.m. to 6:00 p.m., often outside in temperatures approaching 50 degrees Celsius. He escaped from Eritrea in 2011.

[14] Kesete Tekle Fshazion says he was conscripted in 2002 and remained under the control of the Eritrean military until he escaped from Eritrea in 2013. He says he was sent to the Bisha mine in 2008 where he worked from 6:00 a.m. to 6:00 p.m. six days a week and 6:00 a.m. to 2:00 p.m. on the seventh day.

[15] Mihretab Yemane Tekle says he was conscripted in 1994 and, after completing his 18 months of service, was deployed to several positions, mainly within the Eritrean military. He says he was transported to the Bisha mine in February 2010

where he worked 6 days a week from 6:00 a.m. to 6:00 p.m., often outside, uncovered, in temperatures approaching 50 degrees Celsius. He escaped Eritrea in 2011.

Prior Proceedings

[16] Nevsun brought a series of applications seeking: an order denying the proceeding the status of a representative action; a stay of the proceedings on the basis that Eritrea was a more appropriate forum (*forum non conveniens*); an order striking portions of the evidence — first-hand affidavit material and secondary reports — filed by the Eritrean workers; an order dismissing or striking the pleadings pursuant to rule 21-8 or, alternatively, rule 9-5 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, on the grounds that British Columbia courts lacked subject matter jurisdiction as a result of the operation of the act of state doctrine; and an order striking that part of the pleadings based on customary international law as being unnecessary and disclosing no reasonable cause of action, pursuant to rule 9-5 of the *Supreme Court Civil Rules*.

[17] The Chambers Judge, Abrioux J., observed that since it controlled a majority of the Board of the Bisha Company and Nevsun's CEO was its Chair, Nevsun exercised effective control over the Bisha Company. He also observed that there was operational control: "Through its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation".

[18] He denied Nevsun's *forum non conveniens* application, concluding that Nevsun had not established that convenience favours Eritrea as the appropriate forum. There was also a real risk of an unfair trial occurring in Eritrea. Abrioux J. admitted

some of the first-hand affidavit material and the secondary reports for the limited purpose of providing the required social, historical and contextual framework, but he denied the proceeding the status of a representative action, meaning the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom are still in Eritrea.

[19] As to the act of state doctrine, Abrioux J. noted that it has never been applied in Canada, but was nonetheless of the view that it formed part of Canadian common law. Ultimately, however, he concluded that it did not apply in this case.

[20] In dealing with Nevsun's request to strike the claims based on customary international law, Abrioux J. characterized the issue as "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law . . . may form the basis of a civil proceeding in British Columbia". He said that claims should only be struck if, assuming the pleaded facts to be true, it is "plain and obvious" that the pleadings disclose no reasonable likelihood of success and are bound to fail. He 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]" or claims for "new torts based on the adoption of the customary norms advanced by the [workers]". He held that customary international law is incorporated into and forms part of Canadian common law unless there is domestic legislation to the contrary. Neither the *State Immunity Act*, R.S.C. 1985, c. S-18, nor any other legislation bars the Eritrean workers' claims. In his view, while novel, the claims stemming from Nevsun's breaches of customary international law should proceed to trial where they can be evaluated in their factual and legal context,

particularly since the prohibitions on slavery, forced labour and crimes against humanity are *jus cogens*, or peremptory norms of customary international law, from which no derogation is permitted.

[21] On appeal, Nevsun argued that Abrioux J. erred in refusing to decline jurisdiction on the *forum non conveniens* application; in admitting the Eritrean workers' reports, even for a limited purpose; in holding that the Eritrean workers' claims were not barred by the act of state doctrine; and in declining to strike the Eritrean workers' claims that were based on customary international law. The Eritrean workers did not appeal from Abrioux J.'s ruling denying the proceeding the status of a representative action.

[22] Writing for a unanimous court, Newbury J.A. upheld Abrioux J.'s rulings on the *forum non conveniens* and evidence applications (2017 BCCA 401). As for the act of state doctrine, Newbury J.A. noted that no Canadian court has ever directly applied the doctrine, but that it was 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. 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.

[23] Turning to the international law issues, Newbury J.A. noted that in actions brought against foreign states, courts in both England and Canada have not recognized a private law cause of action since they involved the principle of state immunity, codified in Canada by the *State Immunity Act*. But because the Eritrean workers' customary international law claims were not brought against a foreign state, they were not barred by the *State Immunity Act*.

[24] Finally, Newbury J.A. was alert to what she referred to as a fundamental change that has occurred in public international law, whereby domestic courts have become increasingly willing to address issues of public international law when appropriate. With this in mind, she characterized the central issue on appeal as being "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described". She 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.

[25] Ultimately, Newbury J.A. held that since 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.

Analysis

[26] Nevsun's appeal focussed on two issues:

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

(2) 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?

Nevsun did not challenge the Court of Appeal's decision on the admissibility of the reports or on *forum non conveniens*. As a result, there is no dispute that if the act of state doctrine does not bar the matter from proceeding, British Columbia courts are the appropriate forum for resolving the claims.

The Act of State Doctrine

[27] Nevsun's first argument is that the entire claim should be struck because the act of state doctrine makes it non-justiciable.

[28] The act of state doctrine is a known (and heavily criticized) doctrine in England and Australia. It has, by contrast, played no role in Canadian law. Nonetheless, Nevsun asserts that these proceedings are barred by its operation. It is helpful, then, to start by examining what the doctrine is.

[29] There is no single definition that captures the unwieldy collection of principles, limitations and exceptions that have been given the name "act of state" in English law. A useful starting point, however, is Lord Millett's description: "the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state" (*R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.), at p. 269).

[30] The act of state doctrine shares some features with state immunity, which extends personal immunity to state officials for acts done in their official capacity. But the two are distinct, as Lord Sumption explained in *Belhaj v. Straw*, [2017] UKSC 3:

Unlike state immunity, act of state is not a personal but a subject matter immunity. It proceeds from the same premise as state immunity, namely mutual respect for the equality of sovereign states. *But it is wholly the creation of the common law.* Although international law requires states to respect the immunity of other states from their domestic jurisdiction, it does not require them to apply any particular limitation on their subject matter jurisdiction in litigation to which foreign states are not parties and in which they are not indirectly impleaded. *The foreign act of state doctrine is at best permitted by international law.* [Emphasis added; para. 200.]

[31] The outlines of the act of state doctrine can be traced to the early English authorities of *Blad v. Bamfield* (1674), 3 Swans 604, and *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C. 1, (see also *Yukos Capital Sarl v. OJSC Rosneft Oil Co.* (No. 2), [2012] EWCA Civ 855, at para. 40).

[32] In *Blad*, Bamfield and other English traders brought a claim in the English courts against a Danish trader who had been granted letters patent by the King of Denmark as ruler of Iceland “for the sole trade of Iceland” (p. 993). The trader seized Bamfield’s goods in Iceland for allegedly fishing contrary to his letters patent. Bamfield challenged the validity of the letters patent. Lord Nottingham ruled that Bamfield’s action was barred on the grounds that “to send it to a trial at law, where either the Court must pretend to judge of the validity of the king’s letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd” (p. 993).

[33] In the subsequent case of *Duke of Brunswick*, the deposed Duke sued the King of Hanover in England, alleging that, through acts done in Hanover and elsewhere abroad, he had aided in depriving the Duke of his land and title. The House of Lords refused to judge the acts of a sovereign in his own country. In the words of the Lord Chancellor:

[A] foreign Sovereign, coming into this country, cannot be made responsible here for an act done in his sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution of that country or not, the Courts of this country cannot sit in judgment upon an act of a Sovereign, effected by virtue of his Sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as Sovereign. [pp. 998-99]

[34] Since then, 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. This became clear in the case of *Oppenheimer v. Cattermole*, [1976] A.C. 249, where the House of Lords refused to recognize and apply a Nazi decree depriving Jews of their German citizenship and leading to the confiscation of all their property on which the state could “lay its hands” (p. 278). 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” (p. 278). The House of Lords elaborated on this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, where Lord Nicholls held that foreign laws “may be fundamentally unacceptable for reasons other than human rights violations” (para. 18).

[35] There has also been a proliferation of limitations on, and exceptions to, the act of state doctrine in England, reflecting an attempt to respond to the difficulties of applying a single doctrine to a heterogeneous collection of issues. This challenge was identified by Lord Wilberforce in his influential account of the English act of state doctrine in *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), a defamation action that arose in the context of two conflicting oil concessions granted by neighbouring states in the Arabian Gulf. He referred to the act of state doctrine as “a generally confused topic”, adding that “[n]ot the least of its difficulty has lain in the indiscriminating use of ‘act of state’ to cover situations which are quite distinct, and different in law” (p. 930). He explained that, though often referred to using the general terminology of “act of state”, English law differentiates between Crown acts of state (concerning the acts of officers of the Crown committed abroad) and foreign acts of state (concerning the justiciability in domestic courts of actions of foreign states). He went on to observe that within the foreign act of state doctrine, the cases support the existence of two separate principles: a more specific principle guiding courts to consider the choice of law in cases involving whether and when a domestic court will give effect in its law to a rule of foreign law; and the more general principle that courts refrain from adjudicating the transactions of foreign states.

[36] And in the 2012 *Yukos* case, Rix L.J., writing for the Court of Appeal of England and Wales, modernized the description of the doctrine:

It would seem that, generally speaking, the doctrine is confined to acts of state within the territory of the sovereign, but in special and perhaps exceptional circumstances . . . may even go beyond territorial boundaries and for that very reason give rise to issues which have to be recognised as non-justiciable. The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality,

lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied in a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state. [para. 66]

[37] Rix L.J. noted the numerous limitations or exceptions to the doctrine which he grouped into five categories. First, the impugned act must occur within the territory of the foreign state for the doctrine to apply. Second, “the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public policy, as well as where there is a grave infringement of human rights” (para. 69). Third, judicial acts are not “acts of state” for the purposes of the doctrine. Fourth, the doctrine will not apply to the conduct of a state that is of a commercial (rather than sovereign) character. Fifth, the doctrine does not apply where the only issue is whether certain acts have occurred, not the legal effectiveness of those acts.

