Document generated on 03/13/2025 6:54 p.m.

Lex Electronica

Lex Electronica

In the Landmark *NEVSUN* Ruling, the Supreme Court Triggers Debate on the Duties and Powers of the Court Itself and its Ability to Extend the Reach of Public International Law to Impact Private Corporations

Errol P. Mendes

Volume 29, Number 5, 2024

Droit international en droit interne : développements récents et perspectives comparées : actes de conférence

URI: https://id.erudit.org/iderudit/1116026ar
DOI: https://doi.org/10.7202/1116026ar

See table of contents

Publisher(s)

Centre de recherche en droit public Université de Montréal

ISSN

1480-1787 (digital)

Explore this journal

Cite this article

Mendes, E. P. (2024). In the Landmark *NEVSUN* Ruling, the Supreme Court Triggers Debate on the Duties and Powers of the Court Itself and its Ability to Extend the Reach of Public International Law to Impact Private Corporations. *Lex Electronica*, *29*(5), 90–107. https://doi.org/10.7202/1116026ar

Article abstract

There has always been tensions between Canadian courts attempting to uphold the constitutional role of legislatures to determine what laws can impose civil liabilities on non-state actors within its sovereign borders while also not ignoring the importance of international legal norms as a country that promotes the international rule of law. This article discusses how those tensions reached its zenith with the recent historic majority ruling of the Supreme Court of Canada in Nevsun, by extending the reach of customary international law to allow for the imposition of civil liabilities on private entities such as transnational corporations within the domestic legal system. Reviewing first the traditional positivist position of the country's highest court -- that only prohibitive or mandatory rules of customary international law should be incorporated into Canadian domestic law in the absence of contrary legislation -- the author then examines how the Nevsun case may have challenged the constitutional limits of judicial power to create new rights and duties, particularly regarding the adoption of civil liability norms against transnational corporations. Essentially, the article discusses the potential impact of the majority ruling (including Justice Rosalie Abella) internationally, subscribing to the idea that the application of international law norms at the national level can have a significant global impact, as was previously the case in the landmark Reference re Secession of Quebec ruling.

© Errol P. Mendes, 2024

This document is protected by copyright law. Use of the services of Érudit (including reproduction) is subject to its terms and conditions, which can be viewed online.

https://apropos.erudit.org/en/users/policy-on-use/

érudit

This article is disseminated and preserved by Érudit.

Érudit is a non-profit inter-university consortium of the Université de Montréal, Université Laval, and the Université du Québec à Montréal. Its mission is to promote and disseminate research.

https://www.erudit.org/en/

In the Landmark *NEVSUN* Ruling, the Supreme Court Triggers Debate on the Duties and Powers of the Court Itself and its Ability to Extend the Reach of Public International Law to Impact Private Corporations

Errol P. Mendes[281]

281 Full Professor, Faculty of Law, University of Ottawa, emendes@uottawa.ca.

This article could not have been completed without the outstanding work of Sarah-Michèle Vincent-Wright.

RÉSUMÉ

Il y a toujours eu des tensions entre les tribunaux canadiens qui tentent de maintenir le rôle constitutionnel des législateurs pour déterminer quelles lois peuvent imposer des responsabilités civiles aux acteurs non étatiques à l'intérieur de ses frontières souveraines, sans toutefois ignorer l'importance des normes juridiques internationales en tant que pays qui promeut l'État de droit international. Cet article examine comment ces tensions ont atteint leur apogée avec la récente décision historique de la majorité de la Cour suprême du Canada, dans l'affaire *Nevsun,* où il fut question d'étendre la portée du droit international coutumier pour permettre l'imposition de responsabilités civiles à des entités privées telles que des sociétés transnationales dans le cadre du système juridique national. Revenant d'abord sur la position positiviste traditionnelle du plus haut tribunal du pays - selon laquelle seules les règles prohibitives ou obligatoires du droit international coutumier devraient être incorporées dans le droit interne canadien en l'absence de législation contraire - l'auteur examine ensuite comment l'affaire *Nevsun* a pu remettre en question les limites constitutionnelles du pouvoir judiciaire de créer de nouveaux droits et devoirs, notamment eu égard à l'adoption de normes de responsabilité civile face aux sociétés transnationales. Essentiellement, cet article propose une analyse de l'impact potentiel de cette décision majoritaire (et de la position de la Juge Abella) au niveau international, souscrivant à l'idée que l'application des normes du droit international au niveau national puisse avoir un impact mondial significatif, comme ce fut antérieurement le cas dans le cadre de l'arrêt historique *Renvoi relatif à la sécession du Québec*.

