arguably engages in legal fiction by asserting that it would need to determine the continued validity of the arbitration agreement to identify a breach of the principle of the rule of law. The Court could have viewed *pacta sunt servanda* as a component of this principle,[38] which may create obligations independent of a treaty's continued existence.[39] More specifically, international courts have recognized that when parties conclude a treaty to resolve a territorial dispute, the regime they establish "achieves a permanence which the treaty itself does not necessarily enjoy."[40] The CJEU might have thus considered whether the territorial character of the parties' agreement produced obligations that survive its alleged termination.[41] The CJEU Judgment instead adopts a formalistic approach, which disregards the object and purpose of the agreement as both a territorial treaty and an accession instrument. In so doing, the Court appears to be more concerned with avoiding the impression that it has assumed the functions of an arbitral appeals court.

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Supreme Court of Canada—act of state doctrine—customary international law—international human rights violations—business and human rights—civil claims—doctrine of adoption

NEVSUN RESOURCES LTD. V. ARAYA. Case No. 37919. *At* https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do.
Supreme Court of Canada, February 28, 2020.

In *Nevsun Resources Ltd. v. Araya*, the Supreme Court of Canada declined to dismiss a series of customary international law claims brought by Eritrean refugees against a Canadian mining corporation for grave human rights abuses committed in Eritrea. In doing so, the Supreme Court opened the possibility of a novel front for transnational human rights litigation: common law tort claims based on customary international law. Under the doctrine of adoption, customary international law is directly incorporated into the Canadian common law. However, Canadian courts have not yet upheld a private right of action for violations of

[38] *See* Christina Binder, *The* Pacta Sunt Servanda *Rule in the Vienna Convention on the Law of Treaties: A Pillar and Its Safeguards*, *in* INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: FESTSCHRIFT IN HONOUR OF GERHARD HAFNER 317, 341 (Isabelle Buffard, James Crawford, Alain Pellet & Stephan Wittich eds., 2008).

[39] *See* HUGH THIRLWAY, THE SOURCES OF INTERNATIONAL LAW 32 (2014), *citing* Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 164 (Frederik M. van Asbeck ed., 1958).

[40] *See* Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, Judgment, 2007 ICJ Rep. 832, paras. 88–89 (Dec. 13), *citing* Territorial Dispute (Libya/Chad), Judgment, 1994 ICJ Rep. 6, paras. 72–73 (Feb. 3). *See also* Northern Cameroons (Cameroon v. UK), Preliminary Objections, Judgment, 1963 ICJ Rep. 1963 15, 35–36 (Dec. 2).

[41] Concluding that territorial treaties do not imply any right of denunciation, see Second Report on the Law of Treaties, by Sir Humphrey Waldock, Special Rapporteur, 64–70, UN Doc. A/CN.4/156, Add.1–3 (June 5, 1963). *See further* Laurence R. Helfer, *Terminating Treaties*, *in* THE OXFORD GUIDE TO TREATIES 634, 637–38 (Duncan Hollis ed., 2012).

customary international law. Writing for a divided court (5–4), Justice Abella allowed the plaintiffs' claims to proceed, finding that it is not "plain and obvious" that the plaintiffs' customary international law claims are bound to fail under either Canada's burgeoning "transnational" or "foreign relations" law, or international law itself. In reaching this conclusion, she offered a unique and overdue reflection on the role of national courts in identifying, adopting, and developing custom. A larger majority of the court (7–2) also rejected outright the application of the act of state doctrine in Canada, tracking several common law systems in limiting the doctrine in favor of human rights litigants.

The plaintiffs—Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle—are former Eritrean nationals now living as refugees in Canada. They sued Nevsun Resources Ltd., a mining company headquartered in Vancouver, in the Supreme Court for British Columbia. The plaintiffs alleged that they were indefinitely conscripted under Eritrea's National Service Program into working at the Bisha Mine in Eritrea, where they faced cruel, inhuman, and degrading treatment. Nevsun entered into a commercial venture with Eritrea for the development of the mine, taking a majority share in it. Seeking damages, the plaintiffs brought claims under customary international law "as incorporated into the law of Canada," via adoption, for forced labor, torture, slavery, crimes against humanity, and cruel, inhuman, or degrading treatment. They also sued for the domestic torts of battery and unlawful confinement.