[38] *The effect of all these limitations, as he noted, was to dilute the doctrine substantially:*

The important thing is to recognise that increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed. That after all would explain why it has become wholly commonplace to adjudicate upon or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility or other matters That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate

upon allegations relating to the availability of substantive justice in foreign courts. *It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law.* The idea that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era [as in *Oppenheimer*]. [Emphasis added; para. 115.]

[39] The doctrine was again recently assessed by the English courts in *Belhaj*, where Mr. Belhaj and his wife alleged that English officials were complicit with the Libyan State in their illegal detention, abduction and removal to Libya in 2004. The court of first instance concluded that most of the claims were barred by the foreign act of state doctrine. On appeal, Lloyd Jones L.J. for the court cited with approval the modern description of the doctrine and its limitations set out in *Yukos* and held that the action could proceed in light of compelling public policy reasons ([2014] EWCA Civ 1394).

[40] Upholding the Court of Appeal, a divided Supreme Court provided four separate sets of reasons, each seeking to clarify the doctrine but disagreeing on how to do so.

[41] Lord Mance held that the doctrine should be disaggregated into three separate rules, subject to limitations. He concluded that the doctrine did not apply to the circumstances of the case and, if it did, a public policy exception like the one articulated in *Yukos* would apply. Lord Neuberger separated the doctrine into different rules from those of Lord Mance. Like Lord Mance, he concluded that the doctrine did not apply in this case and, even if it did, a public policy exception would preclude its application. Lady Hale and Lord Clarke agreed with Lord Neuberger and Lord Mance

that the foreign act of state doctrine did not apply to the case and, notwithstanding the differing list of rules provided by Lords Mance and Neuberger, considered their reasons on the matter to be substantially the same. Lord Sumption maintained a more unified version of the doctrine, holding that it would have applied but for a public policy exception.

[42] As the conflicting judgments in *Belhaj* highlight, the attempt to house several unique concepts under the roof of the act of state doctrine in English jurisprudence has led to considerable confusion. *Attempting to apply a doctrine which is largely defined by its limitations* has also caused some confusion in *Australia*. In *Habib v. Commonwealth of Australia*, [2010] FCAFC 12, Jagot J. observed that the act of state doctrine has been described as “a common law principle of uncertain application” (para. 51 (AustLII)).

[43] Similarly, in *Moti v. The Queen*, [2011] HCA 50, the court rejected the contention that the act of state doctrine jurisprudence established “a general and universally applicable rule that Australian courts may not be required (or do not have or may not exercise jurisdiction) to form a view about the lawfulness of conduct that occurred outside Australia by reference to foreign law” (para. 50 (AustLII)). The court noted that “the phrase ‘act of State’, must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula” (para. 52).

[44] The Canadian common law has grown from the same roots. As in England, the foundational cases concerning foreign act of state are *Blad* and *Duke of Brunswick*.

But since then, whereas English jurisprudence continually reaffirmed and reconstructed the foreign act of state doctrine, Canadian law has developed its own approach to addressing the twin principles underlying the doctrine articulated in *Buttes Gas*: conflict of laws and judicial restraint. Both principles have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing “act of state doctrine”. As such, in Canada, the principles underlying the act of state doctrine have been completely subsumed within this jurisprudence.

[45] Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.

[46] *Laane and Baltser v. Estonian State Cargo & Passenger Line*, [1949] S.C.R. 530, is an early example of how the law has developed in Canada (see Martin Bühler, “The Emperor’s New Clothes: Defabricating the Myth of ‘Act of State’ in Anglo-Canadian Law”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 343, at pp. 346-48 and 351). In *Laane*, this Court considered whether Canada would give effect to a 1940 decree of the Estonian Soviet Socialist Republic purporting to nationalize all Estonian merchant ships, including those in foreign ports, with compensation to the owners at a rate of 25 percent of each ship’s value. One of the ships was in the port of Saint John, New Brunswick, when it was sold by court order at the insistence of crew members who were owed wages. The balance of the sale proceeds was claimed by the Estonian State Cargo and Passenger Steamship Line. This Court refused to enforce the

1940 decree because it was confiscatory and contrary to Canadian public policy. None of the four judges who gave reasons had any hesitation in expressing views about the lawfulness of Estonia's conduct, whether as a matter of international law or Canadian public policy. As Rand J. noted: ". . . there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy" (p. 545). No act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court. Instead, the case was dealt with as a straightforward private international law matter about whether to enforce the foreign law despite its penal and confiscatory nature.

[47] Our courts also exercise judicial restraint when considering foreign law questions. This restraint means that courts will refrain from making findings which purport to be legally binding on foreign states. But our courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court.

[48] In *Hunt v. T&N plc*, [1993] 4 S.C.R. 289, this Court confirmed that Canadian courts should not hesitate to make determinations about the validity of "foreign" laws where such determinations are incidental to the resolution of legal controversies properly before the courts. The issue in *Hunt* was whether the courts in British Columbia had the authority to determine the constitutionality of a Quebec statute. In concluding that British Columbia courts did have such authority and, ultimately, that the statute in question was constitutionally inapplicable to other provinces, La Forest J. made no reference to act of state:

In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. . . .

. . .

The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that the mere enactment of a statute necessarily means that it is constitutional. [pp. 308-9]

[49] The decision in *Hunt* confirms that 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” (p. 309). And in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, this Court noted that, in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within our legal system, and in these cases, adjudicating these questions is “not only permissible but unavoidable” (para. 23; see also Gib van Ert, “The Domestic Application of International Law in Canada”, in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 501).

[50] Our courts are also frequently asked to evaluate foreign laws in extradition and deportation cases. In these instances, our courts consider comity but, as in other contexts, the deference accorded by comity to foreign legal systems “ends where clear violations of international law and fundamental human rights begin” (*R. v. Hape*,

[2007] 2 S.C.R. 292, at para. 52; see also *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1047; *Canada (Justice) v. Khadr*, [2008] 2 S.C.R. 125, at paras. 18 and 26; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, at para. 16). In *Canada v. Schmidt*, [1987] 1 S.C.R. 500, an extradition case, La Forest J. recognized that

in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. [p. 522]

[51] McLachlin J. endorsed this principle in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, where she explained that “[t]he test for whether an extradition law or action offends s. 7 of the *Charter* on account of the penalty which may be imposed in the requesting state, is whether the imposition of the penalty by the foreign state ‘sufficiently shocks’ the Canadian conscience” (p. 849, citing *Schmidt*, at p. 522). As part of the inquiry, the reviewing court must consider “the nature of the justice system in the requesting jurisdiction” in light of “the Canadian sense of what is fair, right and just” (*Kindler*, at pp. 849-50).

[52] And in *United States v. Burns*, [2001] 1 S.C.R. 283, this Court unanimously held that “[a]n extradition that violates the principles of fundamental justice will always shock the conscience” (para. 68 (emphasis in original)). The Court concluded that it was a violation of s. 7 of the *Canadian Charter of Rights and Freedoms* for the Minister to extradite Canadian citizens to the United States without, as a condition of extradition, assurances that the death penalty would not be sought.

[53] In the deportation context, the Court's unanimous decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, concluded that the Minister, and by extension the reviewing court, should consider the human rights record of the foreign state when assessing whether the potential deportee will be subject to torture there.

[54] The question of whether and when it is appropriate for a Canadian court to scrutinize the human rights practices of a foreign state in the context of deportation hearings was also squarely before the Court in *India v. Badsha*, [2017] 2 S.C.R. 127. Moldaver J., writing for the Court, said: "I am unable to accept . . . that evidence of systemic human rights abuses in a receiving state amounts to a general indictment of that state's justice system", concluding that the Minister and the reviewing court are entitled to "consider evidence of the general human rights situation" in a foreign state (para. 44).

[55] Even though all of these cases dealt to some extent with questions about the lawfulness of foreign state acts, none referred to the "act of state doctrine".

[56] Despite the absence of any cases applying the act of state doctrine in Canada, *Nevsun* argues that the doctrine was part of the English common law received into the law of British Columbia in 1858.

[57] While the English common law, including some of the cases which are now recognized as forming the basis of the act of state doctrine, was generally received into Canadian law at various times in our legal history, as the preceding analysis shows, Canadian jurisprudence has addressed the principles underlying the doctrine within our

conflict of laws and judicial restraint jurisprudence, with no attempt to have them united as a single doctrine. The act of state doctrine in Canada has been completely absorbed by this jurisprudence.

[58] To now import the English act of state doctrine and jurisprudence into Canadian law would be to overlook the development that its underlying principles have received through considered analysis by Canadian courts.

[59] The 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

[60] The Eritrean workers claim in their pleadings that customary international law is part of the law of Canada and, as a result, a “breach of customary international law . . . is actionable at common law”. Specifically, the workers' pleadings claim:

7. The plaintiffs bring this action for damages against Nevsun under customary international law as incorporated into the law of Canada and domestic British Columbia law.

...

53. The plaintiffs seek damages under customary international law, as incorporated into the law [of] Canada, from Nevsun for the use of forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.

...

56. The plaintiffs claim:

(a) damages at customary international law as incorporated into the law of Canada;

...

60. The use of forced labour is a breach of customary international law and *jus cogens* and is actionable at common law.

...

63. Slavery is a breach of customary international law and *jus cogens* and is actionable at common law.

...

