SCC File Number: 37919

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

Between

NEVSUN RESOURCES LTD.

Appellant
(Appellant)

- and -

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

Respondents
(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 MINING WATCH CANADA

Interveners

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This is a case about corporate accountability for the use of forced labour, a form of slavery, in the construction of a Canadian owned gold mine in Africa. The respondents are refugees who fled a lifetime of indefinite conscription in Eritrea's system of national service. They allege that they were forced to work at the mine and seek to hold the majority owner of the mine, Nevsun Resources Ltd. ("Nevsun"), a British Columbia company, accountable for this and other human rights abuses. This appeal raises for consideration the common law's response to these trans-national human rights violations.

2. Nevsun seeks immunity for its conduct by asking this Court to strike all claims advanced against it, including claims grounded in negligence, battery and unjust enrichment, on the basis of a radical formulation of the common law doctrine of act of state.

3. Whereas UK and Australian courts have forcefully held that the act of state doctrine cannot be invoked to bar claims based on grave human rights violations, Nevsun asserts that in Canada the result should be different – Canadian courts should abstain from assessing Nevsun's conduct at all because of vaguely defined concerns of comity, non-justiciability and sovereignty. This approach should be rejected as it is contrary to fundamental values of the Canadian legal system and would allow Canadian companies with close commercial ties to brutal dictatorships to avoid all judicial scrutiny and responsibility for their own conduct.

4. The conduct alleged here is tortious but it is also something more. It is a violation of peremptory norms of customary international law – universal norms which stand at the apex of our legal system and which aid in the development of the common law. In the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment.

5. Recognizing common law torts based on violation of these norms would allow the common law to develop in a principled and structured manner that fully encapsulates the prohibited conduct and which vindicates universal human rights and *Charter* values.

B. Facts

6. Eritrea is one of the most repressive states in the world. It has no constitution, legislature, elections, political opposition, or independent media. All political and economic power is concentrated firmly in the hands of dictator Isaias Afewerki, who has held power since the country gained independence in 1993. Mr. Afewerki has been quoted as saying, "[I]f there is anyone who thinks there will be democracy or [a] multiparty system in this country. . . then that person can think of such things in another world."[1]

7. By any measure, Eritrea is a high risk zone for human rights abuses for any company seeking to do business in the country. The respondents allege that Nevsun entered into a commercial venture with the Government of Eritrea to develop the Bisha Mine fully cognizant of those risks.[2]

8. The respondents are refugees who have now fled Eritrea. They allege that during the construction of the mine, they were forced to work in inhumane conditions and under the constant threat of physical punishment, torture, and imprisonment.[3]

9. The respondents Araya and Fshazion are now resident in the United States and the respondent Tekle is resident in Canada.

10. The respondents assert that Nevsun had a duty to prevent the use of forced labour at the Bisha Mine. The duty is grounded in the control which Nevsun exercises over the construction and operation of the Bisha Mine, its knowledge of the risks of forced labour and human rights abuses present in Eritrea, and its corporate social responsibility policies which place the responsibility for compliance with labour and human rights standards on the highest levels of the company in Vancouver.[4]

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1 Reasons for Judgment of the Honourable Mr. Justice Abrioux of the British Columbia Supreme Court, 2016 BCSC 1856 (as corrected) ["BCSC Reasons"], at para 100: Record of the Appellant, Nevsun Resources Ltd. ["AR"] Vol I, Tab 1.

2 Notice of Civil Claim ["NOCC"], at para 19: AR Vol III, Tab 6.

3 Reasons for Judgment of the Court of Appeal for British Columbia, 2017 BCCA 401 ["BCCA Reasons"], at para 3: AR Vol II, Tab 3.

4 NOCC, *supra* note 2, at paras 31 to 34: AR Vol III, Tab 6, at pp 8-9.

11. Nevsun has adopted, among others, the 2006 International Finance Corporation ("IFC") standards on labour practices and working conditions.[5] The IFC standards required Nevsun to, *inter alia*, protect workers by addressing forced labour risks, use commercially reasonable efforts to ensure contractors are reputable, and to require contractors to abide by the IFC standards including the prohibition on the use of forced labour.[6] This action seeks to hold Nevsun, a Canadian corporation, accountable for, *inter alia*, failing to enforce its own standards which prohibited the use of forced labour at the mine.

C. Indefinite Conscription

12. One of the ways in which the Eritrean regime imposes its authority over its citizens is through indefinite conscription in what is known as the National Service Program (NSP). The NSP began as a presidential proclamation requiring all Eritreans to complete 18 months of military training and service upon reaching the age of 18. In actual practice since 2002, most NSP conscripts are never released from service and are forcibly assigned to permanent work without the ability to change employment, receive anything but a meagre wage, or travel freely.[7]

13. Conditions are brutal, and punishment for perceived disobedience is severe. Many of those subjected to indefinite conscription, like the respondents, have risked their lives in order to flee the country. The United Nations, the International Labour Organisation, and various other international bodies consider this practice of indefinite conscription to be forced labour, a modern form of slavery. In 2016, the United Nations Commission of Inquiry on Eritrea (UNCOI) issued a landmark report on human rights in Eritrea, concluding that the indefinite nature of the NSP constitutes enslavement and a crime against humanity.[8]

14. Nevsun, in its recitation of facts, attempts to downplay the change that occurred in 2002, when the NSP became a program of indefinite conscription – but Nevsun's own evidence in this

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5 Affidavit #3 of Lise Carmichael-Yanish, made October 19, 2015 ["Carmichael-Yanish #3], Ex. "4": Joint Electronic Appeal Book, filed with the Court of Appeal and filed by Nevsun in this Court ["JAB"] Vol 3, Tab 6, at p 1070.

6 BCSC Reasons, *supra* note 1, at para 53: AR Vol I, Tab 1.

7 Affidavit #1 of Biniam Ghebremichael, made October 19, 2015: JAB Vol 8, Tab 9, at pp 2998 to 3000; Affidavit #1 of Nicole Cutler, made August 6, 2015 ["Cutler #1], at p 85: JAB Vol 2, Tab 4, at p 795.

8 Carmichael-Yanish #3, *supra* note 5, Ex. "4": JAB Vol 3, Tab 6 at pp 2742-2744, 2785.

appeal indicates that the practice of indefinite conscription lacks any basis in Eritrean law. Nevsun's expert, Professor Senai Woldeab Andemariam, states that under Eritrean law, the NSP is an 18-month program. He also states that the practice of extending it past these 18 months is extralegal. He observes that the indefinite extension was no more than an "executive announcement" with "no legislation governing it."[9] He emphasizes that these aspects of the NSP are based not on law but on "practice."[10] Prof. Andemariam's characterization is consistent with the June 2016 UNCOI report, which found no evidence of any written document or law relating to the indefinite extension of the NSP.[11]

15. Even in the case of conscripts within the first 18 months of service in the NSP, another of Nevsun's witnesses, Berhane Afwerki Weldemariam, has given evidence that national service conscripts are not officially authorized for use on private projects such as the Bisha Mine.[12]

16. The respondents allege that Nevsun engaged or caused to be engaged three Eritrean entities that supplied forced labour to the Bisha Mine: Segen, a construction company owned by the country's lone political party; Mereb, a military-owned construction company; and the Eritrean military.[13]

D. Procedural History

17. The respondents filed their claim against Nevsun as a representative action in British Columbia in November 2014. They plead a variety of established common law torts, including assault, battery, conversion, unlawful confinement, and negligence. They also plead novel common law torts drawing on standards established under the customary international law prohibitions against forced labour, slavery, crimes against humanity, and cruel, inhuman, or degrading treatment.

18. In response, Nevsun filed and litigated four motions, two of which are under appeal before this Court: the motion to dismiss the action by reason of the act of state doctrine, and the motion

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9 Cutler #1, *supra* note 7, at p 85: JAB Vol II, Tab 4, p 795.
10 *Ibid*.
11 Carmichael-Yanish #3, *supra* note 5, Ex. "4": JAB, Vol 3, Tab 6 at p 2676.
12 Affidavit #1 of Berhane Afewerki Weldemariam, made July 30, 2015, at paras 4-8: JAB Vol I, Tab 1.
13 NOCC, *supra* note 2, at paras 15, 35: AR Vol III, Tab 6.

to strike the respondents' customary international law claims. Two other motions – one to stay the claim by reason of the doctrine of *forum non conveniens* and another contesting the representative action form of procedure – came to a final resolution in the courts below.

(i) Decision of Abrioux J. in the British Columbia Supreme Court

19. Abrioux J. treated Nevsun's act of state motion as a preliminary application and ruled that it was not appropriate at such an early stage to dismiss the claim on this basis. Abrioux J. did express the opinion that the act of state doctrine was part of the law in British Columbia. He felt constrained on this point by a passage in a prior BCCA decision, as well as the fact that the doctrine was well established in both the United Kingdom and Australia.