Mots-clés : Droit international coutumier, Limites constitutionnelles du pouvoir judiciaire, Normes de responsabilité civile, Sociétés privées, Affaire Nevsun, Cour suprême du Canada

ABSTRACT

There has always been tensions between Canadian courts attempting to uphold the constitutional role of legislatures to determine what laws can impose civil liabilities on non-state actors within its sovereign borders while also not ignoring the importance of international legal norms as a country that promotes the international rule of law. This article discusses how those tensions reached its zenith with the recent historic majority ruling of the Supreme Court of Canada in Nevsun, by extending the reach of customary international law to allow for the imposition of civil liabilities on private entities such as transnational corporations within the domestic legal system. Reviewing first the traditional positivist position of the country's highest court -- that only prohibitive or mandatory rules of customary international law should be incorporated into Canadian domestic law in the absence of contrary legislation -- the author then examines how the Nevsun case may have challenged the constitutional limits of judicial power to create new rights and duties, particularly regarding the adoption of civil liability norms against transnational corporations. Essentially, the article discusses the potential impact of the majority ruling (including Justice Rosalie Abella) internationally, subscribing to the idea that the application of international law norms at the national level can have a significant

global impact, as was previously the case in the landmark Reference re Secession of Quebec ruling.

Keywords: Customary international law, Constitutional limits of judicial power, Civil liability norms, Private corporations, Nevsun Case, Supreme Court of Canada

1. INTRODUCTION

[1] There has always been tensions between Canadian courts attempting to uphold the constitutional role of legislatures to determine what laws can impose civil liabilities on non-state actors within its sovereign borders while also not ignoring the importance of international legal norms as a country that promotes the international rule of law.

[2] This article discusses how those tensions reached its zenith with the recent historic majority ruling in the *Araya v. Nevsun Resources Ltd*[282] decision as regards the decision of the Supreme Court to extend the reach of customary international law to allow for the imposition of civil liabilities on private entities like transnational corporations within the domestic legal system.

[3] First, this paper discusses how international law experts who aligned with the positivist position on this tension had felt comfortable with the major ruling in the Supreme Court of Canada's decision in *Hape v. The Queen*[283]. In that case, in another majority ruling, the Court adopted the traditional positivist view in Canada that only the prohibitive or mandatory rules of customary international should be incorporated in domestic Canadian law in the absence of contrary legislation. Such prohibitive rules of customary international law rules would, in the view of most international law experts exclude the adoption of civil liability norms against transnational corporations.

[4] Second, this work discusses how the majority ruling in the *Nevsun* case has the potential of challenging this positivist view of the role of customary international law. The article discusses how those who support the majority ruling, including this author, must engage in a vigorous legal discussion and debate to support the position of the majority ruling and its main author, Madame Justice Rosalie Abella. The paper discusses how the majority ruling directly throws into question the constitutional limits of judicial power to create such new rights and duties.

[5] Finally, the article also discusses the potential impact of the majority ruling internationally. As one of the most respected domestic apex courts in the world, the decisions of the Supreme Court of Canada involving the application of international law norms domestically can have a significant global impact. We have seen that already with the ruling of the Court on the Quebec secessionist claims to unilaterally claim independence in the landmark *Reference Re Quebec Secession* ruling.

282 *Nevsun Resources Ltd. v. Araya*, [2020] 1 SCR 166 ["Nevsun"].

283 *R. v. Hape*, [2007] 2 SCR 292 ["*Hape*"].

2. FROM *HAPE* TO *NEVSUN*: CHALLENGING THE TRADITIONAL POSITIVIST VIEW ON THE ROLE OF CUSTOMARY INTERNATIONAL LAW

[6] There have always been tensions between Canadian courts attempting to uphold the constitutional role of legislatures to determine what laws can impose civil liabilities on non-state actors within its sovereign borders while also not ignoring the importance of international legal norms as a country that promotes the international rule of law. Those tensions reached their zenith with the recent historic majority ruling in the *Nevsun* decision as regards the reach of customary international law to impose civil liabilities within the domestic legal system.

[7] Those international law experts who aligned with the positivist position on this tension had felt comfortable with the major ruling in the Supreme Court of Canada's decision in *Hape*. In that case, another majority ruling, the Court adopted the traditional positivist view in Canada that it is only the prohibitive or mandatory rules of customary international law should be incorporated into domestic Canadian law in the absence of contrary legislation. Even the minority dissent did not conflict with this majority position, asserting it was not necessary to decide on this issue and instead focused on the limits of the extra-territorial reach of the Charter.

[8] The majority ruling in the *Nevsun* case has the potential to severely challenge this positivist view of the role of customary international law. Those who support the majority ruling, like this author, had to engage in a vigorous and often fractious discussion and debate to support the position of the majority ruling and its main author, Madame Justice Rosalie Abella.

2.*1* *NEVSUN* CASE: BACKGROUND AND PRIOR PROCEEDINGS

[9] In brief, the facts that led to the ruling are well known, but the most essential aspects for the discussion of the role of customary international law within Canadian domestic law are as follows. Three refugees, after escaping from Eritrea, claimed in Canada that they were indefinitely conscripted into forced labour at the Bisha mine in Eritrea, partially owned by the Canadian mining company, Nevsun Resources. They brought a class action on behalf of a thousand other individuals who also worked at the mine. They sought damages for breaches of Canadian tort law that could fit the type of extreme physical abuse and exploitation that they had suffered.

[10] After the usual procedural defences of *forum conveniens,* the use of the "plain and obvious" defence that the claims would fail and that the *Act of State* doctrine prevented challenges to Eritrea's forced conscription were rejected by the lower courts, the Eritrean workers also sought damages for breaches of customary international law, listing the prohibitions against forced, labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity at the instigation of the Canadian mining company.