66. Cruel, inhuman or degrading treatment is a breach of customary international law and is actionable at common law.

...

70. Crimes against humanity are a breach of customary international law and *jus cogens* and are actionable at common law.

[61] As these excerpts from the pleadings demonstrate, the workers broadly seek damages from Nevsun for breaches of customary international law as incorporated into the law of Canada.

[62] As the Chambers Judge and the Court of Appeal noted, this Court is not required to determine definitively whether the Eritrean workers should be awarded damages for the alleged breaches of customary international law. The question before us is whether Nevsun has demonstrated that the Eritrean workers' claims based on breaches of customary international law should be struck at this preliminary stage.

[63] Nevsun's motion to strike these customary international law claims was based on British Columbia's *Supreme Court Civil Rules* permitting pleadings to be

struck if they disclose no reasonable claim (rule 9-5(1)(a)), or are unnecessary (rule 9-5(1)(b)).

[64] A pleading will only be struck for disclosing no reasonable claim under rule 9-5(1)(a) if it is “plain and obvious” that the claim has no reasonable prospect of success (*R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, at para. 17; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at paras. 14-15). 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” (*Imperial Tobacco*, at para. 22, citing *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455).

[65] Under rule 9-5(1)(b), a pleading may be struck if “it is unnecessary, scandalous, frivolous or vexatious”. Fisher J. articulated the relevant considerations in *Willow v. Chong*, 2013 BCSC 1083, stating:

Under Rule 9-5(1)(b), a pleading is unnecessary or vexatious if it does not go to establishing the plaintiff’s cause of action, if it does not advance any claim known in law, where it is obvious that an action cannot succeed, or where it would serve no useful purpose and would be a waste of the court’s time and public resources: *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress*, [1999] BCJ No. 2160 (SC (in chambers)); *Skender v. Farley*, 2007 BCCA 629. [at para. 20 (CanLII)]

[66] This Court admonished in *Imperial Tobacco* that the motion to strike

is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. . . . Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and

err on the side of permitting a novel but arguable claim to proceed to trial.
[para. 21]

[67] The Chambers Judge in this case summarized the issues as follows:

The proceeding raises issues of transnational law being the term used for the convergence of customary international law and private claims for human rights redresses and which include:

- (a) whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of customary international law such as forced labour and torture may form the basis of a civil proceeding in British Columbia;
- (b) the potential corporate liability for alleged breaches of both private and customary international law. This in turn raises issues of corporate immunity and whether the act of state doctrine raises a complete defence to the plaintiffs' claims.

He concluded that though the workers' claims raised novel and difficult issues, the claims were not bound to fail and should be allowed to proceed for a full contextual analysis at trial.

[68] In the British Columbia Court of Appeal, Newbury J.A. also believed that a private law remedy for breaches of the international law norms alleged by the workers may be possible. In her view, recognizing such a remedy may be an incremental first step in the development of this area of the law and, as a result, held that the claims based on breaches of customary international law should not be struck at this preliminary stage.

[69] For the reasons that follow, I agree with the Chambers Judge and the Court of Appeal that the claims should be allowed to proceed. As the Chambers Judge put it:

“The current state of the law in this area remains unsettled and, assuming that the facts set out in the [notice of civil claim] are true, Nevsun has not established that the [customary international law] claims have no reasonable likelihood of success”.

[70] Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the *Canadian Yearbook of International Law*:

[I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another’s experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective.

(Hon. Gérard V. La Forest, “The Expanding Role of the Supreme Court of Canada in International Law Issues” (1996), 34 *Can. Y.B. Intl Law* 89, at pp. 100-1)

[71] Since “[i]nternational law not only percolates down from the international to the domestic sphere, but . . . also bubbles up”, there is no reason for Canadian courts to be shy about implementing and advancing international law (Anthea Roberts, “Comparative International Law? The Role of National Courts in Creating and Enforcing International Law” (2011), 60 *I.C.L.Q.* 57, at p. 69; Jutta Brunnée and Stephen J. Toope, “A Hesitant Embrace: The Application of International Law by Canadian Courts” (2002), 40 *Can. Y.B. Intl Law* 3, at pp. 4-6, 8 and 56; see also Hugh M. Kindred, “The Use and Abuse of International Legal Sources by Canadian Courts:

Searching for a Principled Approach”, in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 5, at p. 7).

[72] Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the “choir” of domestic court judgments around the world shaping the “substance of international law” (Osnat Grady Schwartz, “International Law and National Courts: Between Mutual Empowerment and Mutual Weakening” (2015), 23 *Cardozo J. Intl & Comp. L.* 587, at p. 616; see also René Provost, “Judging in Splendid Isolation” (2008), 56 *Am. J. Comp. L.* 125, at p. 171).

[73] Given this role, we must start by determining whether the prohibitions on forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, the violations of which form the foundation of the workers’ customary international law claims, are part of Canadian law, and, if so, whether their breaches may be remedied. To determine whether these prohibitions are part of Canadian law, we must first determine whether they are part of customary international law.

[74] Customary international law has been described as “the oldest and original source of international law” (Philip Alston and Ryan Goodman, *International Human Rights* (2013), at p. 72). It is the common law of the international legal system — constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision.

[75] But in the case of the norms the Eritrean workers claim Nevsun breached, the task is less onerous, since these norms emerged seamlessly from the origins of

modern international law, which in turn emerged responsively and assertively after the brutality of World War II. It brought with it acceptance of new laws like prohibitions against genocide and crimes against humanity, new institutions like the United Nations, and new adjudicative bodies like the International Court of Justice and eventually the International Criminal Court, all designed to promote a just rule of law and all furthering liberal democratic principles (Philippe Sands, *East West Street: On the Origins of “Genocide” and “Crimes Against Humanity”* (2016), at pp. 361-64; Lloyd Axworthy, *Navigating A New World: Canada’s Global Future* (2003), at pp. 200-1).

[76] The four authoritative sources of modern international law, including customary international law, are found in art. 38(1) of the *Statute of the International Court of Justice*, Can. T.S. 1945 No. 7, which came into force October 24, 1945:

...

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Professors Brunnée and Toope have described art. 38 as the “litmus test for the sources of international law” (Brunnée and Toope (2002), “A Hesitant Embrace”, at p. 11).

[77] There are two requirements for a norm of customary international law to be recognized as such: general but not necessarily universal practice, and *opinio juris*, namely the belief that such practice amounts to a legal obligation (United Nations, International Law Commission, *Report of the International Law Commission*, 73rd

Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at p. 124; *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p. 3, at para. 71; *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, at para. 38; Harold Hongju Koh, “Twenty-First Century International Lawmaking” (2013), 101 *Geo. L.J.* 725, at p. 738; Jean-Marie Henckaerts, “Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict” (2005), 87 *Int’l Rev. Red Cross* 175, at p. 178; Antonio Cassese, *International Law* (2nd ed. 2005), at p. 157).

[78] To meet the first requirement, the practice must be sufficiently general, widespread, representative and consistent (International Law Commission, at p. 135). To meet the second requirement, *opinio juris*, the practice “must be undertaken with a sense of legal right or obligation”, as “distinguished from mere usage or habit” (International Law Commission, at p. 138; *North Sea Continental Shelf*, at para. 77).

[79] The judicial decisions of national courts are also evidence of general practice or *opinio juris* and thus play a crucial role in shaping norms of customary international law. As the Permanent Court of International Justice noted in *Case concerning certain German interests in Polish Upper Silesia (Germany v. Poland)* (1926), P.C.I.J. Ser. A, No. 7, legal decisions are “facts which express the will and constitute the activities of States” (p. 19; see also *Prosecutor v. Jelisić*, IT-95-10-T, Judgment, 14 December 1999 (ICTY, Trial Chamber), at para. 61; *Prosecutor v. Krstić*, IT-98-33-T, Judgment, 2 August 2001 (ICTY, Trial Chamber), at paras. 541, 575 and 579-89; *Prosecutor v. Erdemović*, IT-96-22-A, Joint separate opinion of Judge

McDonald and Judge Vohrah, 7 October 1997 (ICTY, Appeal Chamber), at paras. 47-55).

[80] When an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law. As Professor James L. Brierly wrote:

Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate ought to, fall on the transgressor.

(James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at p. 59, cited in John H. Currie, et al., *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at p. 116)

[81] This process, whereby international practices become norms of customary international law, has been variously described as “accretion”, “crystallization”, “ripening” and “gel[ling]” (see, e.g., Bruno Simma and Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles” (1988), 12 *Aust. Y.B.I.L.* 82, at p. 104; *The Paquete Habana*, 175 U.S. 677 (1900), at p. 686; Jutta Brunnée and Stephen J. Toope, “International Law and the Practice of Legality: Stability and Change” (2018), 49 *V.U.W.L.R.* 429, at p. 443).

[82] Once a practice becomes a norm of customary international law, by its very nature it “must have equal force for all members of the international community, and cannot therefore be the subject of any right of unilateral exclusion exercisable at will by any one of them in its own favour” (*North Sea Continental Shelf*, at para. 63).

[83] Within customary international law, there is a subset of norms known as *jus cogens*, or peremptory norms, which have been “accepted and recognized by the international community of States as a whole . . . 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*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art. 53). This Court acknowledged that “a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable” (*Kazemi*, at para. 47, citing John H. Currie, *Public International Law* (2nd ed. 2008), at p. 583; Claude Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at pp. 168-69; *Vienna Convention on the Law of Treaties*, art. 53).

[84] Peremptory norms have been accepted as fundamental to the international legal order (Ian Brownlie, *Principles of Public International Law* (7th ed. 2008), at pp. 510-12; see also Andrea Bianchi, “Human Rights and the Magic of *Jus Cogens*” (2008), 19 *E.J.I.L.* 491; Evan J. Criddle and Evan Fox-Decent, “A Fiduciary Theory of *Jus Cogens*” (2009), 34 *Yale J. Intl L.* 331).