20. Otherwise, Abrioux J. expressed considerable skepticism towards the doctrine. He called it "essentially a 'novel' defence"[14] whose application was "draconian."[15] He noted that it had never been applied in Canada, and expressed concern regarding the substantial uncertainty surrounding the doctrine's scope in places where it had been applied.[16] He also questioned its continued relevance in the modern context of growing universal recognition of fundamental human rights norms, adding, "After all, this is British Columbia, Canada; and it is 2016."[17]

21. Abrioux J. also rejected Nevsun's argument that the torts based in customary international law principles have no reasonable prospect of success. On the contrary, he considered that the respondents' claims raised a "real issue."[18] He concluded that they "should proceed to trial so that they can be considered in their proper factual and legal context."[19] This, he said, was "necessary such that the common law and the law of tort may evolve in an appropriate manner."[20]

22. On the *forum non conveniens* motion, Abrioux J. concluded that the respondents had established that there is a real risk that they would not receive a fair trial in Eritrea, and that Nevsun

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14 BCSC Reasons, *supra* note 1, at para 394: AR Vol 1, Tab 1.
15 *Ibid* at para 393: AR Vol I, Tab 1.
16 *Ibid* at para 419: AR Vol I, Tab 1.
17 *Ibid* at para 421: AR Vol I, Tab 1.
18 *Ibid* at para 484: AR Vol I, Tab 1.
19 *Ibid* at para 484: AR Vol I, Tab 1.
20 *Ibid* at para 484: AR Vol I, Tab 1.

had not established that Eritrea was the more appropriate forum for the litigation.[21] In support of their assertion that there was a real risk of an unfair trial in Eritrea, the respondents introduced firsthand testimony from former Eritrean judges who had fled the country, as well as reports from the United Nations and other international bodies, indicating that the Eritrean justice system was subject to the control of and interference by the executive, and the respondents would be at a real risk of not receiving a fair trial in Eritrea.[22]

23. Finally, Abrioux J. granted Nevsun an order denying the proceeding the status of a representative action. The respondents did not appeal this ruling. Individual claims have since been filed by over 80 additional plaintiffs in a total of 10 separate actions.

(ii) The UK Supreme Court Decision on the Act of State Doctrine in *Belhaj v. Straw*

24. After Abrioux J. released his decision, the UK Supreme Court released its landmark act of state decision in *Belhaj v. Straw*.[23] The UKSC's reasons are comprehensively summarized in the reasons of Newbury J.A. in the court below and will be discussed extensively *infra*.[24]

(iii) Decision of the British Columbia Court of Appeal

25. The Court of Appeal upheld Abrioux J.'s dismissal of the act of state motion. In Newbury J.A.'s view, there were several reasons why the act of state doctrine does not apply in this case, under any existing formulation.[25]

26. Newbury J.A. found that "the plaintiffs' claims do not purport to challenge the legality or validity (the 'effect') of a foreign state's 'legislation or other laws' nor the 'effect' of an act of a foreign state's executive in relation to events in Eritrea. The plaintiffs only seek compensation for acts on the part of Nevsun in connection with wrongs alleged to have occurred in Eritrea that are not contemplated by any legislation or official policy."[26] If it could be said that the "effect" of an

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21 *Ibid* at paras 286 and 338: AR Vol I, Tab 1.
22 *Ibid* at para 296: AR Vol I, Tab 1.
23 *Belhaj & Anor v Straw & Ors*, [2017] UKSC 3 ["*Belhaj UKSC*"].
24 BCCA Reasons, *supra* note 3, at paras 123, 142-53: AR Vol II, Tab 3.
25 BCCA Reasons, supra note 3, at para 165: AR Vol II, Tab 3.
26 *Ibid* at para 166: AR Vol II, Tab 3.

act of an executive of Eritrea was being 'questioned', such acts would by their nature be unlawful to the extent they were in breach of peremptory fundamental norms.[27]

27. According to Newbury J.A., even "if one were to accept Lord Sumption's formulation of act of state [in *Belhaj*] ('the courts will not adjudicate upon the lawfulness or validity of certain sovereign acts of foreign states'), one would again be met with the fact that the lawfulness, validity, effect of, or motives underlying, sovereign acts of Eritrea need not be analyzed by the domestic court."[28]

28. As Newbury J.A. noted, "the conduct of which the plaintiffs complain is Nevsun's alleged complicity in acts that are unlawful, and *could only be unlawful* under both domestic and international law. If the wrongs asserted in the NOCC were shown to have occurred, the only question remaining for the trial court would be Nevsun's alleged complicity therein."[29]

29. Most importantly a public policy exception would clearly apply in any case.[30] Newbury J.A. emphasized that forced labour and slavery were "contrary to both peremptory norms of international law and a fundamental value of domestic law."[31] As such, Nevsun "cannot rely on the doctrine of act of state to claim immunity from the consequences of violating same."[32]

30. Like Abrioux J., Newbury J.A. also dismissed Nevsun's motion to dismiss the respondents' customary international law claims. She observed that many of the issues raised by Nevsun were "historical or philosophical rather than legal – a fact that makes it all the more difficult [at this stage] to arrive at a clear conclusion as to the likelihood of the plaintiffs' position succeeding in Canada."[33]

31. Newbury J.A. also found no error in Abrioux J.'s analysis of the *forum non conveniens* question. Nevsun does not seek to appeal that decision and thus no longer contends that Eritrea is a more appropriate place to adjudicate this lawsuit. That decision is now final.

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27 *Ibid* at para 167: AR Vol II, Tab 3.
28 *Ibid* at para 167: AR Vol II, Tab 3.
29 *Ibid* at para 167: AR Vol II, Tab 3.
30 *Ibid* at para 169: AR Vol II, Tab 3.
31 *Ibid* at para 169: AR Vol II, Tab 3; *Belhaj UKSC*, supra note 23, at para 266.
32 *Ibid* at para 169: AR Vol II, Tab 3.
33 *Ibid* at para 195: AR Vol II, Tab 3.

PART II - STATEMENT OF ISSUES

32. The following questions are at issue in this appeal:

(i) Does the act of state doctrine operate in Canadian law to immunize a Canadian corporation from liability for common law torts and for acts of slavery, forced labour, and crimes against humanity committed in connection with the Canadian corporation's business operations in partnership with a foreign government?

(ii) Are the respondents' common law claims for damages based on breaches of customary international law norms bound to fail?

PART III - ARGUMENT

A. The Respondents' Claim is Not Barred by the Act of State Doctrine

(i) Overview

33. Nevsun's formulation of the act of state doctrine lacks modern precedent, cohesiveness and an analytical framework. Rather than draw on the comprehensive analysis of the doctrine conducted by the UK Supreme Court in *Belhaj*, Nevsun presents a confusing mix of the concepts of sovereign immunity, comity, non-justiciability, *forum non conveniens* and choice of law, all in service of an argument that the subject claim is a "root and branch" attack on Eritrean sovereignty.

34. This is a claim about the unlawful use of forced labour to construct a gold mine owned by a Canadian corporation. It does not raise issues of sovereign immunity as no relief is sought against the state of Eritrea. It does not seek to invalidate, directly or indirectly, any laws of Eritrea since Nevsun's own evidence is that there is no lawful basis for the indefinite extension of National Service in Eritrea. It presents no thorny issues of non-justiciability since the standards governing forced labour, slavery and other human rights violations are legal standards which our courts are competent to adjudicate upon. To the extent the claims raises issues of comity, the respondents emphasize this Court's holding that comity "ends where clear violations of international law and human rights begin".[34]

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[34] *R v Hape,* 2007 SCC 26 at para 27, [2007] 2 SCR 292 ["*Hape*"].

35. Applying the analytical structure developed in *Belhaj*, the act of state doctrine does not apply to this case. The same result is reached under the Australian authorities.[35]

(ii) The Act of State Doctrine

36. Act of state is a doctrine of English and American common law. As Newbury J.A. concluded, "act of state has never been directly applied by a Canadian court." The doctrine "has been described variously as a doctrine of judicial prudence or deference, judicial restraint, judicial abstention, issue preclusion, conflicts of law and choice of law."[36] However, it is not a doctrine of subject matter jurisdiction "and does not have to be considered by the court on its own motion."[37]

37. It provides that in ordinary circumstances, courts should recognize the lawful acts of sovereign states within their own territory as effective. The traditional application of the doctrine is where a foreign government issues a decree purporting to confiscate private property.[38] Should a dispute subsequently arise in a domestic court over title to that property, the court will recognize the foreign government decree as valid and effective.

38. Beyond this paradigmatic case, the doctrine engenders considerable confusion as to when it applies. In *Belhaj*, Lord Mance voiced the frustration that the doctrine "displays in every respect such uncertainty and confusion and rests on so slippery a basis that its application becomes a matter

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35 *Habib v Commonwealth of Australia*, [2010] FCAFC 12 ["*Habib*"]; *Moti v The Queen*, [2011] HCA 50, 245 CLR 456 ["*Moti*"].

36 Matthew Alderton, "The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib" (2011) 12 Melb J Int'l L 1, at 2: Respondent's Book of Authorities ["RBA"], Tab 22. See also *Belhaj UKSC*, *supra* note 23, at para 7.

37 Beth Stephens et al., *International Human Rights Litigation in U.S. Courts*, 2d ed (Leiden: Martinus Nihjoff Publishers, 2008), at p 349: RBA, Tab 17.