[11] Nevsun appealed to the Supreme Court on their key failed defences, no doubt expecting to also have the Court adopting the positivist conventional approach to the

application of customary international ruling that the prohibitive customary rules of international law do not apply to transnational corporations even when they had engaged in what could be regarded as serious international crimes. When instead the majority ruling dismissed the application of the *Act of State* doctrine and ruled that there may exist a right to a civil remedy for breaches of customary international law by Nevsun, it seemed to be a startling surprise not only to some international law experts, but also to the dissenting justices as evidence by their rather strident critique of the reasoning of the majority ruling.

2.2 MAJORITY'S VIEW AND JUSTICE ABELLA UNCONVENTIONAL TERRITORY: APPLYING CUSTOMARY NORMS AND JUS COGENS NORMS TO STATES AND CORPORATIONS

[12] Justice Abella starts the historic ruling by first approving one of the foundations of the positivist view of customary international law, namely the incorporation doctrine regarding customary international law as part of Canadian common law without the need for implementing domestic legislation.

[13] However, she added that a subset of those customary international law norms includes those that have been recognized as *jus cogens.* In the application of this subset of norms, under judicial notice, the Court does not have to consider whether the preconditions of customary international law relating to state practice and *opinio juris* have been fulfilled. From that still conventional position, Justice Abella then plunges into new unconventional territory when she asserts that such customary norms could apply not only to states but also to corporations who could be held accountable for the breaches of these same *jus cogens* norms. Justice Abella recognizes that while such norms are usually of a state-to-state character, human rights jurisprudence has made the case that international law "has long since evolved from [its] state-centric template"[284]. The majority ruling focused on the fact that international human rights law has given individuals rights under customary international law, but that also has evolved to be enforceable against private actors such as transnational corporations. Determining that there was no conflicting legislation to this incorporation, she even cited government policies that supported the creation of an Ombudsperson Office that promotes and recognizes the responsibility of domestic corporations to act responsibly in their international operations but did not preclude civil action against those that did not do so[285]. Arriving at this now unconventional position, Justice Abella dived further into unchartered territory by asserting that domestic courts do have a role in developing coherent principles of human rights norms and international law while reflecting on how their decisions can impact internationally. Given that liability for breach of the most fundamental human rights norms applicable to transnational corporations could be part of Canadian common law, Justice Abella then asserted that what civil remedies could be

---

284 *Nevsun*, par. 106.

285 See discussion of this initiative in: Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad*, July 2019. https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng

available, had to evolve as "where there is a right, there must be a remedy for its violation"[286].

[14] As to what remedy should be considered, Justice Abella determined that it was arguable that the harm suffered by the claimants may not be adequately addressed by domestic tort remedies. Eschewing as unnecessary due to the adoption principle, the creation of new nominate torts being created to design a remedy for breaches of customary international law by the Canadian mining company, Justice Abella reached a truly historic conclusion that a direct remedy for a breach of international customary law would be a stronger response to the breaches by the Canadian mining company than the application of a typical or new nominate tort remedy. Given that Nevsun is a Canadian company bound by Canadian law which includes the adoption of customary international law into the domestic law, the majority concluded that it was not plain and obvious that *jus cogens* breaches by the company may not succeed at trial. However, Justice Abella noted that as regards the remedy for such breaches, "[t]he mechanism for how these claims should proceed is a novel question that must be left to the trial judge"[287].

2.3 DISSENTING'S VIEW: EXCLUDING CORPORATIONS FROM DIRECT LIABILITY UNDER CUSTOMARY INTERNATIONAL LAW

[15] Given that breaches of such *jus cogens* norms which do not permit any form of derogation, can be adjudicated at an international criminal tribunal or court, the majority ruling creates the historic precedent that such norms can also determine the liability of a private corporation under Canadian common law. The majority accepted that taking judicial notice of the application of civil remedies for the breach of customary international norms to the mining company, as a non-state actor, was an appropriate expansion of the conventional approach adopted in the *Hape* ruling. However, two of the dissenting judges, Justices Brown and Rowe, severely criticized the route to the expansion of this judicial notice. These dissenting judges asserted that to whom such norms applied should be determined in the same way in which the norms themselves are established. They severely critiqued[288] how Justice Abella had just taken judicial notice of the application of the norms to transnational corporations just by reference to academic commentary, rather than the normal preconditions of state practice and *opinio juris*[289].

286 *Nevsun*, par. 120.

287 *Ibid.,* par. 146.

288 *Ibid.,* par. 188-191.

289 See the academic works cited by Justice Abella at: *Nevsun*, par. 104-112. She cites in particular KOH, H., "Separating Myth from Reality about Corporate Responsibility Litigation.", 2004, *Journal of International Environmental Law*, V7, 263, p.265-267; DODGE, W.S., "Corporate Liability Under Customary International Law.", 2012, *Georgetown Journal of International Law*, V43, p. 1045-1046; CLAPHAM, A. *Human Rights Obligations of Non-State Actors*, Oxford: Oxford University Press, 2006, p. 58; BAUGHEN, S. *Human Rights and Corporate Wrongs*, Cheltenham: Edward Elgar Publishing, 2015, p. 130-132.