[85] How then does customary international law apply in Canada? As Professor Koh explains, “[l]aw-abiding states *internalize* international law by incorporating it into their domestic legal and political structures, through executive action, legislation, and judicial decisions which take account of and incorporate international norms” (Harold Hongju Koh, “Transnational Legal Process” (1996), 75 *Neb. L. Rev.* 181, at p. 204 (emphasis in original)). Some areas of international law, like treaties, require legislative action to become part of domestic law (Currie, et al., *International Law:*

Doctrine, Practice, and Theory, at pp. 160-61 and 173-74; Currie, *Public International Law*, at pp. 225-26).

[86] On the other hand, customary international law is automatically adopted into domestic law without any need for legislative action (Currie, *Public International Law*, at pp. 225-26; *Hape*, at paras. 36 and 39, citing *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.), per Lord Denning; Hersch Lauterpacht, “Is International Law a Part of the Law of England?”, in *Transactions of the Grotius Society*, vol. 25, *Problems of Peace and War: Papers Read Before the Society in the Year 1939* (1940), 51). In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption. As Professor Brownlie explains:

The dominant principle . . . is that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with Acts of Parliament or prior judicial decisions of final authority. [p. 41]

[87] The adoption of customary international law as part of domestic law by way of automatic judicial incorporation can be traced back to the 18th century (Gib van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 184-208). Blackstone’s 1769 *Commentaries on the Laws of England: Book the Fourth*, for example, noted that “the law of nations . . . is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land”, at p. 67; see also *Triquet v. Bath* (1764), 3 Burr. 1478, (K.B.)). Similarly, in the frequently cited case of *Chung Chi Cheung v. The King*, [1939] A.C. 160 (P.C.), Lord Atkin wrote:

The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals. [p. 168]

[88] Direct incorporation is also far from a niche preserve among nations. In a study covering 101 countries over a period between 1815 and 2013, Professors Pierre-Hugues Verdier and Mila Versteeg found widespread acceptance of the direct application of customary international law:

[P]erhaps the most striking pattern that emerges from our data is that in virtually all states, CIL [Customary International Law] rules are in principle directly applicable without legislative implementation. . . . [M]ost countries that require treaty implementation do not apply the same rule to international custom, but rather apply it directly.

(Pierre-Hugues Verdier and Mila Versteeg, “International Law in National Legal Systems: An Empirical Investigation” (2015), 109 *Am. J. Intl L.* 514, at p. 528)

[89] In Canada, in *The Ship “North” v. The King* (1906), 37 S.C.R. 385, Davies J., in concurring reasons, expressed the view that the Admiralty Court was “bound to take notice of the law of nations” (p. 394). Similarly, in *Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, [1943] S.C.R. 483, Taschereau J., drawing on *Chung Chi Cheung*, held that the body of rules accepted by nations are incorporated into domestic law absent statutes to the contrary (pp. 516-17).

[90] As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of

conflicting legislation. This approach was more recently confirmed by this Court in *Hape*, where LeBel J. for the majority held:

Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following 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. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word “may” later in the paragraph cannot be taken as overtaking his clear direction that, based on “a long line of cases”, customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.

[91] Justice LeBel himself, in an article he wrote several years after *Hape*, explained that the Court's use of the word “may” in *Hape* was in no way meant to diverge from the traditional approach of directly incorporating customary norms into Canadian common law:

Following [*Hape*], there was some comment and concern to the effect that the [statement that “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” (para. 39)] left the law in a state of some doubt. These comments pointed out that this sentence could be read as holding that prohibitive norms are not actually part of the domestic common law, but may only serve to aid in its development. In my view, this was not the sense of this passage, for at least three reasons. First, the sentences immediately preceding this last sentence stated, without reservation, that prohibitive rules of customary international law are incorporated into domestic law in the absence of conflicting legislation. Second, the entire discussion of incorporation was for the purpose of showing how the norm of respect for the sovereignty of foreign states, forming, as it does, part of our common law, could shed light on the interpretation of s. 32(1) of the *Charter*. Third, the majority reasons also explicitly held that the customary principles of non-intervention and territorial sovereignty “may be adopted into the common law of Canada in the absence of conflicting legislation”. The gist of the majority opinion in *Hape* was that accepting incorporation of customary international [law] was the right approach. *In conclusion, the law in Canada today appears to be settled on this point: prohibitive customary norms are directly incorporated into our common law and must be followed by courts absent legislation which clearly overrules them.* [Emphasis added.]

(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)

[92] As for LeBel J.’s novel use of the word “prohibitive”, we should be wary of concluding that he intended to create a new category of customary international law unique to Canada. In the same article, LeBel J. clarified that “prohibitive” norms simply mean norms that are “mandatory”, in the sense that they are obligatory or binding (LeBel, at p. 17). As Professor Currie observes, the word “prohibitive” is a “puzzling qualification [that] does not figure in any of the authorities cited by LeBel J. for the doctrine, nor is it a feature of the doctrine of adoption that operates in the United Kingdom” (John H. Currie, “Weaving a Tangled Web: *Hape* and the Obfuscation of Canadian Reception Law” (2007), 45 *Can. Y.B. Intl Law* 55, at p. 70; see also Armand

de Mestral and Evan Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008), 53 *McGill L.J.* 573, at p. 587).

[93] The use of the word “prohibitive”, therefore, does not add a separate analytic factor, it merely emphasizes the mandatory nature of customary international law (see van Ert, *Using International Law in Canadian Courts*, at pp. 216-18). This aligns with LeBel J.’s statement in *Hape* that the “automatic incorporation” of norms of customary international law “is justified on the basis that *international custom, as the law of nations, is also the law of Canada*” (para. 39 (emphasis added)).

[94] Therefore, as a result of the doctrine of adoption, norms of customary international law — those that satisfy the twin requirements of general practice and *opinio juris* — are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, “Implementation of International Humanitarian and Related International Law in Canada”, in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, “[t]he Canadian story of international law is not merely a story of ‘persuasive’ foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than ‘comparative law’, because international law is partly *our* law”

(Stephen J. Toope, “Inside and Out: The Stories of International Law and Domestic Law” (2001), 50 *U.N.B.L.J.* 11, at p. 23 (emphasis in original)).

[95] There is no doubt then, that customary international law is also the law of Canada. In the words of Professor Rosalyn Higgins, former President of the International Court of Justice: “In short, there is not ‘international law’ and the common law. International law is part of that which comprises the common law on any given subject” (Rosalyn Higgins, “The Relationship Between International and Regional Human Rights Norms and Domestic Law” (1992), 18 *Commonwealth L. Bull.* 1268, at p. 1273). The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.

[96] In other words, “Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact” (Gib van Ert, “The Reception of International Law in Canada: Three Ways We Might Go Wrong”, in Centre for International Governance Innovation, *Canada in International Law at 150 and Beyond, Paper No. 2* (2018), at p. 6; see also van Ert, *Using International Law in Canadian Courts*, at pp. 62-69).

[97] Unlike foreign law in conflict of laws jurisprudence, therefore, which is a question of fact requiring proof, established norms of customary international law are law, to be judicially noticed (van Ert, “The Reception of International Law”, at p. 6; van Ert, *Using International Law in Canadian Courts*, at pp. 62-69). Professor Higgins explains this as follows: “There is not a legal system in the world where international law is treated as ‘foreign law’. It is everywhere part of the law of the land; as much as

contracts, labour law or administrative law” (p. 1268; see also James Crawford, *Brownlie’s Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim’s International Law* (9th ed. 2008), vol. 1, at p. 57; van Ert, *Using International Law in Canadian Courts*, at p. 64).

[98] And just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law. Taking judicial notice — in the sense of not requiring formal proof by evidence — is appropriate and an inevitable implication both of the doctrine of adoption³ and legal orthodoxy (Anne Warner La Forest, “Evidence and International and Comparative Law”, in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 367, at pp. 381-82; van Ert, *Using International Law in Canadian Courts*, at pp. 42-56 and 62-66).

[99] Some academics suggest that when recognising *new* norms of customary international law, allowing evidence of state practice may be appropriate. While these scholars acknowledge that permitting such proof departs from the conventional approach of judicially noticing customary international law, they maintain that this in no way derogates from the nature of international law as law (Anne Warner La Forest, at pp. 384 and 388; van Ert, *Using International Law in Canadian Courts*, at pp. 67-69). The questions of whether and what evidence may be used to demonstrate the existence of a new norm are not, however, live issues in this appeal. Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches

³ As Anne Warner La Forest writes: “[I]f custom is indeed the law of the land, then the argument in favour of judicial notice, as traditionally understood, is a strong one. It is a near perfect syllogism. If custom is the law of the land, and the law of the land is to be judicially noticed, then custom should be judicially noticed” (p. 381).

not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.

[100] Crimes against humanity have been described as among the “least controversial examples” of violations of *jus cogens* (Louis LeBel and Gloria Chao, “The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law” (2002), 16 *S.C.L.R.* (2d) 23, at p. 33).

[101] The prohibition against slavery too is seen as a peremptory norm. In 2002, the Office of the United Nations High Commissioner for Human Rights confirmed that “it is now a well-established principle of international law that the ‘prohibition against slavery and slavery-related practices have achieved the level of customary international law and have attained “*jus cogens*” status” (David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, U.N. Doc. HR/PUB/02/4 (2002), at p. 3).