38 BCCA Reasons, *supra* note 3, at para 168: AR Vol II, Tab 3. See also *Buttes Gas v Hammer*, [1982] AC 888 (HL) at 931 ("A second version of "act of state" consists of those cases which are concerned with the applicability of foreign municipal legislation within its own territory, and with the examinability of such legislation – often, but not invariably, arising in cases of confiscation of property."): RBA, Tab 5.

of speculation."[39] Newbury J.A. noted that there is considerable uncertainty concerning the doctrine while Abrioux J. cited the Australian Federal Court's comment that "Beyond the certainty that the doctrine exists there is little clarity as to what constitutes it."[40]

39. The latest attempt to clarify the doctrine is *Belhaj*. Writing for the majority, Lord Neuberger synthesized the divergent strands of case law and discerned that the doctrine is actually composed of three discrete rules:

(a) The first rule is that domestic courts must recognize the effect of a foreign state's legislation in relation to acts within that state's territory, whether they relate to property or to personal injury.[41] [Historically, this rule has not been followed in Canada as Canadian courts have inquired into the validity of a foreign law within its country of origin as part of its determination as to whether to apply the foreign law.[42]]

(b) The second rule is that domestic courts must recognize the effect of the lawful acts of a foreign state's executive within that state's territory in relation to property. This rule may also extend to unlawful executive acts in relation to property, but it does not extend to unlawful executive acts in relation to personal injury.[43]

(c) The third rule, which is slightly different in nature, is that domestic courts shall not intrude into matters of high foreign policy involving relations between sovereign states. It "almost always only will apply to actions involving more than one state."[44]

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39 *Belhaj UKSC, supra* note 23, at para 33. See also Lord Neuberger at para 118 – "it is a principle whose precise scope is not always easy to identify."

40 BCSC Reasons, *supra* note 1, at para 357: AR Vol I, Tab 1.

41 *Belhaj UKSC, supra* note 23, at paras 121, 159.

42 Martin Bühler, "The Emperor's New Clothes: Defabricating the Myth of "Act of State"" in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) ["Bühler], at pages 346 to 350. RBA, Tab 21.

43 *Belhaj UKSC, supra* note 23, at paras 122, 136-43, 160-62.

44 *Ibid* at para 165.

> Examples include "making war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory."[45]

40. Although it remains poorly understood exactly when the act of state doctrine applies, it is well established that it has exceptions or limitations. An oft-repeated observation is that the act of state doctrine is 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."[46] In other words, the circumstances in which the doctrine will not apply are better understood and defined than those in which it will apply.

41. The first exception or limitation is the public policy limitation, which provides that 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 principles of public policy, or grave infringements of human rights.[47] Thus, the act of state doctrine does not apply where the result would be "inconsistent with what are currently regarded as fundamental principles of public policy."[48] Although this is to be assessed according to strictly domestic considerations, "norms of international law are plainly capable of playing a decisive role."[49]

42. Another limitation, named after a US Supreme Court decision, is the *Kirkpatrick* limitation. It limits application of the doctrine only to cases that involve "denying legal effect" to a foreign official act,[50] which means that act of state will not be engaged where the relief sought does not require a domestic court to invalidate the laws or acts of a foreign state.

43. The final limitation relevant here is the commercial activity limitation. The act of state doctrine only protects sovereign acts. Actions taken by state organs in furtherance of commercial activities do not qualify.[51]

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45 *Ibid* at para 123.

46 *Belhaj v Straw*, [2014] EWCA Civ 1394 ["*Belhaj EWCA*"], at para 54, citing *Yukos Capital Sarl v OJSC Rosneft Oil Co (No.2)* [2012] EWCA Civ 855 ["*Yukos*"], at para 115.

47 BCSC Reasons, *supra* note 1, at para 353: AR, Vol I, Tab 1, citing *Belhaj EWCA* at para 54.

48 *Belhaj UKSC*, *supra* note 23, at paras 153, 154.

49 *Ibid* at para 154; see also paras 107, 168 and 257.

50 *W.S. Kirkpatrick & Co. v Environmental Tectonics Corp. Int'l*, 493 US 400 (US 1990) ["*Kirkpatrick*"]: Appellant's Book of Authorities ["ABA"], Tab 15.

51 *Yukos, supra* note 46, at para 92.

44. The act of state doctrine is not triggered in this case. However, even if the Court finds that it is engaged, all three of these limitations apply such that the case should not be dismissed.

(iii) The Act of State Doctrine Does Not Apply in This Case

45. Newbury J.A., applying *Belhaj*, provided a thorough rebuttal of the argument Nevsun advances again in this Court, that the act of state doctrine should apply in this case.

46. *Belhaj* arose out of the United Kingdom's alleged involvement in a program of rendition. Mr. Belhaj alleged that agents of the UK government were complicit in his abduction and forced transport to Libya where he was subsequently tortured. He sought to hold the Crown accountable. The UKSC held that his claims were not barred by the act of state doctrine.[52]

47. Newbury J.A. characterized the 2-2-2-1 decision as follows:

> i. Lord Mance "disaggregated" the act of state doctrine into three (or four) discrete rules. He concluded that none of these applied and if they did, he would have invoked the public policy limitation.
>
> ii. Lord Neuberger (joined by Lord Wilson) also set out a three-rule formulation of the doctrine, but his rules were different from those suggested by Lord Mance. Lord Neuberger concluded that none of them applied and in any event, he would have invoked the public policy limitation.
>
> iii. Lady Hale and Lord Clarke agreed with Lord Neuberger that act of state did not apply and viewed the reasons of Lord Mance as essentially the same as those of Lord Neuberger on that point. They declined to express a view on the public policy limitation.
>
> iv. Lord Sumption, joined by Lord Hughes, set out a more unified formulation of the doctrine, concluding first that act of state applied, but that in the end, the public policy limitation was engaged.[53]

48. Newbury J.A. then summarized the divergent decisions thus:

> In the result, five of the seven members of the Court were of the view that act of state did not apply; Lords Sumption and Hughes disagreed. Lord Mance expressed a preference for limiting the scope of his third rule, rather than grafting a public policy limitation onto it. However, in the end, he said nothing turned on this

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52 *Belhaj UKSC*, supra note 23, at para 3.

53 BCCA Reasons, *supra* note 3, at para 142: AR Vol II, Tab 3.

> difference; what mattered was "how one defines the ambit [of the third rule] or any exceptions." (See para 89.) Thus, five of the judges, including Lord Sumption, were of the view that the public policy limitation would also apply; two expressed no opinion on that point. (See para. 174.) The opinion of Lord Neuberger may be loosely regarded as the majority opinion, although it is Lord Sumption's decision on which Nevsun largely relies in its arguments on this appeal.[54]

49. The act of state doctrine as articulated in *Belhaj* (on any of the four versions of the doctrine envisioned) would not apply to bar the respondents' claims in this case.

50. Having explained *Belhaj*, Newbury J.A. found that "the plaintiffs' claims do not purport to challenge the legality or validity (the 'effect') of a foreign state's 'legislation or other laws' nor the 'effect' of an act of a foreign state's executive in relation to events in Eritrea." Rather, they seek compensation for acts or omissions by Nevsun in connection with wrongs that occurred at the Bisha Mine.[55]

51. Indeed "the lawfulness, validity, effect of, or motives underlying, sovereign acts of Eritrea need not be analyzed by the domestic court.... If the wrongs asserted in the NOCC were shown to have occurred, the only question remaining for the trial court would be Nevsun's alleged complicity therein."[56]

52. Nevsun's only answer is to state again, incorrectly, that "to obtain the relief sought the plaintiffs must establish that the National Service Program is forced labour and a crime against humanity" and that "[t]he predicate determinations that the Eritrean State acted unlawfully are not incidental to the allegations of liability on the part of Nevsun: they are foundational."[57] This argument is clearly inapplicable to the claims of forced labour and slavery as it ignores Nevsun's own evidence that the indefinite extension of conscription under the National Service Program

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54 *Ibid*, at para 142: AR Vol II, Tab 3.

55 *Ibid* at para 166: AR Vol II, Tab 3.

56 *Ibid* at para 167: AR Vol II, Tab 3. Newbury J.A. emphasized that the conduct is unlawful anyway: "The conduct of which the plaintiffs complain is Nevsun's alleged complicity in acts that are unlawful, and could only be unlawful under both domestic and international law."

57 Appellant's Factum, at para 48.

lacks any basis in Eritrean law. In any event, *Belhaj* and *Habib* confirm that there is no prohibition on inquiring into the conduct of a foreign state which violates fundamental human rights.

53. Nevsun's version of the act of state doctrine takes the concept of comity much too far and seeks to elevate it to a rule of law barring judicial inquiry. Comity refers to informal acts and rules observed by states out of politeness, convenience and goodwill. It is not a rule of law as it does not arise from any formal legal obligations.[58] Further, as Mosley J. noted in *Khadr v. Canada*, defendants should not be able to "escape the reach of tort law… simply by virtue of collaborating with foreign agents."[59] Nevsun has not and cannot articulate how it is that enforcement of universally accepted peremptory norms can violate comity. The universal nature of the norms suggests the opposite conclusion – failure to abide by these norms is an affront to the international legal order.

The Public Policy Limitation Applies

54. Even if the act of state doctrine did apply in this case, the public policy limitation is clearly engaged. The prohibitions against forced labour, slavery, and crimes against humanity are *jus cogens* norms.[60] As such, they lie at the inviolable core of the system of internationally-protected fundamental human rights. Lord Neuberger noted that such norms would "almost always" engage the public policy limitation.[61] The Court of Appeal had little trouble reaching the same conclusion.[62]

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58 *Hape*, *supra* note 34, at para 47.

59 *Khadr v Canada*, 2014 FC 1001 ["*Khadr*"], at para 39.