Nevsun motioned to strike on several grounds, notably that the act of state doctrine stripped the court of subject-matter jurisdiction, and that the customary international law claims disclosed no reasonable cause of action. In its latter contention, Nevsun argued that human rights law does not impose obligations on corporations or give rise to claims for damages, even with respect to *jus cogens* norms. It further questioned the extent to which customary international law prohibitions can give rise to tort claims under domestic common law via the doctrine of adoption, and, alternatively, the propriety of the court recognizing new domestic torts of torture, slavery, forced disappearance, and crimes against humanity (paras. 424–27, 443).

The Supreme Court of British Columbia determined that the act of state doctrine forms part of Canadian common law even if it had not yet been applied in Canada (para. 375). However, looking to the Federal Court of Australia,[1] the UK Court of Appeal,[2] and the U.S. Supreme Court,[3] the motion judge declined to apply the doctrine, observing that across these jurisdictions the doctrine today incorporates an array of limitations, including a public policy exception (paras. 395–96). As for the customary international law claims, the motion judge recognized that while "[c]ommon law courts have historically applied international custom to create private law obligations and, indeed, entire fields of private law" (para. 442), such as pertaining to maritime law, law merchant, and the law of prize, "[n]o civil claims alleging breach of [customary international law] norms, peremptory or otherwise, have been advanced successfully in Canada" (para. 445). Nonetheless, he concluded that it was not "plain and obvious" that the claims are "bound to fail" (paras. 455, 458).

[1] Habib v. Commonwealth of Australia, [2010] FCAFC 12 (Austl.).
[2] Belhaj v. Straw, [2014] EWCA Civ 1394 (UK).
[3] W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990).

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The Court of Appeal for British Columbia unanimously affirmed. The court agreed that while the act of state doctrine had been adopted by virtue of the Law and Equity Act,[4] the doctrine did not bar consideration of the plaintiffs' claims (para. 123). The court determined that a policy exception would apply on account of the grave offenses pled (para. 169), and because the plaintiffs were not purporting to challenge the legal validity of a foreign state's laws directly (para. 173).[5] Turning to the customary international law claims, the court concluded that while "international law is 'in flux'" in relation to its application to nonstate entities,[6] and "transnational law . . . is developing, especially in connection with human rights violations," it was not persuaded that the claims should be struck (para. 197). It nonetheless observed the Supreme Court's holding in *Kazemi Estate v. Republic of Iran*,[7] against Justice Abella's dissent, that Canada was not obligated under international law to create civil remedies for torture (paras. 186–87).

At the Supreme Court, Justice Abella's majority opinion held for the plaintiffs on both the act of state doctrine and on the possibility of customary international law claims against corporate defendants. Beginning with the act of state doctrine, the majority concluded that while the doctrine is "known" and "heavily criticized" in the United Kingdom and Australia, "[i]t has, by contrast, played no role in Canadian law" (para. 28). In the court's view, "no single definition . . . captures the unwieldy collection of principles, limitations, and exceptions" that fall under the doctrine (para. 29). A public policy exception in favor of "giv[ing] effect to clearly established rules of international law" (para. 34) has emerged,[8] alongside other exceptions and limitations identified in recent UK Supreme Court[9] and High Court of Australia[10] opinions (paras. 36–43). Against this background, the majority concluded that Canadian conflicts of law and judicial restraint case law has "completely subsumed" the principles underlying the act of state doctrine (para. 44).

Turning to the customary international law claims and the doctrine of adoption, Justice Abella began by expounding on the role of common law courts in international law. "Canadian courts, like all courts," she explained, "play an important role in the ongoing development of international law" (para. 70). They "implement[]" international law, but they also "advanc[e]" it, and in doing so, "contribute . . . to the 'choir' of domestic court judgments around the world shaping the 'substance of international law'" (para. 72). In the majority's view, the plaintiffs' claims hinged on whether the international law prohibitions pled "are part of Canadian law, and, if so, whether their breaches may be remedied" (para. 73). This framing in effect entails three questions. The first is a matter of pure customary international law (*id.*). The second is a question of Canadian law, which begins with a clear rule: customary international is automatically adopted into Canadian common law without legislative action

[4] Law and Equity Act, RSBC 1996, c. 253 (recognizing English common law as of 1858).

[5] *See Kirkpatrick*, 493 U.S. at 406, 409–10.

[6] For more on this debate, see, for example, ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006).

[7] *See* Kazemi Estate v. Republic of Iran, 2014 SCC 62 (Can.).

[8] *See* Oppenheimer v. Cattermole, [1976] AC 249 (UK); *see also* Kuwait Airways Corp. v. Iraqi Airways Co. (Nos. 4 and 5), [2002] UKHL 19 (UK); Yukos Capital Sarl. v. OJSC Rosneft Oil Co. (No. 2), [2012] EWCA Civ 855 (UK).