[102] Compelling authority also confirms that the prohibition against forced labour has attained the status of *jus cogens*. The International Labour Organization, in a report entitled “Forced labour in Myanmar (Burma)”, *I.L.O Official Bulletin: Special Supplement*, vol. LXXXI, 1998, Series B, recognized that, “there exists now in international law a peremptory norm prohibiting any recourse to forced labour and that the right not to be compelled to perform forced or compulsory labour is one of the basic human rights” (para. 203). To the extent that debate may exist about whether forced

labour is a peremptory norm, there can be no doubt that it is at least a norm of customary international law.

[103] And the prohibition against cruel, inhuman and degrading treatment has been described as an “absolute right, where no social goal or emergency can limit [it]” (Currie, et al., *International Law: Doctrine, Practice, and Theory*, at p. 627). This is reflected in the ratification of several international covenants and treaties such as the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 (entered into force March 23, 1976), art. 7; the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36 (entered into force June 26, 1987), art. 16; the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; the *American Declaration of the Rights and Duties of Man*, April 30, 1948, art. 26; the *American Convention on Human Rights*, 1144 U.N.T.S. 123, art. 5; the *African Charter on Human and Peoples’ Rights*, 1520 U.N.T.S. 217, art. 5; the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, art. 37; the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 1561 U.N.T.S. 363; and the *Inter-American Convention to Prevent and Punish Torture*, O.A.S.T.S. No. 67 (Currie et al., *International Law: Doctrine, Practice, and Theory*, at p. 627).

[104] Nevsun argues, however, that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation.

[105] Nevsun's position, with respect, misconceives modern international law. As Professor William S. Dodge has observed, "[i]nternational law . . . does not contain general norms of liability or non-liability applicable to categories of actors" (William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 *Geo. J. Int'l L.* 1045, at p. 1046). Though certain norms of customary international law, such as norms governing treaty making, are of a strictly interstate character and will have no application to corporations, others prohibit conduct regardless of whether the perpetrator is a state (see, e.g., Dodge; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 *J.I.E.L.* 263, at pp. 265-267; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (2006), at p. 58).

[106] While states were classically the main subjects of international law since the Peace of Westphalia in 1648 (Cassese, at pp. 22-25; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at p. xix), international law has long-since evolved from this state-centric template. As Lord Denning wrote in *Trendtex Trading Corp.*: "I would use of international law the words which Galileo used of the earth: 'But it does move'" (p. 554).

[107] In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of

conventions and normative instruments intended to protect human rights and ensure compliance with those rights.

[108] Professor Payam Akhavan notes that “[t]he rapid emergence of human rights signified a revolutionary shift in international law, from a state-centric to a human-centric conception of global order” (Payam Akhavan, “Canada and international human rights law: is the romance over?” (2016), 22 *Canadian Foreign Policy Journal* 331, at p. 332). The result of these developments is that international law now works “not only to maintain peace between States, but to protect the lives of individuals, their liberty, their health, [and] their education” (Emmanuelle Jouannet, “What is the Use of International Law? International Law as a 21st Century Guardian of Welfare” (2007), 28 *Mich. J. Int’l L.* 815, at p. 821). As Professor Christopher Joyner adds: “The rights of peoples within a state now transcend national boundaries and have become essentially a common concern under international law” (Christopher C. Joyner, “‘The Responsibility to Protect’: Humanitarian Concern and the Lawfulness of Armed Intervention” (2007), 47 *Va J. Int’l L.* 693, at p. 717).

[109] This represents the international law actualization of Professor Hersch Lauterpacht’s statement in 1943 that “[t]he individual human being . . . is the ultimate unit of all law” (Sands, at p. 63).

[110] A central feature of the individual’s position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship (Patrick Macklem, *The Sovereignty of Human Rights* (2015), at p. 22).

They are discrete legal entitlements, held by individuals, and are “to be respected by everyone” (Clapham, *Human Rights Obligations*, at p. 58).

[111] Moreover, as Professor Beth Stephens has observed, these rights may be violated by private actors:

The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children’s rights, crimes against peace and security, and privacy. . . . It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.

(Beth Stephens, “The Amoralism of Profit: Transnational Corporations and Human Rights” (2002), 20 *B.J.I.L.* 45, at p. 73)

There is no reason, in principle, why “private actors” excludes corporations.

[112] Canvassing the jurisprudence and academic commentaries, Professor Koh observes that non-state actors like corporations can be held responsible for violations of international criminal law and concludes that it would not “make sense to argue that international law may impose criminal liability on corporations, but not civil liability” (Koh, “Separating Myth from Reality”, at p. 266). He describes the idea that domestic courts cannot hold corporations civilly liable for violations of international law as a “myth” (Koh, “Separating Myth from Reality”, at pp. 264-68; see also Simon Baughen, *Human Rights and Corporate Wrongs: Closing the Governance Gap* (2015), at pp. 130-32). Professor Koh also notes that

[t]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? [Emphasis in original.]

(Koh, “Separating Myth from Reality”, at p. 265)

[113] As a result, in my respectful view, it is not “plain and obvious” that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of “obligatory, definable, and universal norms of international law”, or indirect liability for their involvement in what Professor Clapham calls “complicity offenses” (Koh, “Separating Myth from Reality”, at pp. 265 and 267; Andrew Clapham, “On Complicity”, in Marc Henzelin and Robert Roth, eds., *Le Droit Pénal à l’Épreuve de l’Internationalisation* (2002), 241, at pp. 241-75). However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.

[114] Ultimately, for the purposes of this appeal, it is enough to conclude that the breaches of customary international law, or *jus cogens*, relied on by the Eritrean workers may well apply to Nevsun. The only remaining question is whether there are any Canadian laws which conflict with their adoption as part of our common law. I could not, with respect, find any.

[115] On the contrary, the Canadian government has adopted policies to ensure that Canadian companies operating abroad *respect* these norms (see, e.g., Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, last updated July 31, 2019 (online); Global Affairs Canada, *Minister Carr announces appointment of first Canadian Ombudsperson for Responsible Enterprise*, April 8, 2019 (online) (announcing the creation of an Ombudsperson for Responsible Enterprise, and a Multi-stakeholder Advisory Body on Responsible Business Conduct)). With respect to the Canadian Ombudsperson for Responsible Enterprise, mandated to review allegations of human rights abuses of Canadian corporations operating abroad, the Canadian government has explicitly noted that “[t]he creation of the Ombudsperson’s office does not affect the right of any party to bring a legal action in a court in any jurisdiction in Canada regarding allegations of harms committed by a Canadian company abroad” (Global Affairs Canada, *Responsible business conduct abroad — Questions and answers*, last updated September 16, 2019 (online); Yousuf Aftab and Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (2019), at pp. 47-48).

[116] In the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun.

[117] Is a civil remedy for a breach of this part of our common law available? Put another way, can our domestic common law develop appropriate remedies for breaches of adopted customary international law norms?

[118] Development of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society (*Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842, at para. 42; see also *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, at para. 93; *Watkins v. Olafson*, [1989] 2 S.C.R. 750). In my respectful view, recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development. As Lord Scarman noted:

Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle *ubi jus ibi remedium* [for every wrong, the law provides a remedy].

(*Sidaway v. Board of Governors of the Bethlem Royal Hospital*, [1985] 1 A.C. 871, at p. 884 (H.L.))

[119] With respect specifically to the allegations raised by the workers, like all state parties to the *International Covenant on Civil and Political Rights*, Canada has international obligations to ensure an effective remedy to victims of violations of those rights (art. 2). Expounding on the nature of this obligation, the United Nations Human Rights Committee — which was established by states as a treaty monitoring body to ensure compliance with the *International Covenant on Civil and Political Rights* — provides additional guidance in its *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004. In this document, the Human Rights Committee specifies that state parties must protect against the violation of rights not

just by states, but also by private persons and entities. The Committee further specifies that state parties must ensure the enjoyment of *Covenant* rights to all individuals, including “asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (para. 10).

As to remedies, the Committee notes:

[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. 15]

[120] In the domestic context, the general principle that “where there is a right, there must be a remedy for its violation” has been recognized in numerous decisions of this Court (see, e.g., *Kazemi*, at para. 159; *Henry v. British Columbia (Attorney General)*, [2015] 2 S.C.R. 214, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, at para. 25; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, at para. 20; *Great Western Railway v. Brown* (1879), 3 S.C.R. 159, at p. 179).

[121] The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman’s estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary. However, it concluded that the *State Immunity Act* was the kind of express legislation that prevented a remedy against the State of Iran for the breach of the *jus cogens* prohibition against torture, which it agreed was part of domestic Canadian law. LeBel J. for the majority noted that “[w]hile rights would be illusory if there was never

a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars” (para. 159). In effect, the majority in *Kazemi* held that the general right to a remedy was overridden by Parliament’s enactment of the *State Immunity Act*. However, the *State Immunity Act* protects “foreign states” from claims, not individuals or corporations.

[122] Unlike *Kazemi*, there is no law or other procedural bar precluding the Eritrean workers’ claims. Nor is there anything in *Kazemi* that precludes the possibility of a claim against a Canadian corporation for breaches in a foreign jurisdiction of customary international law, let alone *jus cogens*. As a result, it is not “plain and obvious” that Canadian courts cannot develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law.

[123] Nevsun additionally argues that the harms caused by the alleged breaches of customary international law can be adequately addressed by the recognized torts of conversion, battery, “unlawful confinement”, conspiracy and negligence, all of which the Eritrean workers have also pleaded. In my view, it is at least arguable that the Eritrean workers’ allegations encompass conduct not captured by these existing domestic torts.

[124] Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms “shock[s] the conscience of humanity” (M. Cherif Bassiouni, “International

Crimes: *Jus Cogens* and *Obligatio Erga Omnes*” (1996), 59 *Law & Contemp. Probs.* 63, at p. 69).