60 Nevsun argues that forced labour falls outside this category, but this is not so. See *Doe I v Unocal Corp.*, 395 F. (3d) 932 (9th Circuit 2002) ("forced labor is so widely condemned that it has achieved the status of a jus cogens violation."): RBA, Tab 8; International Labour Organization, *Forced labour in Myanmar (Burma), Report of the Commission of Inquiry Appointed under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention*, 1930 (No. 29) UN ILO, 1998, at para 203. Moreover, there is no requirement that only *jus cogens* norms can trigger the public policy limitation.

61 *Belhaj UKSC*, *supra* note 23, at para 168.

62 BCCA Reasons, *supra* note 3, at para 169: AR Vol II, Tab 3.

55. However, to avoid this result, Nevsun aims to re-characterize the public policy limitation as a sort of balancing test, in which fundamental human rights must be weighed against considerations of comity. Nevsun further alleges that the courts below offered no rationale as to why upholding fundamental human rights should be a higher order concern.

56. In fact, Newbury J.A. offered a clear rationale:

> The nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy; nor has it been argued in this case that they are. As Lord Sumption observed, torture (and I would add, forced labour and slavery) is "contrary to both peremptory norms of international law and a fundamental value of domestic law."[63]

57. This echoes the guidance of this Court in *R v. Hape*, where LeBel J. wrote that the "deference [required by the principle of comity] ends where clear violations of international law and fundamental human rights begin,"[64] and that "the need to uphold international law may trump the principle of comity."[65]

58. Violations of internationally protected fundamental human rights simply do not qualify as valid sovereign acts that are beyond review by courts. Thus, there is no weighing of public policy against comity. The public policy exception is not a balancing test.

59. Nevsun further asserts that allegations of fundamental human rights violations do not engage the public policy limitation unless there has been some prior external confirmation of the alleged violations in an appropriate forum, on which the domestic court can rely. This is an argument that has been raised elsewhere in the Commonwealth, and rejected each time.[66]

60. In *Habib*, the court found that the case law, including *Kuwait Airways Corporation v Iraqi Airways Co*, did not support a distinction between known and alleged human rights violations and there was no principled basis for doing so.[67]

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63 *Ibid* at para 169: AR Vol II, Tab 3.

64 *Hape*, *supra* note 34 at para 52. See also *Canada (Justice) v Khadr*, 2008 SCC 28 at para 18, [2008] 2 SCR 125.

65 *Hape*, *supra* note 34, at para 51.

66 *Belhaj EWCA*, *supra* note 46, at paras 114-120; *Habib*, *supra* note 35, at para 110.

67 *Habib*, *supra* note 35, at para 110; *Kuwait Airways Corporation v Iraqi Airways Company*, [2002] 2 AC 883 at paras 12-18 [2002] 2 WLR 1353.

61. As unsuccessful litigants have done elsewhere, Nevsun cites to this Court's decision in *Khadr* in support of this argument, but *Khadr* is a *Charter* decision, not an act of state case.[68]

62. Even if external confirmation were required, there is ample such confirmation in this case. United Nations bodies, including the UNCOI, have concluded that the practices associated with Eritrea's National Service Program constitute forced labour, slavery, and crimes against humanity.[69] Similarly, the International Labour Organisation (ILO), has affirmed that "labour exacted from the population in the framework of compulsory national service… constitutes forced labour."[70]

The Kirkpatrick Limitation Applies

63. The *Kirkpatrick* limitation was explained by the US Supreme Court as follows:

> Act 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.[71]

64. The High Court of Australia in *Moti v. The Queen* accurately encapsulates the essence of the *Kirkpatrick* limitation:

> the Courts are free to consider and pronounce an opinion upon the exercises of sovereign power by a foreign Government, if the consideration of those acts of a

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68 *Canada (Justice) v Khadr*, 2008 SCC 28 at paras 3 and 21-26.

69 Carmichael-Yanish #3, *supra* note 5, Ex. "4", JAB Vol 3, Tab 6 at pp 2785. Nevsun in its submissions acknowledges that the UN Human Rights Council is among the international bodies having sufficient authority to make such a determination. Appellant's Factum, at para. 55. In fact, the UNCOI was established by a resolution of the UN Human Rights Council, which also endorsed its findings through another resolution.

70 International Labour Organization, *Forced Labour Convention, 1930 (No. 29) – Eritrea (Ratification: 2000)*, Observation (CEACR) - adopted 2017, published 107th ILC session (2018).

71 BCCA Reasons, *supra* note 3, at para 170, citing *Kirkpatrick*: AR Vol I, Tab 1.

> foreign Government only constitutes a preliminary to the decision of a question ... which in itself is subject to the competency of the Court of law.[72]

65. Here, on some of the respondents' claims, the acts of Eritrean officials are "a preliminary to" determining Nevsun's liability. Nothing in the respondents' claims purports to modify or undo the legal effect of any official act taken pursuant to any Eritrean law that has been identified by Nevsun.

66. Newbury J.A. correctly concluded that *Kirkpatrick* would apply in the case at bar as "the plaintiffs here are not attempting to undo or disregard any act of government, but only to obtain damages from private parties who are alleged to have been complicit therein." In addition, "Nevsun's exoneration under act of state would 'serve no interest which it is the purpose of the doctrine to protect.'"[73]

The Commercial Activity Limitation Applies

67. The acts of forced labour and slavery in this case are commercial in nature. They are the means by which labour was provided for a business venture. They do not lose their commercial character solely by reason of constituting human rights violations.

68. Similarly, the activities in question had a fundamentally commercial purpose. This purpose was the development and operation of the Bisha Mine with a view to generating a profit from the production of gold and other metals.

69. This case is, in fact, the opposite of a case like *Re Canada Labour Code*, where the employment activities were undertaken in furtherance of a fundamentally sovereign purpose, the operation of a US Navy base.[74] Here, the supply of forced labour by parastatal entities was in furtherance of a commercial venture – the construction and operation of a mine.

70. Neither is this a case like *Bouzari v Islamic Republic of Iran*, where the underlying financial motive was only incidental to the alleged acts of torture which were the primary basis of the

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72 *Moti, supra* note 35, at para 52.
73 *Kirkpatrick, supra* note 50, at para 173: ABA, Tab 15.
74 *Re Canada Labour Code*, [1992] 2 SCR 50 at pp 78, 91 DLR (4th) 449.

claim.[75] Here, the acts of forced labour and slavery, themselves commercial in nature, are the focal point of the claim.

71. The commercial nature of the operation is further addressed in the respondents' fresh evidence motion which has been referred to the panel of the Court hearing this appeal.[76]

(iv) Nevsun's Rationales in Support of a Vastly Expanded Version of Act of State Do Not Apply

72. In its submissions, Nevsun cites no concrete legal standard for its version of the act of state of doctrine. Instead, it relies heavily on abstract policy arguments and emotive language such as "root and branch" attack and "denial of sovereignty." The reason is that through the course of proceedings in two levels of court, it has become clear that no existing legal formulation of the act of state doctrine would apply in this case. Nevsun focuses instead on what it asserts are the doctrine's underlying rationales. However, none of the rationales advanced by Nevsun support the creation of a new and vastly expanded version of the act of state doctrine that would apply to shield Nevsun's conduct from judicial scrutiny.

First Rationale: Sovereignty of Foreign States

73. Nevsun's first rationale is that the doctrine must be applied in this case to ensure respect for the sovereignty of foreign states. However, Canadian conflict of laws already applies numerous rules designed to ensure respect for comity and the sovereignty of other nations.

74. For instance, Lords Neuberger and Mance noted in *Belhaj* that the act of state doctrine overlaps substantially with principles of choice of law.[77] That is, a defendant may simply argue that the law applicable to the claim is the foreign law, under which its actions were lawful.

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75 *Bouzari v Islamic Republic of Iran*, (2004) 71 OR (3d) 675 (CA) at paras 49-55, 243 DLR (4th) 406 ["*Bouzari*"].

76 See order of Justice Brown, dated November 26, 2018.

77 *Belhaj UKSC*, *supra* note 23, at paras 150, 159 (per Lord Neuberger), and paras 35, 38 (per Lord Mance).

75. Canadian courts have also recognized that state immunity protects foreign states from being "indirectly impleaded" in a claim where its legal interests are affected.[78] Here, Nevsun initially raised a state immunity argument, but subsequently abandoned it.[79]

76. *Forum non conveniens* offers yet another tool for a litigant concerned about the sovereignty of a foreign nation. The *forum non conveniens* analysis is designed to take into account all relevant factors weighing for and against asserting a court's jurisdiction, including the ones raised by Nevsun here. A defendant may thus raise comity as a consideration in arguing that the courts of the foreign state are a more appropriate forum. Nevsun did precisely this, unsuccessfully, in the courts below.[80] As noted, no appeal is taken from that decision in this Court.

77. Abrioux J. heard Nevsun's arguments that sovereign acts of the Eritrean state should be respected. He also heard the respondents' arguments that, *inter alia*, Eritrean courts were subordinate to the executive, that many judges lived in fear of retribution should they fall into disfavour with the state or military, and that the respondents had no effective or safe way to litigate such a case in Eritrea. Abrioux J. weighed these factors and decided that the BC court was, on balance, the best forum.

78. Having lost the *forum non conveniens* argument, Nevsun now seeks through the act of state doctrine to effectively re-litigate it with reference to just one of the relevant factors, excluding consideration of the others. This would undermine the statutory scheme devised by the legislature in s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*.[81]

79. In particular, this Court has already ruled that considerations of comity and deference to foreign states cannot oust all the other relevant factors in the *forum non conveniens* analysis. In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [82] McLachlin CJ rejected arguments that

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78 *Khadr*, *supra* note 59, at paras 19-43.