[16] This author strongly supports Justice Abella's attempt to rebut this critique by pointing out that it was not just academic commentary, but the UN Universal Declaration of Human Rights and the multilateral international human rights treaties that followed it that had demonstrated a shift in the development of international law from a "state-centric" paradigm to one that extended rights-bearing status to other legal persons including individuals and groups, particularly as regards breaches of the most fundamental human rights norms. She rightly concludes that "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 ... 'complicity offences'"[290].

[17] In response, the dissent justices Brown and Rowe asserted that Justice Abella and the concurring justices showed "no pressing concern for judicial economy or for the integrity of the common law." In particular, they rejected the majority's view that the prohibitive rules of customary norms can be converted into domestic civil liability and that this was "inconsistent with the doctrine of incrementalism and the principle of legislative supremacy." The dissenting duo also argued that the claims could be addressed under existing tort law and that the majority violated the separation of powers by "[placing] courts in the unconstitutional position of conducting foreign relations, which is in the executive's domain"[291]. Other experts in the international community, like Scott Fairley, have agreed with this strident critique of the majority ruling arguing that any form or kind of remedy for breach of customary norms should fall to Parliament and not the courts whose jurisdiction does not include extending the limits of international law, particularly for domestic application[292]. Fairley approvingly cites the dissenting judges' view that international law antecedents were too open-ended, overlapped with existing tort remedies and went beyond the types of changes that the courts should advance[293].

[18] It should be noted that there were two other dissenting justices, namely Justices Côté and Moldaver, who largely agreed with Justices Brown and Rowe on the application of customary norms to a private actor but focused in particular on their view and that of US Supreme Court jurisprudence that there was no state practice or *opinio juris* for linking corporations to customary norms dealing with international criminal liability[294]. It was a point also made by Justices Brown and Rowe who asserted that despite the majority's reliance on academic commentary, there were "no cases where a corporation has been held civilly liable for breaches of customary international law

---

290 *Nevsun*, par. 104-113.

291 *Ibid.*, par. 148.

292 See FAIRLEY, S.H., "International Law Matures within the Canadian Legal System: Araya et al. v. Nevsun Resources Ltd.", 2021, *Canadian Bar Review*, V99, p. 193.

293 *Ibid., Nevsun*, par. 232-237.

294 These two dissenting judges cited the US Supreme Court ruling in *Kiobel v. Royal Dutch Petroleum Co.,* [2013] 569 US 108. The [Kiobel] ruling was cited to assert the absence of state practice regarding applying criminal liability norms to transnational corporation.

anywhere in the world, and we do not know of any"[295]. Indeed, examining the intensity of the dissent's dismissal of the majority's use of academic writings to expand the reach of customary international law's norms to include civil liability claims against transnational corporations, the dissent seems to question the relevance and strength of the work of the main authors cited[296]!

[19] Therefore, in the view of these dissenting justices, states were the only ones bound by the norms of customary international law and it is plain and obvious that corporations are excluded from direct liability under customary international law.

3. OTHER ARGUMENTS TO SUPPORT THE DIRECTION OF THE MAJORITY RULING IN *NEVSUN*: CHALLENGING THE CONSTITUTIONAL LIMITS OF JUDICIAL POWER TO CREATE NEW RIGHTS AND DUTIES

[20] However, there are other strong arguments to counter the strident critique of the majority ruling that this author, as co-counsel and advisor to one of the intervenors, the International Commission of Jurists, Canada, had put forward in arguments to support the direction of the majority ruling.

3.1 ROLE FOR DOMESTIC COURTS IN EXPANDING THE REACH OF CUSTOMARY INTERNATIONAL LAW: NATIONAL COURTS CAN BE AN INCREMENTAL MEANS OF STATE PRACTICE AND OPINIO JURIS

[21] First, according to the International Law Commission beyond ascertaining and applying customary norms, national courts can be an incremental means of state practice and *opinio juris.* In other words, they can be both adopters and creators of

295 *Nevsun*, par. 188.

296 In the same par. 188, the questioning of the relevance of the works cited verges on acerbic:

[188] The majority states that "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'" (par. 113, citing KOH, H., p. 267). The authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh. It cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world, and we do not know of any. While it does cite a book by Simon Baughen and an article by Andrew Clapham, those authorities do not support its view of the matter (BAUGHEN, S. Human Rights and Corporate Wrongs, Cheltenham, Edward Elgar Publishing, 2015); CLAPHAM, A., "On Complicity", in HENZELIN M and ROTH R (eds), Le droit penal à l'épreuve de l'internationalisation, 2002, 241, p. 241-275). Baughen's discussion of norms of international criminal law imposing civil liability on aiders and abetters is specific to the provision in the United States Codenow commonly known as the Alien Tort Statute, 28 U.S.C.

customary international law which Justice Abella rightly stated is the common law of nations[297].

[22] It should also be noted that the main sources of international law are authoritatively established in article 38(1) of the Statute of the International Court of Justice [*ICJ Statute*] as including the following:

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. subject to the provisions of Article 59, 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.

