SCC File Number: 37919

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

B E T W E E N :

NEVSUN RESOURCES LTD.

APPELLANT
(APPELLANT)

and

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

RESPONDENTS
(RESPONDENTS)

- and -

MINING ASSOCIATION OF CANADA; EARTHRIGHTS INTERNATIONAL; INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW; GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW; AMNESTY INTERNATIONAL CANADA AND INTERNATIONAL COMMISSION OF JURISTS; MINING WATCH CANADA

INTERVENERS

FACTUM OF THE INTERVENER, MINING ASSOCIATION OF CANADA

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*)

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PART I - OVERVIEW

1. The Mining Association of Canada ("**MAC**") is the voice of the Canadian mining and mineral processing industry. MAC's 44 members represent a broad spectrum of mining companies, from some of the country's largest and most sophisticated Canadian and international mining companies to smaller, more junior companies.

2. Consistent with MAC's mandate to promote a strong and sustainable mining industry, MAC has been a vocal advocate for human rights and policy development within Canada and abroad. MAC's view, however, is that changes to the domestic law of Canada in the name of advancing human rights must be made in a well-considered and careful manner. It is for this reason that MAC is intervening in this Appeal. Depending on how the Court disposes of this Appeal, MAC's members and the Canadian mining industry may face the spectre of uncertain and undefined civil liability. This would negatively affect the industry and the Canadian economy as a whole.

3. MAC limits its submissions to the issue of whether a cause of action for damages based on alleged breaches of the norms of Customary International Law ("**CIL**") should be recognized in Canada.

4. In summary, MAC makes the following submissions:

(a) There is currently no separate cause of action for breach of CIL.

(b) The Canadian common law should not be expanded to recognize a private cause of action for breach of CIL. The requirements for common law expansion are not met. The law of Canada is in step with the law of other jurisdictions: the norm is to allow claimants to invoke existing torts and extra-contractual liability to seek civil redress for alleged physical and economic harms, rather than to create a new cause of action for breach of CIL. The existing regime is predictable and effective.

(c) Allowing private parties to assert civil causes of action against other private parties based on a system of laws developed on the basis of inter-state relationships would amount to an unprecedented expansion of the common law, and would create indeterminate liability and materially (and negatively) affect the business environment within Canada.

5. For these reasons, MAC requests that this Court allow the appeal and strike the Plaintiff's claims for breach of CIL as it is plain and obvious they are not justiciable.

6. MAC accepts the adjudicative facts of the appeal as set out in Nevsun's Factum.[1]

PART II - QUESTIONS IN ISSUE

7. The only issue addressed by MAC is whether the common law should be expanded to recognize a new cause of action for breach of CIL.

8. MAC's submissions focus on: (1) the doctrine of adoption; (2) whether the common law should be expanded; and (3) the negative impact this expansion would have on Canadian business.

PART III - STATEMENT OF ARGUMENT

1. There is no Private Cause of Action for Breach of CIL

9. No Canadian court has ever held that there is a private cause of action for breaches of CIL. Claimants' efforts to create such a cause of action, including in *Abdelzarik* and *Mack*, have not succeeded.[2] There is also no statute, whether provincial or federal, that creates such a cause of action. This is no surprise given that claimants in Canadian courts may address breaches of CIL through well-established common law causes of action and remedies.[3] The law of the United Kingdom takes essentially the same approach.[4]

10. Whether and how a state responds to violations of international law is a matter of domestic law, not a matter of international law.[5] In *Kazemi*, this Court recognized that while Canada is bound

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1 *Nevsun Resources Ltd v Gize Yebeyo Araya, et al*, Ottawa 37919 (SCC) (Factum of the Appellant Nevsun Resources Ltd).

2 *Abdelzarik v Canada (Attorney General)*, [2010] FCJ No 1028 at paras 51-53: Respondent's Book of Authorities [**RBA**], Tab 1; *Mack v Canada (Attorney General)*, 60 OR (3d) 737 at paras 18-33: RBA at Tab 11.

3 *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 [*Choc*]; *Garcia v Tahoe Resources Inc*, 2017 BCCA 39 [*Garcia*].

4 *Chandler v Cape PLC*, [2012] EWCA Civ 525 [*Chandler*].