79 Defendant's Notice of Application to Dismiss, Stay, or Strike Plaintiffs' Claims Based on the Act of State Doctrine and State Immunity, filed August 12, 2015, at paras 10, 24-25: AR Vol III, Tab 10.

80 BCSC Reasons, *supra* note 1, at para 232: AR Vol I, Tab 1.

81 *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c. 28, s. 11 ["*CJPTA*"].

82 *Teck Cominco v Lloyd's Underwriters*, 2009 SCC 11, at para 23.

considerations of comity must trump all the other factors, noting that s. 11 of the *CJPTA* "is itself a comity-based approach."[83]

Second Rationale: Domestic Courts Lack Expertise in the Subject Matter

80. As a second rationale for applying the act of state doctrine in this case, Nevsun contends that domestic courts "lack expertise in the dauntingly wide field of international law."[84] This, Nevsun says, is more properly the domain of "expert international tribunals,"[85] of which it offers several examples that it asserts are more suitable fora.[86]

81. This argument ignores that the respondents plead several long-established domestic torts, including negligence. The negligence claim, for example, will turn on whether the respondents prove they were at the mine and that they were forced to work there, and whether Nevsun owed a duty of care to them by reason of, among other things, Nevsun's adoption of standards on forced labour and the company's own Corporate Social Responsibility policies and statements. This is an analysis that a BC court is well positioned to undertake.

82. Further, this is not an analysis that international criminal tribunals would even have jurisdiction to undertake. Indeed, Nevsun's argument that the respondents' case is a "root and branch" attack on Eritrean sovereignty seems tied primarily to respondents' crimes against

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83 Nevsun also claims without any evidence that because foreign states are immune in Canada, "aiding and abetting actions like this one can be expected to arise" and that other factors "will inevitably attract such claims to Canada." Appellant's Factum at para 23. This is overstated. Claims like these will only arise when a private corporation or person over whom a Canadian court has jurisdiction has itself committed such violations or when the relationship of that defendant is so close to a foreign government that has committed such violations that the defendant can be credibly alleged to have aided and abetted the violations.

84 Appellant's Factum, at para 32.

85 *Ibid* at para 32.

86 *Ibid* at para 55.

humanity claim[87] which will require an analysis of whether the indefinite National Service Program is a widespread or systematic attack on the Eritrean population.

83. But in suggesting that international legal tribunals are a more appropriate forum to litigate this issue, Nevsun ignores the international law principles of subsidiarity and complementarity which confer primacy to national courts:

> Since its creation in the 1940s, the international human rights system has placed primary reliance on states to ensure the protection of human rights. International institutions facilitate that protection in a variety of ways – by providing guidance, assistance, monitoring, and back-up – but without replacing states as the primary guarantors.[88]

84. Likewise, the International Criminal Court (ICC) was created with explicit jurisdictional rules deferring to national courts:

> At the heart of that new system is the idea that, first and foremost, the courts at the national level should deal with cases of serious violations. And the ICC, according to the Rome Statute, is complementary to those national jurisdictions…. It has become obvious from the cases that have been considered by the ICC so far that complementarity is one of the most important concepts — if not THE most important concept —in the Rome Statute and the global fight to end impunity for serious crimes.[89]

85. Thus, Nevsun's assertion that we should look to international tribunals for resolution of claims of this nature simply reinforces, rather than displaces, the need for Canadian courts to address serious violations of human rights by Canadian companies.

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87 *Ibid* at para 47 ("The plaintiffs' central allegation is that Eritrea's National Service Program is an illegal system of forced labour and a crime against humanity.").

88 Gerald L. Neuman, "Subsidiarity," in Dinah Shelton, ed, *The Oxford Handbook of International Human Rights Law*, (Oxford, United Kingdom: Oxford University Press 2013), at 363-64: RBA, Tab 18.

89 International Center for Transitional Justice, "What Is Complementarity? National Courts, the ICC, and the Struggle Against Impunity", 2016, online: https://www.ictj.org/sites/default/files/subsites/complementarity-icc/; See also United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Rome Statute of the International Criminal Court*, July 17, 1998, UN Doc. A/CONF.183/9, 2187 UNTS 90, article 17.

Third Rationale: Non-Interference in Foreign Affairs

86. Nevsun also asserts that the act of state doctrine is necessary to avoid impinging on the executive branch's proper sphere of authority with respect to the conduct of foreign relations. However, this Court has already rejected this argument, finding that a court may make a determination that touches on a question connected to foreign affairs if a litigant's concrete legal rights are validly in question.[90] As such, "this consideration has never been as important a factor in Anglo-Canadian jurisprudence."[91]

87. Further, Nevsun does not explain, or provide any evidence to establish, how this particular litigation would interfere with executive authority over foreign relations.

88. The decisions cited by Nevsun do not support its position. This is not a case like *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, where the Court was asked for (and ultimately granted) a remedy that directly intervened in the actual conduct of foreign relations. Nor is this a case like *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, where the defendant was an actual foreign government.

89. Here, the Court will not have to adjudicate a claim that will directly impact a foreign state's legal interests. In *Khadr v. Canada*, Mosley J. made an astute observation in this regard:

> The Defendant is correct that this Court would have to deem the conduct of U.S. officials unlawful in order to hold Canada liable under unlawful means conspiracy. However, it is well accepted that a court may evaluate the behaviour of a foreign state for purposes that do not affect its legal interests… Moreover, this Court routinely scrutinizes the behaviour of foreign states in refugee cases. To determine whether claimants are at risk of persecution or torture upon return, Federal Court judges often assess the likelihood that state agents might commit some of the most egregious international crimes against them, often by investigating the past behaviour of those states.[92] [Emphasis added]

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90 *Operation Dismantle v The Queen*, [1985] 1 SCR 441 ["*Operation Dismantle*"], at paras 55-67.

91 Bühler, *supra* note 42, at p 354: RBA, Tab 21.

92 *Khadr*, *supra* note 59, at para 39.

90. Consistent with this observation, courts and tribunals adjudicating refugee claims both in Canada[93] and around the world[94] have on many occasions made determinations that Eritrean state agents have committed acts of forced labour, slavery, torture, and crimes against humanity. Thus, the same judicial pronouncements that Nevsun warns would put Canadian foreign relations in jeopardy have already been made repeatedly. Nevsun presents no evidence that this has impeded the ability of the executive branch to conduct foreign relations.

Fourth Rationale: Government Policy Favours Non-Judicial Mechanisms

91. Finally, Nevsun argues that the Canadian government has pursued a policy choice that favours the use of non-judicial mechanisms (to the outright exclusion of judicial mechanisms) to encourage Canadian companies operating abroad to comply with international human rights standards. Nevsun offers no evidence that such a policy exists. Instead, Nevsun points to various non-judicial measures the Canadian government has introduced to address the human rights responsibility of Canadian companies operating abroad. In particular, Nevsun points to the creation of the office of the Canadian Ombudsperson for Responsible Enterprise in 2018. From this, Nevsun urges the inferential leap that it is the government's policy intent that such mechanisms serve as a replacement for bringing claims against Canadian mining companies to Canadian courts.

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93 See e.g. *Yhdego v. Canada (Citizenship and Immigration)*, 2017 FC 1172, at para 10; *X (Re)*, 2018 CanLII 64868 (CA IRB), at para 41; *X (Re)*, 2017 CanLII 143136 (CA IRB), at paras 40, 46; *X (Re)*, 2016 CanLII 107894 (CA IRB), at para 18; *Chirum v Canada (Public Safety and Emergency Preparedness)*, 2015 CanLII 93550 (CA IRB), at para 34 (aff'd 2017 FC 101); Affidavit #1 of Jared Will, made October 12, 2015 ["Will #1"], at Ex. "K" paras 14, 16: JAB Vol 8, Tab 7; Will #1, at Ex. "G", at para 13: JAB Vol 8, Tab 7; Will #1, at Ex. "M", para 11: JAB Vol 8, Tab 7; Will #1, at Ex. "P", at p 119: JAB Vol 8, Tab 7.

94 *Nuru v Gonzales*, 404 F. (3d) 1207 (9th Cir 2005) ("The severe form of cruel and inhuman treatment to which Nuru was subjected by the Eritrean army falls well within the definition of torture set forth in the Convention"): RBA, Tab 13; *Milat v Holder*, 755 F. (3d) 354 (5th Cir 2014) ("the Eritrean National Service is a hybrid of traditional military conscription and a system of forced labor akin to slavery."): RBA, Tab 12. See also *NM (Draft evaders – evidence of risk) Eritrea*, [2005] UKIAT 00073, at para 12; *MA (Female draft evader) Eritrea* [2004] UKIAT 00098, at paras 23-24; *1103210,* [2011] RRTA 382 (24 May 2001), at paras 50, 54; *0907135,* [2009] RRTA 1082 (6 November 2009), at paras 61-62, 66-67.

92. While such unsubstantiated speculation clearly does not demonstrate government intent, in the case of the Ombudsperson, the federal government has actually stated that it is not trying to preclude civil litigation:

> **Will the Ombudsperson serve as a replacement for bringing claims against Canadian mining companies to Canadian courts?**
>
> The 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.[95]

93. Finally, the federal government has not intervened in or registered an objection to this proceeding. As Nevsun notes, the Canadian government has done so previously against a different Canadian company in a US court.[96]

(v) Conclusion

94. Nevsun seeks immunity from suit in Canada on the basis that a Canadian court may not assess the laws or executive acts of a foreign state even where those acts lack a basis in law and violate fundamental human rights.