[125] Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court’s ability to adequately address the heinous nature of the harm caused by this conduct. As Professor Virgo notes, in the context of allegations of human rights violations, the symbolism reflected by the characterization or labelling of the allegations is crucial:

From the perspective of the victim . . . the fact that torture is characterized as a tort, such as battery, will matter — simply because characterising torture in this way does not necessarily reflect the seriousness of the conduct involved. In the context of human rights . . . symbolism is crucial.

. . .

[In this context, accurately labelling the wrong is important] because the main reason why the victim wishes to commence civil proceedings will presumably be to ensure public awareness of the violation of fundamental human rights. The remedial consequence of successfully bringing a case is often, or even usually, only a secondary concern.

(Graham Virgo, “Characterisation, Choice of Law, and Human Rights”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 325, at p. 335)

[126] While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from

those of existing torts that, as the workers say, “[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment”. Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not “do justice to the specific principles that already are, or should be, in place with respect to the human rights norm” (Craig Scott, “Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 45, at p. 62, fn 4; see also Sandra Raponi, “Grounding a Cause of Action for Torture in Transnational Law”, in Craig Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 373; Virgo).

[127] The workers’ customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers’ claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.

[128] The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary (Gib van Ert, “What Is Reception Law?”, in Oonagh E. Fitzgerald, ed., *The Globalized Rule of Law: Relationships between International and Domestic Law* (2006), 85, at p. 89). That may mean that the Eritrean workers’ customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not “plain and obvious” to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.

[129] Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical “private law action in the nature of a tort claim” (*Vancouver (City) v. Ward*, [2010] 2 S.C.R. 28, at para. 22, citing *Dunlea v. Attorney-General*, [2000] NZCA 84). The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.

[130] As Professor Koh wrote about civil remedies for terrorism:

Whenever a victim of a terrorist attack obtains a civil judgment in a United States court, that judgment promotes two distinct sets of objectives: The objectives of traditional tort law and the objectives of public international law. A judgment awarding compensatory and punitive damages to a victim of terrorism serves the twin objectives of traditional tort law, compensation and deterrence. At the same time, the judgment promotes the objectives of public international law by furthering the development of an international rule of law condemning terrorism. By issuing an opinion and judgment finding liability, the United States federal court adds its voice to others in the international community collectively condemning terrorism as an illegitimate means of promoting individual and sovereign ends.

(Harold Hongju Koh, “Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation” (2016), 50 *Tex. Intl L.J.* 661, at p. 675)

[131] This proceeding is still at a preliminary stage and it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of customary international law and, if so, what remedies are appropriate. These are complex questions but, as Wilson J. noted in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959:

The fact that a pleading reveals “an arguable, difficult or important point of law” cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law . . . will continue to evolve to meet the legal challenges that arise in our modern industrial society. [pp. 990-91]

[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 the Eritrean workers’ claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.

[133] I would dismiss the appeal with costs.

The reasons of Moldaver and Côté JJ. were delivered by

CÔTÉ J. —

I. Introduction

[134] My main point of departure from the analysis of my colleague, Abella J., concerns the existence and applicability of the act of state doctrine, or some other rule of non-justiciability barring the respondents' claims. As for the reasons of Brown and Rowe JJ. concerning the respondents' claims inspired by customary international law, while I agree with their analysis and conclusion, I wish to briefly stress a few points on that issue before addressing the act of the state doctrine.

II. Claims Inspired by Customary International Law

[135] On this first issue, I must emphasize that the extension of customary international law to corporations represents a significant departure in this area of the law.

[136] The question posed to this Court is not whether corporations are “immune” from liability under customary international law (Abella J.'s reasons, at para. 104), but whether customary international law extends the scope of liability for violation of the norms at issue to corporations: *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111

(2nd Cir. 2010), at p. 120, aff'd on other grounds, 569 U.S. 108 (2013). While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences:

As Professor Dworkin demonstrated in *Law's Empire* (1986), the ordering of competing principles according to the importance of the values which they embody is a basic technique of adjudication. But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to “develop” international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states.

(*Jones v. Ministry of Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, at p. 298, per Lord Hoffman)

My colleague is indeed correct that international law “does move” (at para. 106), but it moves only so far as state practice will allow. The widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations: J. Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at pp. 102 and 607.

III. Act of State Doctrine

[137] Turning to the issue of the act of state doctrine, this is not a conflict of laws case. This Court is not being asked to determine whether the courts of British Columbia have jurisdiction over the parties, whether a court of another jurisdiction is a more appropriate forum to hear the dispute, whether the law of another jurisdiction should be applied or what the content of that foreign law happens to be.

[138] Rather, we must decide whether the respondents' claims are amenable to adjudication by courts within Canada's domestic legal order or whether they are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy. In my view, the respondents' claims, as pleaded, fall within this latter category. Accordingly, I would allow the appeal and dismiss the respondents' claims in their entirety, as they are not justiciable.

[139] In the reasons that follow, I begin by outlining two distinct branches within the act of state doctrine. I conclude that our choice of law jurisprudence does indeed play a similar role to that of certain aspects of the act of state doctrine. However, I also conclude that the act of state doctrine includes a second branch distinct from choice of law which renders some claims non-justiciable. This branch of the doctrine bars the adjudication of civil actions which have their foundation in allegations that a foreign state has violated public international law.

[140] Next, I discuss how the doctrine of justiciability and the constitutional separation of powers explain why a Canadian court may not entertain a civil claim between private parties where the outcome depends on a finding that a foreign state violated international law. Finally, I apply the doctrine of justiciability to the

respondents' claims, ultimately finding that they are not justiciable, because they require a determination that Eritrea has committed an internationally wrongful act.

A. *Substantive Foundations of the Act of State Doctrine*

[141] Whether a national court is competent to adjudicate upon the lawfulness of sovereign acts of a foreign state is a question that has many dimensions. As the United Kingdom Supreme Court explained in *Belhaj v. Straw*, [2017] UKSC 3, [2017] A.C. 964, the act of state doctrine can be disaggregated into an array of categories: para. 35, per Lord Mance; paras. 121-22, per Lord Neuberger; paras. 225-38, per Lord Sumption.

[142] My colleague holds that the act of state doctrine, and all of its animating principles, have been completely subsumed by the Canadian choice of law and judicial restraint jurisprudence. With respect, I am unable to agree with her approach. There is another distinct, though complementary, dimension of the act of state doctrine in addition to the choice of law dimension. Claims founded upon a foreign state's alleged breach of international law raise a unique issue of justiciability which is not addressed in my colleague's reasons.

[143] Whether this dimension is referred to as a branch of the act of state doctrine or as a specific application of the more general doctrine of justiciability, the Canadian jurisprudence leads to the conclusion that some claims are not justiciable, because adjudicating them would impermissibly interfere with the conduct by the executive of Canada's international relations.

[144] I pause to note that the distinction between the non-justiciability and choice of law branches does not exhaust the “array of categories” within the act of state doctrine. Rather, I prefer to consider the doctrine along two axes: (1) unlawfulness under the foreign state’s domestic law, as opposed to unlawfulness under international law; and (2) the choice of law branch, as opposed to the non-justiciability branch, of the doctrine. These two axes are interrelated. As I explain below, there are choice of law rules that apply to a court’s review of alleged unlawfulness under the foreign state’s domestic law and under international law. There are also rules of non-justiciability which address unlawfulness under the foreign state’s domestic law and unlawfulness under international law. The discussion that follows is not intended to be comprehensive, as my aim is simply to demonstrate that the issue before this Court is whether a domestic court is competent to adjudicate claims based on a foreign state’s violations of international law under the non-justiciability branch of the doctrine.

[145] I turn now to the underlying rationale for drawing a distinction between the respective branches of the act of state doctrine.

(1) Choice of Law Branch of the Act of State Doctrine

[146] The choice of law branch of the act of state doctrine establishes a general rule that a foreign state’s domestic law — or “municipal law” — will be recognized and normally accepted as valid and effective: *Belhaj*, at paras. 35 and 121-22. In England, the effect of this principle is that English courts will not adjudicate on the lawfulness or validity of sovereign acts performed by a state under its own laws: *Johnstone v. Pedlar*, [1921] 2 A.C. 262, at p. 290 (H.L.). This branch is focused on whether an English court should give effect to a foreign state’s municipal law.

[147] There are exceptions to this general rule. The act of state doctrine gives way to the “well-established exception in private international law of public policy”: C. McLachlan, *Foreign Relations Law* (2014), at para. 12.157. For example, in *Oppenheimer v. Cattermole*, [1976] A.C. 249, the House of Lords refused to apply a Nazi-era law depriving Jews of their citizenship and property: pp. 277-78. Lord Cross reasoned that “it is part of the public policy of this country that our courts should give effect to clearly established rules of international law”, and that the Nazi decree was “so grave an infringement of human rights that the courts of this country ought to refuse to recognize it as a law at all”: p. 278. The House of Lords reiterated this principle in *Kuwait Airways Corpn. v. Iraqi Airways Co. (Nos. 4 and 5)*, [2002] UKHL 19, [2002] 2 A.C. 883, holding that the domestic law of a foreign state could be disregarded if it constitutes a serious violation of international law. 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.

[148] In Canada, similar principles are reflected in this Court’s choice of law jurisprudence. In *Laane and Baltser v. Estonian State Cargo & Passenger s. s. Line*, [1949] S.C.R. 530, this Court declined to give effect to a 1940 decree of the Estonian Soviet Socialist Republic that purported to nationalize all Estonian merchant vessels and also purported to have extraterritorial effect. The appeal was decided on the principle that a domestic court will not give effect to foreign public laws that purport to have extraterritorial effect: see p. 538, per Rinfret C.J.; p. 542, per Kerwin J.; p. 547,

per Rand J.; pp. 547-51, per Kellock J. However, Rand J. would also have held that, irrespective of the decree's extraterritorial scope, there is a "general principle that no state will apply a law of another which offends against some fundamental morality or public policy": p. 545. I note that no act of state issue actually arose on the facts of that case, as the domestic law branch of the act of state doctrine applies only to acts carried out in the foreign state's territory: see, e.g., *Belhaj*, at paras. 229 and 234, per Lord Sumption. Therefore, it is unsurprising that "[n]o act of state concerns about Estonia's sovereignty or non-interference in its affairs were even raised by the Court": Abella J.'s reasons, at para. 46.