[9] Belhaj v. Straw, [2017] UKSC 3, [2017] AC 964 (UK).

[10] *Habib*, supra note 1.

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(paras. 86, 90).[11] The third pertains to the scope of the adoption process. In the majority's view, the common law can provide a civil remedy for adopted customary international law prohibitions because, in keeping Canada's international commitments, "where there is a right, there must be a remedy for its violation" (para. 120).

Finally, the majority dismissed Nevsun's suggestion that it cannot be held liable because human rights norms do not apply to corporations. The majority recognized states as traditionally the main subjects of international law. Yet, in its view, international law has evolved from its purely sovereigntist origins such that it now extends, at least partially, to individuals and nonstate entities. Nonetheless, it acknowledged that "because some norms of international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on" are applicable to other nonstate entities (para. 113).[12] As for whether the court should recognize new domestic torts, Justice Abella noted her preference for accepting the plaintiffs' claims on the theory that customary international law grounds them directly, though she left the issue to the trial court (para. 128).

Justices Brown and Rowe dissented in part. They agreed with the majority on the act of state doctrine, but disagreed with its views on customary international law, the scope of the doctrine of adoption, and the availability of a tort remedy (para. 135). They would have rejected both the majority's preferred approach of treating the plaintiffs' claims under customary international law, and the alternative option of construing new torts. Noting Justice Lebel's suggestion in *R v. Hape* that "prohibitive norms" are given direct effect in Canada, they argued that other kinds of customary norms do not have the same effect (para. 136). They contrasted Lebel's prohibitive norms with "mandatory norms,"[13] or norms which require the state "to act in a certain way."[14] The dissenters argued that the court cannot give direct effect to "mandatory" norms without taking into account the preferences of the legislature, and the mechanisms available to implement them (paras. 169, 175). Statutory criminal law, in their opinion, was better suited to implementing the norms pled by the plaintiffs (para. 218). Turning to the alternative view of the plaintiffs' claims, the dissenters maintained that there was no need for new torts inspired by international law. They cautioned that such torts would have little utility in cases like the present one: courts would generally apply the law of the place of tort—here, Eritrea—under traditional conflict of law rules (paras. 252, 260).[15]

The dissent also disagreed on the content of customary international law, and how it is to be identified. They argued that common law courts cannot take judicial notice of customary international law where its contents are disputed, but should instead treat its content as a question of fact, as they would when applying foreign law (para. 181). As to substance, they found it "plain and obvious" that "corporations are excluded from direct liability" under international custom (para. 189). Invoking debates about whether human rights can

[11] *See* R. v. Hape, 2007 SCC 26, para. 39 (Can.); *see also* Gib van Ert, *The Domestic Application of International Law in Canada*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 2, 10 (Curtis Bradley ed., 2019).

[12] This phrasing tracks a similar suggestion in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n. 20 (2004).

[13] *See* JOSEPH RAZ, PRACTICAL REASON AND NORMS 49 (1999) (describing "mandatory norms" as "normally stated by saying that a certain person ought to, should, must . . . perform a certain action").

[14] The majority disputed the existence of such a distinction in Canadian or international law (para. 93).

[15] *See* Haaretz.com v. Goldhar, 2018 SCC 28 (Can.) (discussing the *lex loci delicti* rule).

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have horizontal effect (para. 210), they cited to a report by John Ruggie, the UN secretary-general's special representative on business and human rights issues, suggesting that national practice on corporations and human rights is not yet "uniform and consistent."[16] They concluded that even if human rights can apply to individuals and nonstate entities, courts cannot translate customary international law into domestic liability rules without violating legislative supremacy (para. 148).

Justices Côté and Moldaver dissented in full. They rejected the majority's conclusion that customary international law can apply to corporations but focused primarily on the act of state doctrine (para. 269). In their view, because the justiciability branch of the act of state doctrine is rooted in constitutional separation of powers, courts should only permit private law claims impugning foreign sovereigns where issues of constitutional rights, the legality of an administrative decision, or the interface between international law and Canadian public institutions are implicated (para. 296).