95. There is no basis in Canadian jurisprudence for Nevsun's position. The act of state doctrine has never been applied by a Canadian court, and even under UK, US or Australian standards it would not apply here. The highest levels of courts in both the UK and Australia have rejected the argument that they are barred from considering the conduct of foreign states in like circumstances.[97] A private corporation is not entitled to immunity on claims related to a joint business venture with a foreign state, particularly one in which major human rights violations are alleged to have occurred.

96. The consequences of Nevsun's position are disconcerting. Nevsun argues that if the acts of Eritrea were lawful, "it cannot have been tortious for Nevsun to have assisted in their commission

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95 Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng&_ga=2.10241205.1082788558.1519150855-1667319261.1516126772.

96 Appellant's Factum, at para 34.

97 *Belhaj UKSC*, *supra* note 23; *Moti*, *supra* note 35.

or to have failed to protect the plaintiff from their consequences."[98] Yet Nevsun takes the position that, due to the act of state doctrine, a Canadian court is not even permitted to address the lawfulness of the acts. The logical conclusion of Nevsun's argument is that even if a Canadian corporation aids or abets, or is otherwise complicit in gross violations of human rights and/or fails to protect plaintiffs from those violations, it is beyond a Canadian court to offer relief. This position must be rejected.

B. The Respondents' Claims Rooted in *Jus Cogens* Norms of Customary International Law Are Not Bound to Fail

97. The conduct alleged in this action is clearly tortious, and long-established common law torts including negligence, battery, false imprisonment, and unjust enrichment have been pleaded. The question for this Court is whether there is any binding authority or other radical defect which confines the respondents to advancing claims based solely on these established nominate torts rather than also seeking a common law remedy of damages based directly on breach of customary international law norms.

98. The development of the common law will be aided by the recognition of torts which fully capture the prohibited injurious conduct, rather than treating these kinds of claims as a variant or hybrid of traditional torts. In the same way that torture is not simply battery, slavery is not simply a combination of unlawful confinement, unjust enrichment, and battery.

99. The US District Court for the Southern District of New York made this point with considerable force in *Presbyterian Church of Sudan v. Talisman Energy, Inc.* There, Judge Schwartz rejected an argument that Canada was a more appropriate forum for civil claims of genocide, war crimes, torture, and slavery against a Canadian company with operations in Sudan. In arriving at this conclusion, he cited the inadequacy of the traditional common law torts available in Canada to address such serious claims:

> [Causes of actions available in Canada] included a variety of common law claims (battery, false imprisonment, assault, intentional infliction of mental suffering, conspiracy, unlawful interference with economic interests, trespass to chattels, and negligence)…

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[98] Appellant's Factum, at para 47.

> The concern is that the causes of action available do not reflect the gravity of the alleged offenses, and in particular, the universally-condemned nature of these acts. The offenses alleged in the Amended Complaint are considered international crimes entailing individual responsibility and subject to universal jurisdiction precisely because they constitute a fundamental affront to the international order. Such crimes are more than the sum of their parts. Genocide may quantitatively be the same as a large number of murders, but it is qualitatively different, and this difference is recognized by the fact that the act enjoys special status under international law.[99]

100. These claims should only be struck if it is plain and obvious that they are bound to fail.[100] The chambers judge and the Court of Appeal applied this standard and allowed the claims to continue.[101] The fact that the claims raise novel and complex issues is reason to preserve, not strike the claims at this stage.

101. The *jus cogens* norms invoked here stand at the apex of customary international law.[102] They reflect fundamental values of our community and our collective abhorrence of such violations as slavery and crimes against humanity.

102. The common law must be adapted to reflect the changing social, moral and economic fibre of Canadian society. In assessing whether to recognize new nominate torts, *Charter* values inform the assessment of the societal importance of the rights at issue.[103] The common law should also develop in a manner consistent with *Charter* principles.[104] The values underlying the prohibition on, *inter alia*, slavery and crimes against humanity are *Charter* values and are rooted in the same notions of personal liberty and dignity embodied in s. 7.

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99 244 F. Supp. 2d 289, 337 (SDNY 2003): ABA, Tab 9.

100 *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959, at paras 990-91.

101 BCCA Reasons, *supra* note 3, at paras 179, 180, 197: AR Vol II, Tab 3.

102 Nevsun claims that forced labour has not reached the level of a *jus cogens* violations. As discussed at footnote 60 above, this is incorrect. It is also irrelevant given that claims of slavery and crimes against humanity have been pleaded. Nevsun does not contest that these are *jus cogens* violations. Additionally, there is not a requirement that a customary international law norm has reached *jus cogens* status to form a part of the common law.

103 *R v Salituro*, [1991] 3 SCR 654, at 670; *Jones v Tsige*, 2012 ONCA 32 ["*Tsige*"].

104 *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573; *Dagenais v CBC*, [1994] 3 SCR 835; *Hill v Church of Scientology*, [1995] 2 SCR 1130.

103. Even so, change in the common law must be incremental. Despite Nevsun's overblown claims of "complex and far-reaching effects" from such a change, the claims advanced are incremental. The underlying conduct is already tortious, and civil claims can already be filed based on existing torts. The recognition of these new claims will not create litigation in Canada that would not otherwise be available to victims. The question is only whether plaintiffs will be able to plead claims based on prohibitive norms of customary international law in addition to well-established tort claims like negligence or battery.

104. As Newbury J.A. found in concluding that respondents' claims are not bound to fail:

> If, as the Court suggested, the development of the law in this area should be gradual, it may be that an incremental first step would be appropriate in this instance…. We have seen that international law is "in flux" and that transnational law, which regulates "actions or events that transcend national frontiers" is developing, especially in connection with human rights violations that are not effectively addressed by traditional "international mechanisms".[105]

105. Slavery may not be a new problem, as Nevsun asserts, but the fact that slavery persists into this century strongly suggests the need for new responses.

106. Nevsun argues that recognizing tort claims derived from peremptory norms is unnecessary but at the same time, it denies, as a matter of law, that it can be held liable under the existing nominate torts pleaded. Notwithstanding the fact that UK courts[106] have established that a parent company owes a duty of care to individuals harmed by its overseas conduct, Nevsun pleads that no such duty exists under Canadian law.[107] With respect to the claims advanced in battery, unlawful confinement and unjust enrichment, Nevsun claims it is protected by an inviolable corporate veil.[108] Hence, existing nominate torts may not fully address the impugned conduct and

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[105] BCCA Reasons, *supra* note 3, at paras 196-197: AR Vol II, Tab 3, relying on S. Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in C. Scott ed, *Torture as Tort: Comparative Perspectives in the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) at 374-5: RBA, Tab 24.

[106] *Chandler v Cape PLC*, [2012] EWCA Civ 525, [2012] 3 All ER 640.

[107] Defendant's Response to Civil Claim, filed February 13, 2015 ["Nevsun's Response to NOCC"], at paras 13 to 16: AR Vol III, Tab 7.

[108] Nevsun's Response to NOCC, at paras 22 to 25: AR Vol III, Tab 7.

the claims advanced here on the basis customary international law norms may well be required for the plaintiffs to vindicate their rights.

107. Most importantly, Nevsun pleads that this case is governed by Eritrean law[109] and asserts on this appeal that if the conduct complained of here is lawful under Eritrean law, Nevsun cannot be held liable at all notwithstanding the fact that the conduct violates peremptory norms of international law.[110] The possibility that states with little regard for the rule of law may attempt to authorize acts of, for example, forced labour and slavery, is a significant factor that supports the respondents' argument that these claims should be recognized and permitted to stand trial.

108. The potential for multinational corporations to engage in ventures with repressive governments or in weak states, in a way that outpaces the ability of existing mechanisms to provide remedies when violations occur is a modern phenomenon which has been recognized by the United Nations.[111] As the chambers judge noted, citing the Hon. Ian Binnie, C.C., Q.C.:

> Today, however, transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood. This has created a challenge for the international community as it seeks to develop remedies for harms arising out of the involvement of such companies in human rights abuses.[112]

109. Applying universal, transnational norms to conduct of this nature would allow the common law to develop remedial mechanisms which are aligned more closely to the transnational nature of the harm at issue than traditional torts of negligence and unjust enrichment.

110. Multinational businesses already incorporate compliance with international law norms into their activities. Here, for instance, the respondents have pleaded that Nevsun adopted International Finance Corporation (IFC) standards which prohibit the use of forced labour as defined by international conventions negotiated through the International Labour Organization (ILO) and the United Nations (UN).

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[109] Nevsun's Response to NOCC, at para 7: AR Vol III, Tab 7.
[110] Appellant's Factum, at para 47.
[111] Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie***,** 8th Sess, UN Doc A/HRC/8/5 (7 April 2008) at para 3.
[112] BCSC Reasons, *supra* note 1, at para 467: AR Vol I, Tab 1.