[23] Given the clear reference to judicial decisions, primacy should be given to the decisions of the most authoritative apex courts such as the Canadian Supreme Court. Moreover, if such decisions are indeed supported and or endorsed by the most highly qualified publicists, which would surely include the work of Harold Koh which was cited by Justice Abella, it could be argued that historic rulings of apex courts, such as in this case those of the Supreme Court of Canada, should be regarded as an early sign of the expansion of the nature and reach of customary international law.

[24] It is therefore imperative to critique Justice Brown's and Rowe's disagreement with Justice Abella's creative role for domestic courts in expanding the reach of customary international law. These dissenting judges also regarded this creative expansion of the reach of customary international law as being contrary to the imperatives of judicial economy in applying the common law and also contrary to the principles of incrementalism and parliamentary supremacy.

[25] This critique also seems contrary to the reality and role of other apex courts in a globalized legal order as articulated by one of the leading judicial minds from the UK, a country that established the foundations of the common law that Canada inherited and adopted.

[26] Lord Bingham, a former chief justice of the top court in the UK asserted that while international was not often featured largely in domestic courts in the past, "… [t]imes have changed. To an extent almost unimaginable even thirty years ago, national courts in this and other countries are called upon to consider and resolve issues turning on the correct understanding and application of international law, not on an occasional basis,

297 International Law Commission (ILC), "Draft Conclusions on Identification of Customary International Law, with Commentaries", 2018, *ILC Yearbook*, V2, N2, 122 p. 125. https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

now and then, but routinely, and often in cases of great importance" (FATIMA, 2005, p. 200).

[27] However, to the contrary, another writer, Eva Monteiro, who tends to support Justice Abella's application of a more creative role of customary international law in Canadian domestic courts, advises caution on such an argument. She cites the danger posed by the dissenting justices that judicial decisions should not mistakenly create norms that then may be used as proof of state practice (MONTEIRO, 2021, p. 341). The same author while supporting the vision of Justice Abella and the concurring majority in extending the creative role of the courts in applying customary international law, still seems to support the critique of the dissenting judges in these words:

> "Unfortunately, the majority judgment in Nevsun leaves many stones unturned and arguably raises more questions than it answers. Yet what it lacks in methodological rigour, it makes up for in vision and potential. It is to be hoped that subsequent decisions of domestic courts, perhaps even in the ongoing Nevsun proceedings themselves, are better able to match rigour to vision — lest the latter remain in the realm of legal luxuries" (MONTEIRO, 2021, p. 341).

3.2 EVOLUTION OF DOMESTIC LAW NORMS IN APPLYING CUSTOMARY INTERNATIONAL LAW AND JUS COGENS WITHIN DOMESTIC LAW: OBLIGATION FOR TRANSNATIONAL CORPORATIONS TO TAKE DUE DILIGENCE MEASURES TO PROHIBIT AND PREVENT SERIOUS HUMAN RIGHTS ABUSES

[28] It is suggested that due to the dramatic evolution of who holds power and duties in the global community, it is overdue that respected and authoritative apex courts such as the Supreme Court of Canada have a legitimate mandate to expand who would be bound by the norms of customary international law despite the critique of the dissenting judges and a number of international law experts. The dissenting judges seem to base their critique on an unchanging and static nature of international law. That perspective seems to be the "state-centric" position of past architects of international law who regarded its main function as to govern the relations between states.

[29] This outdated view is that it is primarily states that have legal personality and that states are also the main actors in the formation of international customary law through the requirements of state practice and *opinio juris* leaving some of the most powerful actors in the global community such as transnational corporations beyond their reach as duty bearers.

[30] Such a perspective had already become dated as the reach of international law and related international relations grew beyond states and even international organizations. In the wake of the horrors of the Second World War, modern international human rights law was, in the words of Justice Abella, "the phoenix that rose from the ashes of World War II and declared global war on human rights abuses"[298]. The majority ruling is correct in stating that customary international human rights law has been

298 *Nevsun*, par. 1.

evolving to go beyond only dealing with the state as a major rights holder and duty bearer in international law and required the evolution of domestic law norms that related to how to apply customary international and *jus cogens* within domestic law.

[31] Indeed the logic and the writings of one of the world's most eminent international jurists, Harold Koh, whose work seems to have strongly influenced Justice Abella to write the majority's decision is strongly supported by this author. That logic states 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][299].

[32] It should also not be forgotten that there is a reference in the UN Universal Declaration of Human Rights preamble, that:

> "every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction"[300].

[33] It is suggested that it can't be contested that the reference to "every organ of society" in the UDHR refers to juridical entities like private sector corporations[301]. It should be read as an obligation for transnational corporations to take measures to ensure that in their own operations and those of their business partners, they take all due diligence measures to prohibit and prevent serious human rights abuses. Given that the UDHR has become part of customary international law, it then becomes legitimate to argue that it could provide sufficient judicial notice guidance on imposing direct legal duties on non-state actors as both Justice Abella and Harold Koh have done.

[34] While the Nuremberg Trials, the post-World War II global human rights movement and the multilateral conventions on human rights have focused on primarily how to protect individuals and groups against the state, there are an ever-growing number of voluntary measures focusing on the potential human rights abuses by transnational corporations. These include those established by the UN and many sectoral, regional,

---

299 *Ibid.*, par. 112, Justice Abella cites KOH, H., "Separating Myth from Reality about Corporate Responsibility Litigation.", 2004, *Journal of International Environmental Law*, V7, 263, p.265.