In late October 2020, the parties reached a confidential settlement.[17]

* * * *

Nevsun v. Araya is a landmark case. As *Filártiga v. Peña-Irala*[18] was for the rediscovery of the Alien Tort Statute (ATS)[19] and the subsequent rise of transnational human rights litigation in the United States,[20] *Nevsun* may well prove a watershed moment for human rights plaintiffs in Canada seeking to invoke customary international law. The opinion also provides a model for other national courts looking to make use of customary international law more generally. *Nevsun* is equally important as a case about corporate social responsibility, particularly in finding that it is possible for a court to apply customary international law to corporations in a suit at common law. After the U.S. Supreme Court's decision in *Arab Bank v. Jesner*[21] that foreign corporations cannot be held liable under the ATS,[22] *Nevsun* provides a resounding reply in substance and in form to the U.S. Supreme Court's increasing hostility to transnational human rights litigation. Given the shared history of Canadian and U.S. courts in recognizing customary international law as part of domestic common law, there is much to be learned from the comparison.[23]

[16] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. A/HRC/4/035 (2007).

[17] *See* Yvette Brend, *Landmark Settlement Is a Message to Canadian Companies Extracting Resources Overseas: Amnesty International*, CBC (Oct. 23, 2020).

[18] Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980). In *Filártiga*, the Second Circuit found that a Paraguayan police inspector located in the United States could be sued under the ATS for torture committed abroad.

[19] The ATS grants U.S. federal courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350.

[20] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991).

[21] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

[22] The U.S. Supreme Court is set to address the question of domestic corporate liability under the ATS in *Nestlé USA, Inc. v. Doe I*, 929 F.3d 623 (9th Cir. 2019), *cert. granted*, 2020 WL 3578678 (mem.) (July 2, 2020) (No. 19-416).

[23] Scholars continue to debate the status of customary international law in U.S. law. The established position leading up to *Sosa* was that customary international law forms part of the federal common law. *See Filártiga*, 630 F.2d at 885–86; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, intro. n. to pt. I, ch. 2 (1987) ("From the beginning, the law of nations . . . was considered to be incorporated into the law of the United States without the need for any action by Congress or the President . . . ."). While some read *Sosa* as casting doubt on the incorporation of custom into the federal common law, *Sosa* need not be read as disrupting the status

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Nevsun also charts a novel course for transnational human rights litigation. While the *Nevsun* majority and dissent debate whether the plaintiffs' international law claims are better conceived of as claims under customary international law directly or as new domestic torts inspired by it, both approaches stand in contrast to recent routes taken in other courts. For example, the UK Supreme Court in *Vedanta*[24] and The Hague district court in *Kiobel v. Dutch Shell*[25] have only allowed claims for abuses committed by corporations abroad to proceed on the basis of duties owed under the domestic law of the place where the torts occurred. The approach of these courts may be a simpler, perhaps even surer route to holding defendants accountable. It requires fewer inquiries into novel areas of law, and it may prove less prone to controversy. Nonetheless, domestic torts lack the critical expressive value of claims rooted in human rights law. As Justice Abella points out, they hardly encapsulate the complete nature of harm caused by *jus cogens* violations. And because they are founded on local duties, domestic tort claims contribute to the development of universal standards only indirectly—certainly less directly than claims prompting a ruling on the contents of customary international law.

However, the availability of customary human rights claims in Canada is not yet an inevitably, as the dissent makes clear. Many issues remain to be resolved as claims inspired by the opinion proceed to the trial stage. The majority's underlying approach to the concept of common law claims based on human rights nonetheless offers significant response to some of the dissent's criticisms, even as it leaves open additional avenues for critique. In particular, one of the most constant and important themes running throughout *Nevsun* is the idea that customary international law is "part of" the common law of Canada absent conflicting legislation. While this idea has been frequently reiterated, the majority invigorates it. Two aspects of this approach merit special consideration: the degree of latitude available to courts when translating customary international law into the common law; and the role of domestic courts in "determin[ing] and develop[ing]" custom (para. 2).

At the most basic level, the fact that customary international law is "part of" the common law means that Canadian courts can fashion new torts inspired by custom, as common law courts do in other areas of law.[26] But the fact that custom is "part of" Canadian law also has significant ramifications for the claims said to be brought under international law "directly." Even with respect to these claims, the majority's approach acknowledges, even embraces, a reasonable degree of discretion in translating international law into the common law. An important example of this comes in relation to the debate over which body of law supplies the various aspects of these claims. For instance, in the ATS context, *Sosa* set out the basic division of work between international law and domestic law. The Court explained that the common law provides the cause of action as the ATS is a jurisdictional statute.[27] Nonetheless,

of customary international law as part of federal common law. *See* Carlos Manuel Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AJIL 531, 534 (2012) (explaining that *Sosa*'s holding that a cause of action in federal common law "extends to only *some* violations of customary international law is entirely consistent with the view that customary international law more broadly has the status of federal common law" (emphasis added)).