5 *Hanoch Tel-Oren, et al v Libyan Arab Republic*, 726 f (2d) 774 at 778 (1984) [*Tel-Oren*]: RBA, Tab 15; Oliver Jones, "The Doctrine of Adoption of Customary International Law: A future in Conflicting Domestic Law and Crown Tort Liability", (2010) 89 Can Bar Rev 401 at 425 [Oliver Jones]: Appellant's Book of Authorities [**ABA**], Tab 26.

by many CIL or *jus cogens* norms, this does not equate to a duty to provide a domestic civil remedy for breaches of CIL:

> While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state. Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. (emphasis added)[6]

11. Further, the doctrine of adoption was not intended to transpose an entire body of public law into the private law. Such a drastic change should only be made through the legislature, not judicially. Parliament is best placed to assess CIL and, if it considers it prudent to do so, create a predictable regime that includes causes of action, rules and remedies consistent with private law concepts.

12. Justice LeBel's comments in *Hape*[7] should not be interpreted to mean otherwise. Those comments, which in MAC's respectful submission were in *obiter*, noted that CIL is automatically adopted in Canada but did not suggest that the courts create a civil liability regime based on public law. *Hape* addressed the applicability of CIL to the Canadian government, and Justice LeBel's own writings interpreting *Hape* do not mention any implications on the private law arising from the adoption of CIL.[8] Justice LeBel speaks of prohibitions on *countries*, not private actors within countries.

2. The Common Law Should Not be Expanded to Recognize a Private Cause of Action for Breach of CIL

13. It is well-established that Canadian courts should expand the common law (a) when it is "necessary to keep the common law in step with the dynamic and evolving fabric of our society" or (b) when the common law is out of step with international developments.[9] As these two requirements

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6 *Kazemi (Estate) v Islamic Republic of Iran*, 2014 SCC 62 at 182.

7 *R v Hape*, 2007 SCC 26 [*Hape*].

8 *Hape*; Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3: ABA, Tab 30.

9 *R v Salituro*, 1991 CanLII 17 at 670 [*Salituro*]; *Friedmann Equity Developments Inc v Final Note Ltd*, 2000 SCC 34 at 844-845.

are not met in the present case, Canadian courts should instead continue to develop existing torts incrementally and when necessary.

(a) The Development of a Cause of Action for Breaches of Customary International Law is Not Necessary

14. A novel cause of action for breaches of CIL is unnecessary. States are at liberty to determine the domestic consequences and remedies for criminal and civil misconduct.[10] Canada has created and developed its own framework whereby criminal conduct is dealt with under the criminal code and civil conduct is addressed through the tort system. Wrongs committed in the civil context lead to damages for which a number of nominate torts already exist. Roger Alford, a well-respected U.S. scholar, has advanced the argument that "[h]uman rights violations are transnational torts. Torture is assault and battery. Terrorism is wrongful death. Slavery is false imprisonment".[11] Canadian courts have also opened the door for parent-company liability in certain cases.[12] Although the Respondents argue that the current tort system is unable to deal with the alleged abuses, they have not identified a single case in which Canadian law was shown to be insufficient.[13] Simply put, the current state of Canadian law leaves no gap to be filled by a novel cause of action.

15. The Respondents nonetheless propose the creation of a tort that seeks to import into the private law criminal and public law concepts of universal jurisdiction and aiding and abetting. Additionally, the Respondents propose the creation of a tort with a criminal sounding name. However, these elements, which are deemed necessary by the Respondents, [14] are inconsistent with both public and private law principles and create what is effectively a hybrid tort between the criminal law and tort law ("**Criminal Tort**").

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10 *Tel-Oren*, at 778; Oliver Jones, at 425.

11 See Roger P Alford, "Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation" (2014) 63 Emory LJ 1089 at 1091 [Alford]; Book of Authorities **[BA]**, Tab 1 also see generally Seth Davis & Christopher A Whytock, "State Remedies for Human Rights", (2018) 98 Boston U L Rev 397 [Whytock]; BA, Tab 2 and see concurring judgment of Justice Reinhardt in *Doe v Unocal Corp*, 395 f (3d) 932 (2001): RBA, Tab 8.

12 *Choc*; See also *Garcia*, which involves a similar claim in British Columbia.