300 See : Universal Declaration of Human Rights, United Nations, December 10, 1948. https://www.un.org/en/about-us/universal-declaration-of- human-rights ["UDHR"]

301 See an interesting discussion on what else other than corporations could be included in what is meant by "organ of society" in what is termed the Anthropocene era in: HEY, E., "The Universal Declaration of Human Rights in 'The Anthropocene'.", 2018, *AJIL Unbound*, V112, p. 350-354. doi:10.1017/aju.2018.87.

multilateral[302] and multistakeholder initiatives[303], including the widely adopted UN Guiding Principles on Business and Human Rights[304]. While such voluntary measures no doubt have a measurable impact on countering corporate human rights abuses in many instances, experts still question whether there are sufficient effective measures against breaches of such voluntary measures and there are questions about the lack of effective remedies for those who are victims of such breaches of the voluntary measures[305]. This author has also severely questioned whether the UNGP and some of the voluntary multilateral and multistakeholder measures have provided anywhere close to a sufficient framework for victims of human rights abuses by transnational corporations regarding access to an effective remedy[306].

[35] These concerns about the still large instances of impunity for serious human rights abuses have led the UN Human Rights Council to set up a working group[307] to explore, among other areas, the potential for a binding instrument on business and human rights. While the pressure for such a binding treaty has come primarily from some areas of the Global South for such a binding instrument, there is, not surprisingly, strong resistance from the countries that host the most significant number of transnational corporations, namely the US, the EU and other Western nations. However, this author has suggested that, ultimately, the negotiations at the Working Group could and should lead not to a directly binding instrument on human rights, but a proposed framework draft instrument that member states could incorporate into their domestic legal system imposing hard law civil liability norms for human rights rights abuses[308].

---

302 See for example: OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, https://doi.org/10.1787/81f92357-en., June 8th 2023, which includes provisions on human rights responsibilities and due diligence.

303 See for example: Voluntary Principles on Security and Human Rights, 2000. https://www.voluntaryprinciples.org/ which also includes human rights responsibilities, especially in an area that is most likely to give rise to civil and criminal liability claims arising out of the use of security personnel in the companies' international operations.

304 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Office of the UN High Commissioner for Human Rights, 2011, UN Doc A/HRC/17/31. The Human Rights Council endorsed the Guiding Principles in its resolution 17/4 of 16 June 2011. https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf. ["UNGP"]

305 See for example: UTTING, P., "Regulating business via multistakeholder initiatives: A preliminary assessment.", in *Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide*, 2002, p. 61-130.

306 See: MENDES, E. *Global Governance, Human Rights and International Law*, *Second Edition*, London: Routledge, 2023, p. 191-257 ["Mendes, 2023"].

307 See: Working Group on Business and Human Rights, United Nations Human Rights Special Procedures, June 16, 2011. https://www.ohchr.org/en/special-procedures/wg-business

308 See: Mendes, 2023. p. 242; See also this well-respected legal and social science blog report on where the attempt to establish such a treaty stands: O'BRIEN, C. and SCHÖNFELDER, D., "A Defining Moment for the UN Business and Human Rights Treaty Process", 2022, *Verfassungsblog on Matters Constitutional*. https://verfassungsblog.de/a-defining-moment-for-the-un- business-and-human-rights-treaty-process/

[36] Regardless of the ultimate outcome of a binding UN instrument on business and human rights, an increasing number of European states, including, France, Germany and Norway[309] and the European Union[310] are developing due diligence and duty of care legal obligations[311] on transnational corporations located in their home jurisdictions regarding their international operations and expanding to their supply chains. These UN, regional and state actions that attempt to impose due diligence duties and potentially significantly harder legal obligations and civil liabilities on transnational corporations could provide both the conditions of state practice and *opinio juris* for expanding the norms on who are the potential subjects of civil liability norms deduced by judicial notice of the evolving nature of customary international law.

3.3 NATIONAL, REGIONAL, MULTISTAKEHOLDER AND MULTILATERAL INITIATIVES TO IMPOSE SOFT AND HARD LAWS ON TRANSNATIONAL CORPORATIONS: CUSTOMARY INTERNATIONAL LAW AND PRIVATE ACTORS AS SUBJECTS OF CIVIL LIABILITY

[37] It is suggested that Justice Abella and the majority concurring justices may have been aware of these national, regional, multistakeholder and multilateral initiatives to impose soft and hard laws on transnational corporations that indicate that customary international law was and is moving to treat such private actors as subjects of civil liability. Much of the academic commentary cited by Justice Abella, including that of this author, has taken note of the potentially devastating human rights impacts by transnational corporations[312]. These developments seemed to have moved Justice Abella and the concurring majority to take judicial notice that under customary international law, there are no "norms of liability or non-liability applicable to categories of actors"[313].