[24] Vedanta Resources PLC and Another v. Lungowe and Others [2019] UKSC 20 (UK).

[25] Kiobel v. Dutch Shell, C/09/540872/HAZA 17-10 (Jan. 5, 2019).

[26] *See* Jones v. Tsige, 2012 ONCA 32, 108 O.R. (3d) 241 (Can.) (recognizing a new tort for invasion of personal privacy).

[27] *See Sosa*, 542 U.S. at 713–14, 724.

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courts have disputed whether the *mens rea* and secondary liability standards of ATS claims should be established by international or domestic law.[28] Likewise, *Jesner* displayed the significant confusion that persists over which body of law accounts for the availability of corporate liability. In *Jesner*, the plurality reasoned that customary international law did not provide a "specific, universal, and obligatory norm of *corporate liability*,"[29] against significant criticism that it held the plaintiffs to an impossible standard. As the *Jesner* dissent argued, international law does not typically address matters of "liability," let alone the scope of civil redress available in domestic courts.[30] The *Nevsun* majority avoids much of this confusion. It finds that the question of corporate liability is simply one of whether an adopted international law norm can apply to nonstate actors. It then leaves the rest to development by the common law.

This reasoning has several advantages. By reinvigorating the function of the common law in customary international law claims, the *Nevsun* majority offers a rebuttal to the argument that international law is as of yet underspecified in relation to corporations, significantly disarming the dissent. Far from stretching international law, as the dissent contends, the majority's approach can instead be read as relatively modest in relation to it. Each of the claims at issue—the direct customary claims and the torts—in reality entails a combination of domestic and international law.[31] Justices Brown and Rowe nonetheless fiercely dispute whether courts have discretion to fashion a private cause of action in the event that international law does not itself supply one. In effect, they see international law as a "source" of the common law, roughly akin to foreign law, to be "applied," but not adjusted substantively at the domestic level.[32] Their view, however, may be an overly narrow take on the doctrine of adoption. Whole fields of private law, such as the law merchant, did not enter the Canadian common law predetermined; the common law filled in the gaps. Likewise, in the United States, it is unlikely that the quintessential injury said to have concerned the ATS drafters—infringements of the rights of ambassadors—had a significantly clearer civil liability rule under international law than human rights law offers today. While Justices Brown and Rowe are right that some international norms may be unfit for adoption, the claims here fall within reasonable bounds of translation.

The majority's emphasis on customary international law as "part of" the Canadian common law has a second consequence: increased judicial discretion in identifying custom. Similar to the courts of the United Kingdom, Australia, and the United States, the majority asserts the capacity to take judicial notice of customary international law.[33] Taking judicial notice, as in other areas of domestic law, means that parties pleading customary international law do not necessarily need to prove, as fact, the existence of a particular custom. This position accords with Justice Abella's view of the function of international law domestically, as well as of the role of domestic courts in developing international law. Indeed, in rejecting the

[28] *See, e.g.*, Khulumani v. Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

[29] *Jesner*, 138 S. Ct. at 1401 (emphasis added).

[30] *Id.* at 1419 (Sotomayor, J., dissenting).

[31] *See also* William Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 Notre Dame L. Rev. 1577, 1593 (2014) (noting that "ATS cases ha[ve] clearly taken the international law road, which [i]s really a road that combine[s] the application of international law and federal law in various ways").

[32] *See* Roger O'Keefe, *The Doctrine of Incorporation Revisited*, 79 Brit. Y.B. Int'l L. 7 (2008); *see also* James Crawford, Chance, Order, Change: The Course of International Law 229–30 (2014).

[33] Gib van Ert, The Reception of International Law in Canada: Three Ways It Might Go Wrong 1 (2018).

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dissent's call for a strictly "empirical" exercise when identifying custom, Abella in effect furthers her position in *Kazemi*. There, she explained in dissent that even "[e]quivocal customary international law" should not block the development of domestic civil remedies.[34] This position may be particularly important in the context of corporate liability. The *Nevsun* majority suggests that even if a norm has a strictly interstate character, it may be possible for the common law to "evolve so as to extend the scope of th[e] norm to bind corporations" to corporations (para. 113). Whether these more flexible approaches to custom take hold, and the ultimate success of customary international law claims in Canada, remains to be seen in further appeals.

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[34] *Kazemi*, *supra* note 7, para. 174 (Abella, J., dissenting).