[149] In another English case, *Buck v. Attorney General*, [1965] 1 All E.R. 882 (C.A.), the plaintiffs sought a declaration that the constitution of Sierra Leone was invalid. Lord Harman held that an English court could not make a declaration that impugned the validity of the constitution of a foreign state: p. 885. Lord Diplock reasoned that the claim had to be dismissed because the issue of the validity of the foreign law did not arise incidentally:

The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction. [pp. 886-87]

[150] While the facts of *Buck* fall within the non-justiciability branch, the effect of Lord Diplock's reasoning is that the act of state doctrine does not prevent a court from examining the validity of a foreign law if the court is obliged to determine the

content of the foreign law as a choice of law issue. As Professor McLachlan points out, any other approach could lead to perverse results, because a court applying foreign law must apply the law as it would have been applied in the foreign jurisdiction: McLachlan, at para. 12.139.

[151] In this regard, too, this Court reached a similar result in *Hunt v. T&N plc*, [1993] 4 S.C.R. 289. The issue in it was whether British Columbia's superior court could rule on the constitutionality of a Quebec statute which prohibited the removal from Quebec of business documents required for judicial processes outside Quebec. This Court approached the question as one of conflict of laws, observing that there was no reason why a court should never be able to rule on the constitutionality of another province's legislation. Ultimately, this Court held that a provincial superior court has jurisdiction to make findings respecting the constitutionality of a statute enacted by the legislature of another province if this issue arises incidentally in litigation before it. The constitutionality of the Quebec statute was not foundational to the claim advanced in the British Columbia courts. Rather, it arose in the discovery process in the context of the parties' obligation to disclose relevant documents, some of which were in Quebec. Therefore, the constitutionality of the statute could properly be considered in the choice of law analysis. Of course, because the facts of that case gave rise to an issue involving the British Columbia courts and Quebec legislation, it is, again, unsurprising that this Court "made no reference to act of state": Abella J.'s reasons, at para. 48.

[152] Nonetheless, based on this comparative review of the case law, it appears that this Court's choice of law jurisprudence leads to the same result as the choice of law branch of the English Act of State doctrine: see McLachlan, at paras. 12.24 and

12.126-12.167. To this extent, I agree with Abella J. that that jurisprudence plays a similar role to that of the choice of law branch of the act of state doctrine in the context of alleged unlawfulness under foreign domestic and international law: paras. 44-57. However, this is not true as regards the non-justiciability branch as applied to alleged violations of international law.

(2) Non-justiciability Branch of the Act of State Doctrine

[153] The non-justiciability branch of the doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states: see *Buttes Gas and Oil Co. v. Hammer (No. 3)*, [1982] A.C. 888 (H.L.), at p. 931; McLachlan, at paras. 12.168 and 12.177-12.178. As I explain below, a court should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law.

[154] *Blad v. Bamfield* (1674), 3 Swans 604, 36 E.R. 992, may be the earliest case regarding this branch of the act of state doctrine. A 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. In the High Court of Chancery, Lord Nottingham entered 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" (p. 606), and that it would be "monstrous and absurd" (p. 607) 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.

[155] Another early case on the act of state doctrine is *Duke of Brunswick v. King of Hanover* (1848), 2 H.L.C.1, 9 E.R. 993. Revolutionaries in the German duchy of Brunswick overthrew the reigning Duke, Charles, in 1830. The King of Hanover deposed Charles in favour of Charles' brother, William, and placed Charles' assets under the guardianship of the Duke of Cambridge. Charles brought an action in which he sought an accounting for the property of which he had been deprived. In the House of Lords, Lord Chancellor Cottenham reasoned that the action was not concerned with determining private rights as between individuals but, rather, concerned an allegation that the King of Hanover had acted contrary to the "laws and duties and rights and powers of a Sovereign exercising sovereign authority": p. 1000. This led the Lord Chancellor to conclude that the English courts cannot "entertain questions to bring Sovereigns to account for their acts done in their sovereign capacities abroad": p. 1000.

[156] The leading case on the non-justiciability branch is *Buttes Gas*. The Occidental Petroleum Corporation and Buttes Gas and Oil Co. held competing concessions to exploit disputed oil reserves near an island in the Arabian Gulf. Occidental claimed its right to exploit the reserves under a concession granted by the emirate of Umm al Qaiwain. Buttes Gas claimed its right pursuant to one granted by the emirate of Sharjah. Both emirates, as well as Iran, claimed to be entitled to the island and to its oil reserves. After the United Kingdom intervened, the dispute was settled by agreement. Occidental's concession was subsequently terminated. Occidental alleged that Buttes Gas and Sharjah had fraudulently conspired to cheat and

defraud Occidental, or to cause the United Kingdom and Iran to act unlawfully to the injury of Occidental: p. 920. Buttes Gas argued that an English court should not entertain such claims, as they concerned acts of foreign states.

[157] In the House of Lords, Lord Wilberforce held that Occidental's claim was not justiciable. He identified a branch of the act of state doctrine which he said was concerned with the applicability of foreign domestic legislation: p. 931. He suggested that this branch was essentially a choice of law rule concerned with the choice of the proper law to apply to a dispute: p. 931. However, he drew one important distinction:

It is one thing to assert that effect will not be given to a foreign municipal law or executive act if it is contrary to public policy, or to international law (cf. *In re Helbert Wagg & Co. Ltd's Claim* [1956] Ch. 323) and quite another to claim that the courts may examine the validity, under international law or some doctrine of public policy, of an act or acts operating in the area of transactions between states. [p. 931]

[158] Lord Wilberforce went on to hold, following *Blad, Duke of Brunswick* and other authorities, that private law claims which turn on a finding that a foreign state has acted in a manner contrary to public international law are not justiciable by an English court:

It would not be difficult to elaborate on these considerations, or to perceive other important inter-state issues and/or or issues of international law which would face the court. They have only to be stated to compel the conclusion that these are not issues upon which a municipal court can pass. Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have been drawn to the attention of the court by the executive) there are . . . no judicial or manageable standards by which to judge these issues, or to adopt another phrase (from a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the

use of force, and to say that at least part of these were “unlawful” under international law. [p. 938]

[159] In the two passages reproduced above, Lord Wilberforce touched on an important point: a distinction must be drawn between the types of problems addressed in justiciability cases and the types of problems addressed in choice of law cases. Private international law is a response to the problem of how to distribute legal authority among competing municipal jurisdictions: R. Banu, “Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules” (2013), 31 *Windsor Y.B. Access Just.* 197, at p. 199. However, the problem posed by claims based on violations of public international law is that the international plane constitutes an additional legal system with its own claim to jurisdiction over certain legal questions: McLachlan, at para. 12.22. Thus, conflict of laws rules alone are not capable of addressing the concerns raised by Lord Wilberforce in *Buttes Gas*, because they do not mediate between domestic legal systems and the international legal system. In order to address the problems raised by Lord Wilberforce regarding the legitimacy of a domestic court’s consideration of questions of international law, this Court must inquire into whether such questions are justiciable under Canada’s domestic constitutional arrangements.

[160] Before doing so, I want to express my agreement with Newbury J.A. that the early English cases which underpin the act of state doctrine were received into the law of British Columbia in 1858 by what is now s. 2 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253: 2017 BCCA 401, 4 B.C.L.R. (6th) 91, at para. 123. However, for conceptual clarity, the principles animating early cases such as *Blad* and *Duke of Brunswick* should be reflected through the lens of the modern doctrine of justiciability

recognized by this Court in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, [2018] 1 S.C.R. 750. It is to that doctrine which I now turn.

B. *Justiciability of International Law Questions in Canada*

[161] Justiciability is rooted in a commitment to the constitutional separation of powers: L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 289. The separation of powers under the Constitution prescribes different roles for the executive, legislative and judicial orders: *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455, at pp. 469-70. In exercising its jurisdiction, a court must conform to the separation of powers by showing deference for the roles of the executive and the legislature in their respective spheres so as to refrain from unduly interfering with the legitimate institutional roles of those orders: *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at paras. 29-30. It is “fundamental” that each order not “overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other”: *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, at p. 389, per McLachlin J. The doctrine of justiciability reflects these institutional limitations.

[162] This Court recognized the existence of a general doctrine of non-justiciability in *Highwood Congregation*, stating that the main question to be asked in applying the doctrine of justiciability is whether the issue is one that is appropriate for a court to decide: para. 32. The answer to that question depends on whether the court

asking the question has the institutional capacity to adjudicate the matter and whether its doing so is legitimate: para. 34.

[163] A court has the institutional capacity to consider international law questions, and its doing so is legitimate, if they also implicate questions with respect to constitutional rights (*Canada (Justice) v. Khadr*, 2008 SCC 28, [2008] 2 S.C.R. 125), the legality of an administrative decision (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3) or the interface between international law and Canadian public institutions (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at para. 23). If, however, a court allows a private claim which impugns the lawfulness of a foreign state's conduct under international law, it will be overstepping the limits of its proper institutional role. In my view, although the court has the institutional capacity to consider such a claim, its doing so would not be legitimate.