[38] Indeed by emphasizing the breaches of *jus cogens* regarding the abuses alleged by the plaintiffs, it is suggested Justice Abella was referencing the growing jurisprudence that confirms that liability for such breaches can extend to individuals and non-state actors. As one author has suggested, the majority opinion could well have focused entirely on the application of duties to non-state actors under *jus cogens* related jurisprudence (MONTEIRO, 2021, p. 349-352). This is because *jus cogens* norms as

---

309 See the details of these due diligence laws in: KRAJEWSKI, M., TONSTAD K and WOHLTMANN F., "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction ?", 2021, *Business and Human Rights Journal*, V6, N3, p. 550-558. doi:10.1017/bhj.2021.43.

310 See an expert analysis of the potential civil and other liabilities that can be imposed on transnational corporations when the EU directive is fully implemented by: KOTZAMANI, P., "EU Corporate Human Rights Due Diligence Obligations: From Means to Results", 2023, *OpinioJuris*. http://opiniojuris.org/2023/05/15/eu- corporate-human-rights-due-diligence-obligations-from-means-to-results/

311 National courts in Europe, including Canada, the UK and the Netherlands are applying the "duty of care" principles to impose civil liability on transnational corporations.

312 See examples of devastating impacts caused by the deep corruption, environmental and health disasters and human rights abuses caused by some of the world's leading transnational corporations in: Mendes, 2023, p. 194-203.

313 *Nevsun*, par. 105.

argued by some of the leading jurisprudence from international tribunals can be the product of "the express or tacit manifestation of will" or the "changing notions of what is considered humane" that make *"jus cogens"* the product of both conventional international law and general principles of law[314]. Indeed, in the international criminal tribunal's ruling in the *Furundžija* case, the court ruled that as regards the norm against torture, the court asserted that "[T]he victim could bring a civil suit for damage in a foreign court, which would therefore be asked inter alia to disregard the legal value of the national authorising act"[315].

[39] Given such supporting jurisprudence that indicates that individual and other non-state victims of *jus cogens* breaches can bring civil suits against non-state actors, the academic commentary by Eva Monteiro does provide sound arguments for suggesting that the majority could have focused on using these *jus cogens* approach to allow the plaintiffs to bring the civil suits against the mining company, rather than focusing on such liability under other customary international law norms (MONTEIRO, 2021, p. 349-352).

[40] However, it is suggested that Justice Abella has properly drawn the connections between the post-World War II conventional human rights system with the foundations of *jus cogens* norms in both conventional, customary and general principles of international law that also focused on the rights of non-state actors. In hindsight, the majority was perfectly correct to tie these main building blocks of international law with the evolving soft and hard national, multilateral, multistakeholder and UN laws and initiatives to develop coherent human rights norms under customary international law regarding transnational corporations. It is suggested that by connecting these key strands of the applicable international soft and hard law norms with respect to who are duty and rights bearers beyond states and individuals, Justice Abella and the concurring judges were advancing the non-static life of international law in arriving at their landmark ruling.

4. CONCLUSION

[41] As one of the most respected domestic apex courts in the world, the decisions of the Supreme Court of Canada involving the application of international law norms domestically can have a significant global impact. We have seen that already with the ruling of the Court on secessionist unilateral claims to independence in the landmark

314 See: MONTEIRO, E., "Mining Legal Luxuries: The Pitfalls and Potential of Nevsun Resources Ltd v. Araya.", 2021, Canadian Yearbook of International Law/Annuaire canadien de droit international, V58, p. 331-361, citing also the non-static view of the evolving nature of jus cogens by one of the most revered international law jurists, Justice Antonio Cassese in his chapter "For an Enhanced Role of Jus Cogens": CASSESE, A., ed, Realizing Utopia : The Future of International Law, Oxford : Oxford University Press, 2023, 158 at p. 165.

315 *Prosecutor v. Furundžija*, [1998], IT-95-17/1-T, par. 156.

Reference Re Quebec Secession ruling[316]. The conclusion of the Court that there is no international law norm that gives such a unilateral claim to secession has been followed in other jurisdictions around the world[317].

[42] Could the landmark ruling in the *Nevsun* case result in other apex courts around the world also declaring civil liability actions against private actors for violations of customary international law? One writer implies that such landmark rulings from European or North American courts may have limited impacts as the courts and governments of the non-Western powers such as China, Russia, India, Iran and Brazil are dissatisfied with the global governance system and their role within the international system and may challenge current norms or rules. The view is then that landmark decisions such as the *Nevsun* ruling may lead to fragmentation of the application of customary international law within domestic systems (MONTEIRO, 2021, p. 357-360).

[43] It is suggested such a fear of fragmentation is somewhat naïve about the reality of a global community of states divided between those that have endorsed and implemented domestically the post-World War II human rights promotion and protection norms and those who don't or have outright rejected it as the present governments of China, Russia and other authoritarian states have done. There is no doubt that many of the latter camps have and will continue to deny that neither customary international law nor even *jus cogens* can have any impact on the rights of non-state actors within their jurisdiction.

[44] However, in those democratic nations that still fully accept the non-static nature of customary international law or *jus cogens* norms that have evolved since the end of World War II and have incorporated these perspectives within their domestic legal systems, the *Nevsun* ruling could have a major impact in those jurisdictions. This could especially be the case for those states in Europe and elsewhere that are already imposing hard domestic legal obligations, including imposing civil liability on transnational corporations if they fail to demonstrate due diligence or a duty of care in how their operations impact universally accepted human rights norms. Canada, the EU and an increasing number of Europeans are already moving in that direction even before the landmark ruling in the *Nevsun* case. It is the hope that the legal systems and courts in other countries in the community of democratic states that believe in the international rule of law and still acknowledge their obligations to universal human rights obligations will also follow the *Nevsun* majority ruling promotion of the reach of customary international law to impose civil liability on corporations for the worst human rights abuses in which their corporations are complicit.