(i) Adoption of Customary International Law into Canadian Common Law

111. In *Hape*, this Court reaffirmed the doctrine of adoption of customary international law into Canadian law and described the principles governing its operation:

> [T]he 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.[113]

112. The doctrine of adoption has been part of the law since the mid-18th century decisions of Lord Mansfield CJ. In 1764, he declared that "the law of nations, in its full extent was part of the law of England."[114]

113. The incorporation of customary international law norms into the common law is justified at least in part by the universality of these norms. As Rand J. noted:

> If in 1767 Lord Mansfield, as in *Heathfield v. Chilton* [(1767), 4 Burr. 2015, 98 E.R. 50], could say, "The law of nations will be carried as far in England, as any where", in this country, in the 20th century, in the presence of the United Nations and the multiplicity of impacts with which technical developments have entwined the entire globe, we cannot say any thing less.[115]

114. Customary international law norms apply with particular force in the common law when they are peremptory, *jus cogens* norms:

> As acknowledged by the Attorney General in this case, customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation. So far as possible, domestic legislation should be interpreted consistently with those obligations. This is even more so

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[113] *Hape*, *supra* note 34, at para 39.
[114] *Triquet v Bath*, (1764) 3 Burr. 1478: RBA, Tab 16.
[115] *Saint John (Municipality of) v Fraser-Brace Overseas Corp.*, [1958] SCR 263 at 268-69.

> where the obligation is a peremptory norm of customary international law, or jus cogens.[116]

115. As Abrioux J. noted, the doctrine of adoption has led to domestic incorporation of the international law fields of maritime law and commercial law (formerly known as the law merchant or *lex mercatoria*).[117]

116. There are also examples in the Commonwealth of civil claims based on customary international law outside these realms,[118] and to this point in Canada, courts have not rejected such claims.[119]

117. To be clear, the respondents do not contend that the adoption of *jus cogens* norms into Canadian law leads automatically to a civil remedy for the violation of those norms. Rather, the *jus cogens* norms serve as a source for development of the common law, and the test for recognition of new common law torts must still be satisfied.

118. Nevsun's main response to this Court's holdings on adoption in *Hape* is to argue, based primarily on excerpts of UK cases, that Canadian courts must make a policy decision on whether to incorporate customary international law.[120] This is not what the above-quoted language of *Hape* requires, and even if it does, the recognition of these new torts is desirable given the factors outlined at paragraphs 97 to 110 above.

119. Nevsun also asserts that the doctrine of adoption is no longer the law in England.[121] This is incorrect. English courts treat the doctrine as the law in England today, and apply it

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116 *Bouzari, supra* note 75, at para 65.
117 BCSC Reasons, *supra* note 1, at para 442: AR Vol I, Tab 1.
118 *Al-Adsani v Government of Kuwait & Ors*, (1995) 103 ILR 420 at 426-27: RBA, Tab 3; *ACT Shipping (PTE) Ltd. v Minister for the Marine, Ireland and the Attorney- General (The MV 'Toledo')*, [1995] 2 ILRM 30 at 43, 45: RBA, Tab 2.
119 *Abdelrazik v Canada (Attorney General)* [2010] FCJ No 1028: RBA, Tab 1; *Mack v Canada (Attorney General)*, 60 OR (3d) 737 at paras 18-33: RBA, Tab 11.
120 Appellant's Factum, at paras 65, 66.
121 Appellant's Factum, at para 65.

uncontroversially. Customary international law is "treated as incorporated into the common law unless there is some reason of constitutional principle why it should not be."[122]

(ii) There is no Doctrine of Corporate Immunity in International Law

120. As it has done previously, Nevsun continues to present an interpretation of international law that is ahistorical and based on philosophy more than the current reality of international law.

121. Nevsun has retreated from its previous stance that amounted to a claim of immunity for corporations under international law and, now, argues primarily that "corporate liability for human rights violations is not yet recognized under customary international law."[123]

122. In support, Nevsun mischaracterizes the holding of a recent U.S. Supreme Court decision by stating, "In its recent decision in *Jesner*, the U.S. Supreme Court rejected arguments that currently prevailing customary international law extends liability, civil or criminal, for human rights violations to corporations…"[124]

123. The majority in *Jesner* made no definitive finding on the potential liability of corporations under international law as the section of Justice Kennedy's opinion that discussed the issue was only joined by two other justices. Justice Kennedy noted:

> In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations.[125]

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[122] *R (Freedom & Justice Party) v Secretary of State for Foreign & Commonwealth Affairs*, [2018] EWCA Civ 1719 ["*Freedom & Justice Party*"] at para 117.

[123] Appellant's Factum, at para 69.

[124] Appellant's Factum, at para. 69.

[125] *Jesner v Arab Bank*, PLC, 138 S. Ct. 1386, 200 L. Ed. 2d 612, at p 1402 ["*Jesner*"]: ABA, Tab 6; See also William S. Dodge, "Jesner v. Arab Bank: The Supreme Court Preserves the Possibility of Human Rights Suits Against U.S. Corporations" (26 April 2018), Just Security, online: https://www.justsecurity.org/55404/jesner-v-arab-bank-supreme-court-preserves-possibility-human-rights-suits-u-s-corporations/ ["Dodge Article"].

124. In fact, four of the justices[126] reached the opposite conclusion,[127] as did the majority of Courts of Appeals considering the question.[128]

125. Importantly, Nevsun has not identified any international law prohibition on Canadian courts developing these new torts, and appears to concede that it is permissible for states to provide a civil remedy for violations of customary international law.[129]

126. Nevsun continues to incorrectly portray international law as only applying to states[130] and as requiring an obligatory norm creating a civil remedy against corporations.[131]

127. Regarding the latter, the claims advanced here are not claims in international law per se, but claims in common law, which incorporates prohibitive rules of customary international law through the doctrine of adoption. The prohibition is on acts of slavery or crimes against humanity; it is domestic law which defines the remedies.[132]

128. Customary international law leaves the nature and scope of a remedy and other "technical accoutrements" of a cause of action to be filled in by recourse to domestic law principles.[133]

129. As the chambers judge noted, "Common law courts have historically applied international custom to create private law obligations and, indeed, entire fields of private law."[134]

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[126] Justices Alito and Gorsuch did not join Justice Kennedy's statement concerning a "distinction in international law between corporations and natural persons". *Jesner*, *supra* note 125 at p 1402: ABA, Tab 6; Dodge Article, *supra* note 125.

[127] *Jesner*, *supra* note 125 at pp 1419-25 (Justice Sotomayor).

[128] See *Romero v Drummond Co*., 552 F.3d 1303 (11th Cir 2008): RBA, Tab 14; *Doe v Exxon Mobil Corporation*, 654 F.3d 11 (DC Cir 2011): RBA, Tab 9; *Doe I v Nestle USA, Inc*., 766 F.3d 1013 (9th Cir 2014) ["*Nestle*"]: RBA, Tab 7; *Flomo v Firestone Nat. Rubber Co., LLC*, 643 F. 3d 1013 (7th Cir 2011): ABA, Tab 3; *Kiobel v Royal Dutch Petroleum Co*., 621 F.3d 111 (2d Cir. 2010): RBA, Tab 10.

[129] Appellant's Factum, at paras 68, 69.

[130] Appellant's Factum, at para 70.

[131] Appellant's Factum, at para 68.

[132] *Nestle*, *supra* note 128, at pp 1022-1023: RBA, Tab 7.

[133] *Tel-Oren v Libyan Arab Republic*, 726 F.2d 774 (DC Cir 1984) at 778: RBA, Tab 15.

[134] BCSC Reasons, *supra* note 1, at para 442: AR Vol I, Tab 1.

130. At the same time, customary international law has long imposed legal consequences on corporations, particularly in the area of piracy. One of the earliest examples is a claim for relief against the Dutch East India Company for acts of piracy in violation of the "jus gentium" ("law of nations") in seizing two English merchant ships on the high seas. When diplomacy bore no results, the ships' owners were granted letters of reprisal under international law authorizing them to pursue reparations.[135]

131. Among the trials for crimes against humanity after World War II were three involving the heads of major German business entities: I.G. Farben, Krupp, and Flick. These courts repeatedly made reference to the liability of corporations themselves:

> Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations [of 1907 with Respect to the Laws and Customs of War on Land], is in violation of international law. [Emphasis added][136]

132. US courts reviewing this history have consistently held that corporations are not shielded from the application of customary international law, especially in regards to modern day civil claims of slavery and forced labour.[137]

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[135] Thomas Browne, *Vox Veritatis* (Westminster: 1683), at paras 4-13. Reprisal was "a right granted to a private person by the sovereign authority of which he is a subject to repossess, in times of peace, even by force, his goods or the equivalent thereof, from a foreigner or fellow citizens of the latter.": RBA, Tab 25; Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press 2005), at p 14 ["Paulsson"]: RBA, Tab 19; See also William Blackstone, *Commentaries on the Laws of England*, Book 1 (Oxford: Clarendon Press, 1765), at p 258: RBA, Tab 27.

[136] United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol X The I.G. Farben and Krupp Trials (London: H.M.S.O. for the United Nations War Crimes Commission, 1949) ["I.G. Farben"], at p 44: RBA, Tab 26. The same tribunal further noted that, "Such action on the part of Farben constituted a violation of the Hague Regulations." I.G. Farben, at pp 49-50: RBA, Tab 26.

[137] *Nestle*, *supra* note 128 at p 1021: RBA, Tab 7.