[164] The executive is responsible for conducting international relations: *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 39. In *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, this Court observed that creating a universal civil jurisdiction allowing torture claims against foreign officials to be pursued in Canada "would have a potentially considerable impact on Canada's international relations", and that such decisions are not to be made by the courts: para. 107. Similar concerns arise in the case of litigation between private parties founded upon allegations that a foreign state has violated public international law. Such disputes "are not the proper subject matter of judicial resolution" (Sossin, at p. 251), because questions of international law relating to internationally wrongful acts of

foreign states are not juridical claims amenable to adjudication on “judicial or manageable standards” (*Buttes Gas*, at p. 938, per Lord Wilberforce). Such questions are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

[165] In *Khadr* (2010), this Court justified its interference with the exercise by the executive of an aspect of its power over international relations on the basis that the judiciary possesses “a narrow power to review and intervene on matters of foreign affairs to ensure the constitutionality of executive action”: para. 38. However, the same cannot be said of a private claim for compensation which is dependent upon a determination that a foreign state has breached its international obligations. This is not a case in which a court would be abdicating its constitutional judicial review function if it were to decline to adjudicate the claim.

[166] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 2005 WL 2082846 (S.D. New York), is an example of how private litigation can interfere with the responsibility of the executive for the conduct of international relations. In *Presbyterian*, a foreign state had sent a diplomatic note to the United States Department of State in response to litigation initiated in the U.S. by Sudanese residents against a company incorporated and domiciled in the foreign state that had operations in Sudan. The allegations were based on violations of international law by Sudan. Although the company’s motion to dismiss the claim was not successful, the incident was significant enough to spur the foreign state to send the diplomatic note in which it insisted that its foreign policy was being undermined by the litigation. I would point out in particular that the motion failed because the action as pleaded did “not require a judgment that

[the foreign state's foreign policy] was or caused a violation of the law of nations", which suggests that if the reverse were true, the claim would have been barred: para. 5. Thus, even in the case of disputes between private parties, when courts "engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy": *International Association of Machinists and Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (1981), at pp. 1358-60 (C.A., 9th Circuit).

[167] As a practical matter, Canadian courts have good reason to refrain from passing judgment on alleged internationally wrongful acts of foreign states. If Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada's international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada's reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts.

[168] Further, as this doctrine consists in a rule of non-justiciability, it is not amenable to the application of a public policy exception. It arises from the constitutional separation of powers and the limits of the legitimacy of acts of the judiciary. The public importance and fundamental nature of the values at stake cannot render justiciable that which is otherwise not within the judiciary's bailiwick.

[169] Abella J. relies on the *Secession Reference* as authority for the proposition that the adjudication of questions of international law is permitted for the purpose of determining the private law rights or obligations of individuals within our legal system: para. 49. With respect, this is an overstatement of the scope of the reasoning in the *Secession Reference*, in which this Court held that it could consider the question whether international law gives the National Assembly, the legislature or the Government of Quebec the right to effect the secession of Quebec from Canada unilaterally: paras. 21-23. In the Court's view, the question was not a "pure" question of international law, because its purpose was to determine the legal rights of a public institution which exists as part of the domestic Canadian legal order: para. 23. This Court's holding was confined to delineating the scope of Canada's obligation to respect the right to self-determination of the people of Quebec. No issue regarding private law claims or internationally wrongful acts of a foreign state arose in the *Secession Reference*.

[170] In its public law decisions, this Court has had recourse to international law to determine issues relating to other public authorities, such as whether municipalities can levy rates on foreign legations (*Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208) and whether the federal or provincial governments possess proprietary rights in Canada's territorial sea and continental shelf (*Reference re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *Reference re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86). It has never held that a Canadian court is free, in adjudicating a private law claim, to decide whether a foreign state — which does not exist as a part of the domestic Canadian legal order — has violated public international law.

[171] Abella J. also relies on decisions in the extradition and deportation contexts, in which courts consider the human rights records of foreign states as part of their decision-making process: paras. 50-55. However, when Canadian courts examine the human rights records of foreign states in extradition and deportation cases, they do so to ensure that Canada complies with its own international, statutory and constitutional obligations: see *Suresh*. The same cannot be said of a civil claim for compensation. To equate the respondents' civil claim for a private law remedy to claims in the public law extradition and deportation contexts is to disregard the judiciary's statutory and constitutional mandates to consider human rights issues in foreign states in extradition and deportation cases. No such mandate exists in the context of private law claims.

[172] In conclusion, although a court has the institutional capacity to consider international law questions, it is not legitimate for it to adjudicate claims between private parties which are founded upon an allegation that a foreign state violated international law. The adjudication of such claims impermissibly interferes with the conduct by the executive of Canada's international relations. That interference is not justified without a mandate from the legislature or a constitutional imperative to review the legality of executive or legislative action in Canada. In the absence of such a mandate or imperative, claims based on a foreign state's internationally wrongful acts are allocated to the plane of international affairs for resolution in accordance with the principles of public international law and diplomacy.

IV. The Respondents' Claims Require a Determination That Eritrea Violated Public International Law

[173] In this context, justiciability turns on whether the outcome of the claims is dependent upon the allegation that the foreign state acted unlawfully. If this issue is central to the litigation, the claims are not justiciable: e.g., *Buck*, at pp. 886-87; *Buttes Gas*, at pp. 935-38. By contrast, a court may consider the legality of acts of a foreign state under municipal or international law if the issue arises incidentally: e.g., *Hunt; W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), at p. 406.

[174] In *Buck*, the issue of the validity of the foreign state's constitution was central to the plaintiffs' claim, because the plaintiffs were seeking a declaration that the constitution of Sierra Leone was invalid: p. 886. Lord Diplock stated:

I do not think that this rule [that a state does not purport to exercise jurisdiction over the internal affairs of another state], which deprives the court of jurisdiction over the subject-matter of this appeal because it involves assertion of jurisdiction over the internal affairs of a foreign sovereign state, can be eluded by the device of making the Attorney-General of England a party instead of the government of Sierra Leone.
[p. 887]

[175] A case to the opposite effect is *Kirkpatrick*, in which the respondent alleged that the petitioner had obtained a construction contract from the Nigerian Government by bribing Nigerian officials, which was prohibited under Nigerian law. Scalia J. found that the factual predicate for application of the act of state doctrine did not exist in that case, as nothing in the claim required the court to declare an official act of a foreign state to be invalid: p. 405. Scalia J. reasoned that:

[a]ct of state issues only arise when a court *must decide* — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act

of state doctrine. That is the situation here. Regardless of what the court's factual findings may suggest as to the legality of the Nigerian contract, its legality is simply not a question to be decided in the present suit, and there is thus no occasion to apply the rule of decision that the act of state doctrine requires. [Emphasis in original; p. 406.]

[176] Similarly, in *Hunt*, La Forest J. concluded that the issue of the constitutionality of the "foreign" statute arose incidentally, because it arose in a proceeding in which the plaintiff sought the disclosure of relevant documents, which was barred by the impugned Quebec statute. In *Buttes Gas*, on the other hand, Occidental pleaded the tort of conspiracy against Buttes Gas, but to succeed, the claim required a determination that Sharjah, Umm al Qaiwain, Iran and the United Kingdom had violated international law. This was not incidental to the claim, and the House of Lords held that it was not justiciable: p. 938.

[177] In the case at bar, the issue of the legality of Eritrea's acts under international law is central to the respondents' claims. To paraphrase Lord Diplock in *Buck*, at p. 887, the respondents are simply using the appellant, Nevsun Resources Ltd., as a device to avoid the application of Eritrea's sovereign immunity from civil proceedings in Canada. The respondents' central allegation is that Eritrea's National Service Program is an illegal system of forced labour (A.R., vol. III, at pp. 162-64) that constitutes a crime against humanity (p. 175). The respondents allege that "Nevsun expressly or implicitly condoned the use of forced labour and the system of enforcement through threats and abuse, by the Eritrean military", and that it is directly liable for injuries suffered by the respondents as a result of its "failure to stop the use of forced labour and the enforcement practices at its mine site when it was

obvious . . . that the plaintiffs were forced to work there against their will”: A.R., vol. III, at p. 178.

[178] In other words, the respondents allege that Nevsun is liable because it was complicit in the Eritrean authorities’ alleged internationally wrongful acts. As was the case in *Buttes Gas*, Nevsun can be liable only if the acts of the actual alleged perpetrators — Eritrea and its agents — were unlawful as a matter of public international law. The case at bar is therefore materially different from *Hunt* and *Kirkpatrick*, in which the legality of the acts of a foreign sovereign state, or of an authority in another jurisdiction, had arisen incidentally to the claim.

[179] To obtain relief, the respondents would have to establish that the National Service Program is a system of forced labour that constitutes a crime against humanity. This means that determinations that the Eritrean state acted unlawfully would not be incidental to the allegations of liability on Nevsun’s part. In my view and with respect, Newbury J.A. erred in finding that the respondents were not asking the court to “inquire into the legality, validity or ‘effectiveness’ of the acts of laws or conduct of a foreign state”: C.A reasons, at para. 172. As she had noted earlier in her reasons — and I agree with her on this point — given how the complaint was being pleaded, Nevsun could only be found liable if “Eritrea, its officials or agents were found to have violated fundamental international norms and Nevsun were shown to have been complicit in such conduct”: para. 92. The respondents’ claims, as pleaded, require a determination that Eritrea has violated international law and must therefore fail.

V. Conclusion

[180] It is plain and obvious that the respondents' claims are bound to fail, because private law claims which are founded upon a foreign state's internationally wrongful acts are not justiciable, and the respondents' claims are dependent upon a determination that Eritrea has violated its international obligations. Additionally, for the reasons given by Brown and Rowe JJ., I find that it is plain and obvious that the respondents' causes of action which are inspired by customary international law are bound to fail. Accordingly, I would allow the appeal and dismiss the respondents' claims.