316 *Reference re Secession of Quebec*, [1998] 2 SCR 217 ["*Reference re Secession of Quebec*"]. See also: MENDES, E., "The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally", in Delledonne, G. and Martinico, G. (eds), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference*, Palgrave Macmillan, 2019.

317 For example, the Supreme Court in Sri Lanka in *Chandrasoma v. Senathiraja*, [2014] SC SPL 03 (Supreme Court of Sri Lanka) applied the reasoning of the Canadian court that there is no unilateral right to secession.

BIBLIOGRAPHIC REFERENCES

Monograph

BAUGHEN, S. *Human Rights and Corporate Wrongs*, Cheltenham: Edward Elgar Publishing, 2015.

CASSESE, A., ed, Realizing Utopia: The Future of International Law, Oxford: Oxford University Press, 2023.

CLAPHAM, A. Human Rights Obligations of Non-State Actors, Oxford: Oxford University Press, 2006.

FATIMA, S. Using International Law in Domestic Courts, Oxford: Hart Publishing, 2005.

MENDES, E. Global Governance, Human Rights and International Law, Second Edition, London: Routledge, 2023.

Article

DODGE, W.S., "Corporate Liability Under Customary International Law.", 2012, *Georgetown Journal of International Law*, V43, p. 1045-1046

FAIRLEY, S.H., "International Law Matures within the Canadian Legal System: Araya *et al.* v. Nevsun Resources Ltd.", 2021, *Canadian Bar Review*, V99, p. 193

HEY, E., "The Universal Declaration of Human Rights in 'The Anthropocene'.", 2018, *AJIL Unbound*, V112, p. 350-354.

KOH, H., "Separating Myth from Reality about Corporate Responsibility Litigation.", 2004, *Journal of International Environmental Law*, V7, p. 263, p.265-267.

KRAJEWSKI, M., TONSTAD K and WOHLTMANN F., "Mandatory Human Rights Due Diligence in Germany and Norway: Stepping, or Striding, in the Same Direction?", 2021, *Business and Human Rights Journal*, V6, N3, p. 550-558.

MONTEIRO, E., "Mining Legal Luxuries: The Pitfalls and Potential of Nevsun Resources Ltd v. Araya.", 2021, Canadian Yearbook of International Law/Annuaire canadien de droit international, V58, p. 331-361.

Chapter of collective work

MENDES, E., "The Legacy of the Quebec Secession Reference Ruling in Canada and Internationally", in Delledonne, G and Martinico G (eds), *The Canadian Contribution to a Comparative Law of Secession: Legacies of the Quebec Secession Reference*, Palgrave, Macmillan, 2019.

UTTING, P., “Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment.”, in *Voluntary Approaches to Corporate Responsibility: Readings and a Resource Guide*, 2002, p. 61-130.

Legislation

Alien Tort Statute, 28 U.S.C § 1350 (2018).

International instruments

Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework, Office of the UN High Commissioner for Human Rights, 2011, UN Doc A/HRC/17/31.

OECD (2023), OECD Guidelines for Multinational Enterprises on Responsible Business Conduct, OECD Publishing, Paris, https://doi.org/10.1787/81f92357-en.

UN General Assembly, Resolution 217A (III), *Universal Declaration of Human Rights,* A/RES/217(III) (December 10, 1948),

Voluntary Principles on Security and Human Rights, 2000.

Jurisprudence

Chandrasoma v. Senathiraja, [2014] SC SPL 03 (Supreme Court of Sri Lanka).

Kiobel v. Royal Dutch Petroleum Co., [2013] 569 US 108.

Nevsun Resources Ltd. v. Araya, [2020] 1 SCR 166.

Prosecutor v. Furundžija, [1998], IT-95-17/1-T.

R. v. Hape, [2007] 2 SCR 292.

Reference re Secession of Quebec, [1998] 2 SCR 217.

Other sources

Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada’s Extractive Sector Abroad*, July 2019. https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng

International Law Commission (ILC), “Draft Conclusions on Identification of Customary International Law, with Commentaries”, 2018, *ILC Yearbook*, V2, N2, 122 p. 125. https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf

KOTZAMANI, P., “EU Corporate Human Rights Due Diligence Obligations: From Means to Results”, 2023, *OpinioJuris*. http://opiniojuris.org/2023/05/15/eu- corporate-human-rights-due-diligence-obligations-from-means-to-results/

O’BRIEN, C. and SCHÖNFELDER, D., “A Defining Moment for the UN Business and Human Rights Treaty Process”, 2022, *Verfassungsblog on Matters Constitutional*. https://verfassungsblog.de/a-defining-moment-for-the-un-business-and-human-rights-treaty-process/

United Nations, United Nations Human Rights Special Procedures, *Working Group on Business and Human Rights*, https://www.ohchr.org/en/special-procedures/wg-business