133. As the World War II cases demonstrate, the rise of the legal positivist philosophy in the nineteenth century that sought to redefine international law as solely emanating from the collective will of sovereign states[138] did not extinguish the original understanding in international law that non-state actors are subject to its rules.[139]

134. At a minimum, international law recognizes the corporate entity as having "independent and distinct legal personality".[140] The International Court of Justice (ICJ) has concluded that it is necessary for "international law… to recognize the corporate entity."[141] Other international tribunals have rejected the argument that corporations are immune from liability under international law.[142]

135. As Jan Paulsson notes, corporations routinely assert claims which have as their basis customary international law. In pursuing claims for denial of justice in investment cases, corporations are effectively asserting rights which derive from customary international law. [143]

(iii) These Torts Pose No Conflict with the Domestic Legal Order

136. Beyond issues of international law, Nevsun also advances several arguments based in principles of domestic law. In fact, all of these arguments assist the respondents.

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138 Stephen Hall, "The Persistent Spectre: Natural Law, International Law, and the Limits of Legal Positivism," (2001) 12 European Journal of International Law 269 at 280-84.

139 See e.g. Jordan Paust, Nonstate Actor Participation in International Law and the Pretext of Exclusion, (2011) 51 Va. J. Int'l L. 977, at pp 977-78, 985-86: RBA, Tab 20; Richard Collins, "Classical legal positivism in international law revisited" in Jörg Kammerhofer & Jean D'Aspremont eds, *International Legal Positivism in a Post-Modern World* (Cambridge: Cambridge University Press 2014) at pp. 34-35: RBA, Tab 23.

140 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)*, Preliminary Objections, 2007 ICJ Rep 582, at para 61.

141 *Barcelona Traction, Light and Power Company, Limited*, Judgment 1970 ICJ Rep 3 at para 38: RBA, Tab 4.

142 *Urbaser S.A. v The Argentine Republic* (2016), ICSID Case No. ARB/07/26, at para 1195; *Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings in the Case against New TV S.A.L. and Karma Mohamed Tahsin Al Khayat*, Special Tribunal for Lebanon Case No. STL-14-05/PT/AP/AR126.1, at paras 33-67: RBA, Tab 6.

143 Paulsson, *supra* note 135, at p 14: RBA, Tab 19.

The Separation of Powers Is Best Served When Courts Exercise their Judicial Powers

137. First, Nevsun makes various submissions pertaining to the separation of powers and foreign relations.[144] These essentially duplicate its arguments on the act of state doctrine.

138. As with those submissions, the Canadian government has not taken any step in this proceeding to express concern with the respondents' claims based on customary international norms.

139. The mere existence of a tort should not upset the separation of powers or impinge on the conduct of foreign relations. As explained above, the underlying conduct is already tortious and civil claims can already be filed based on existing torts. The recognition of these new claims will not create litigation in Canada that would not otherwise be available. Even if a specific case could be deemed to impact foreign relations, Canadian conflict of laws already has the tools to address this, including *forum non conveniens*, state immunity, and indirect impleader. Otherwise, as this Court explained in *Operation Dismantle*, the separation of powers is best served when the courts discharge their constitutional responsibility to exercise their judicial powers.[145]

Recognizing these New Nominate Torts Would Harmonize with Parliamentary Objectives in Other Legislation

140. A variation on Nevsun's first argument is that civil remedies for, *inter alia*, slavery, forced labour, and crimes against humanity are strictly a matter for Parliament, and Parliament has evinced an intent that survivors be denied such remedies.[146]

141. In support of its argument, Nevsun simply draws on examples of parliamentary action or inaction on related issues but none of these examples includes a statement, conclusion, or implication by Parliament that civil claims based on customary international norms should be prohibited.

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144 Appellant's Factum, at paras 71, 75, 80, 87.
145 *Operation Dismantle*, *supra* note 90, at paras 55-79.
146 Appellant's Factum, at paras 67, 84-85, 88-91.

142. In fact, the clearest statement by Parliament may be the language cited above at paragraph 92 in relation to the recently enacted Canadian Ombudsperson for Responsible Enterprise, namely that the creation of the Ombudsperson "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."

143. Further, Nevsun indicates that Parliament has enacted criminal sanctions for crimes against humanity and torture and this reality forecloses civil remedies for all of the customary international law violations alleged by the respondents.[147]

144. This argument overlooks the federal structure of our constitutional order, which assigns jurisdiction over property and civil rights within the provinces not to Parliament, but to the provincial legislatures. Parliament certainly has the power to create civil causes of action, but it is not within its core ambit to do so. Parliamentary silence or inaction on this point therefore cannot be conclusive. In the absence of precise and express language, federal legislation is presumed not to "interfere with common law rights, to oust the jurisdiction of common law courts, or generally to change the policy of the common law".[148]

145. The fact that the federal government has passed legislation covering similar subject matter does not preclude the development of a common law remedy. As Sharpe JA held in recognizing the tort of intrusion on seclusion, the legislation must demonstrate a clear intention to halt the development of the common law.[149]

146. The recent England and Wales Court of Appeal decision in *R. (Freedom & Justice Party) v. Secretary of State for Foreign & Commonwealth Affairs* illustrates the proper approach to harmonizing the intent of Parliamentary legislation with the adoption of a customary international law rule.[150]

147. The question in that case concerned the immunities enjoyed by special missions under customary international law. Parliament had enacted statutes implementing other customary

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147 Appellant's Factum, at para 88.
148 *Watson v Bank of America Corporation*, 2015 BCCA 362, at para 47.
149 *Tsige, supra* note 103, at paras 48-49.
150 *Freedom & Justice Party*, *supra* note 122.

international law obligations respecting immunity, such as the State Immunity Act 1978. Similar to here, the appellant in that case argued that the legislative silence as to special mission immunity evinced an affirmative Parliamentary intent that it not be recognized.

148. Arden LJ rejected this argument, noting that the proper inference was that special mission immunity was "a topic to be left to the general common law, informed by and developed in line with customary international law."[151] Recognizing special mission immunity under the common law "runs with the grain of relevant legislation and legislative policy in the field and does not conflict with such legislation or policy."[152]

149. Here, recognizing new nominate torts for slavery or crimes against humanity under the common law complements and advances Parliament's broader intent in enacting legislation such as the *Crimes Against Humanity and War Crimes Act* that there be accountability for serious human rights abuses.

150. Nevsun further points to one Private Member's Bill, introduced multiple times and not passing first reading, and one other piece of legislation not related to tort remedies. These hardly demonstrate a precise and express intent to halt the development of the common law.

151. Nevsun's argument also ignores the guidance in *Bouzari*, that where norms of *jus cogens* are concerned, legislation should be interpreted consistently with these higher-order norms "so far as possible."[153]

The Existence of Criminal Sanctions Supports a Civil Remedy

152. Nevsun argues, as it did unsuccessfully below, that the customary international law prohibitions pleaded as torts here are crimes and therefore cannot also constitute civil wrongs.[154] Citing *Direct Lumber Co. v Western Plywood Co.*,[155] Nevsun asserts that "claims for damages for breach of a criminal prohibition do not disclose a reasonable claim and will be struck out."[156]

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151 *Ibid* at para 125.
152 *Ibid* at para 126.
153 *Bouzari*, *supra* note 74 at paras 64-65.
154 Appellant's Factum, at paras 71, 84.
155 [1962] SCR 646.
156 Appellant's Factum, at para 71.

153. This mischaracterizes the decision in *Direct Lumber*. In that case, the Court concluded that there was no civil cause of action because the criminal prohibition in question, anticompetitive practices, was deemed to be "enacted solely for the protection of the public interest."[157] Otherwise, the Court considered it "well settled" that:

> If B commits an indictable offence and the direct consequence of that indictable offence is that A suffers some special harm different from that of the rest of [the public], then, speaking generally, A has a right of action against B.

154. Criminal wrongs and civil wrongs are not mutually exclusive, as s. 11 of the *Criminal Code* makes clear:

> No civil remedy for an act or omission is suspended or affected by reason that the act or omission is a criminal offence.

155. A similar argument to that advanced by Nevsun was made by the defendants in *Belhaj*, namely that torture is a crime and, accordingly, treaties prohibiting torture cannot inform the public policy limitation on the common law act of state doctrine. Lord Sumption rejected that argument:

> It is no answer to these points to say that these treaty provisions are concerned with criminal law and jurisdiction. So they are. But the criminal law reflects the moral values of our society and may inform the content of its public policy. Torture is contrary to both a peremptory norm of international law and a fundamental value of domestic law.[158]

(iv) <u>Conclusion</u>

156. Canadian common law currently does not possess the tools to fully address claims of complicity in internationally-condemned conduct of the nature alleged here. The traditional common-law torts do not adequately capture the gravity of such atrocities, and new nominate torts based on the customary international law prohibitions are needed. Nevsun's argument that the respondents cannot succeed in negligence underscores the undesirability of finding it plain and obvious that claims based on customary international law cannot succeed.

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[157] *Direct Lumber* has been overtaken by *Cement LaFarge v B.C. Lightweight Aggregate*, [1983] 1 SCR 452.

[158] *Belhaj UKSC, supra* note 23, at para 266 (Lord Sumption).

157. The respondents' claims based on customary international law deserve to be heard and are not bound to fail.

PART IV - SUBMISSIONS REGARDING COSTS

158. The respondents seek their costs in this Court and in the courts below.

PART V - ORDER REQUESTED

159. The respondents seek an order dismissing the appeal with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30 DAY OF NOVEMBER, 2018.

Camp Fiorante Matthews Mogerman LLP

Siskinds LLP

Lawyers for the Respondents

PART VI - TABLE OF AUTHORITIES

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35.	*Milat v Holder*, 755 F. (3d) 354 (5th Cir 2014)	90
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