13 Respondent's Factum, at paras 97-110.

14 Respondent's Factum, at paras 97-98, 106-107.

16. This Court should be cautious in considering whether to create new causes of action that invoke the criminal law. The Respondents in this case urge the Court to recognize new causes of action bearing criminal sounding names: "Forced Labour", "Torture" and "Slavery".[15] These torts would carry significant stigma, which "is inherently linked to the criminal process" and is a "consequence of the operation of a criminal system".[16] Although the Respondent's Criminal Torts would be privately prosecuted, these novel torts would be analogous to common law crimes: they would serve a recognized criminal law purpose, be backed by a prohibition and be enforced through penalties that include both damages and social stigma exceeding most crimes.[17] To ensure a fair and predictable evolution of private law, such a change is best left to Parliament, which has the sole authority to create new criminal offences[18] and can choose to amend the Criminal Code, create civil laws consistent with Canada's existing private law system, or both.

17. This Court has recognized for more than 30 years that prohibitions bearing names that carry important social stigma trigger *Charter* rights.[19] However, *Charter* remedies are unavailable in the civil context, and this gives rise to the concern that a CIL norm could one day impact other *Charter* rights. The common law should be developed in line with *Charter* principles and should not be used to create novel torts with criminal sounding names.[20]

18. Further, the use of aiding and abetting and universal jurisdiction constitutes an attempt to circumvent the separate legal personality of a corporation as well as private international law rules governing the applicable law. Courts in the United Kingdom and Canada adhere to the concept of separate legal personality and the concept "will not be lightly disregarded".[21] Courts have established rules to lift the corporate veil, and absent fraud, are typically reluctant to do so even if the result is

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15 Respondent's Factum, at paras 97-99.

16 Frédéric Mégret, "Practices of Stigmatization" (2014) 76 L & Contemp Probs 287 at 287. BA, Tab 4

17 *RJR-MacDonald Inc v Canada*, 1995 CanLII 64 (SCC) at paras 240-242; see broadly for concerns related to CIL and stigma: *R v Finta*, 1994 CanLII 129 (SCC).

18 *Criminal Code*, RSC 1985, c C-46, Section 9(a); *R v W (DL)*, 2016 SCC 22 at paras 3, 18, 57-59.

19 *R v Vaillancourt*, 1987 CanLII 2 at 651-654; *R v Martineau*, 1990 CanLII 80 at 645-646.

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

21 *Edgington v Mulek Estate*, 2008 BCCA 505 at para 21 [*Edgington*].

unfair to a claimant.[22] The policy justifications for separate legal personality of a corporation do not disappear because of alleged criminal action by a subsidiary. Instead, the rules relating to vicarious liability, agency or negligence can be applied if appropriate to establish the liability of a parent company for the actions of its subsidiary. In addition, the creation of a concept of "universal jurisdiction" in the criminal law was intended to remedy the fact that criminals could escape liability in cases where traditional criminal liability or jurisdiction did not exist. This issue does not exist in the private law context: jurisdictions around the world have created regimes of civil liability capable of dealing with the many physical and economic harms that may qualify as human rights abuses.[23] The Respondents have pleaded damages in tort and the development of the law in this area should follow the rules and principles developed in the civil tort context.

19. Canada already has a robust and predictable civil liability system, and that system can address adequately the conduct complained of by the Respondents. The continued incremental, and predictable, development of existing torts is an approach that is supported by scholars[24] and the only one likely to find support from foreign governments.[25] The incremental development of existing torts is also consistent with the courts' typical approach to modifying the common law given "courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them".[26]

(b) There is no International Consensus Favouring Private Actions for Breaches of Customary International Law

20. There is no international consensus in favour of creating a civil cause of action for breaches of CIL. A study completed by the International Commission of Jurists ("**ICJ Study**") has shown that every legal system in the world contains some form of tort law and allows victims of physical or economic harm, that may qualify as human rights abuses, to initiate civil claims.[27] The consensus is

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22 *Edgington*, at paras 22-26.

23 International Commission of Jurists, "Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes" (2008) Vol 3 Civil Remedies, at 3-4 [ICJ Study].

24 See generally: Alford; BA, Tab 1 Whytock. BA, Tab 2

25 The ICJ Study found that governments believed their tort and extra-contractual obligations regimes could deal with human rights abuses: see ICJ Study at 6.

26 *Watkins v Olafson*, 1989 CanLII 36 at 760 [*Watkins*]; *Salituro*, at 666.

27 ICJ Study, at 3-4.

therefore for states to address human rights abuses through their tort or extra-contractual obligation regimes.[28] For instance, in the United Kingdom, ordinary tort actions are usually pleaded against foreign corporations and "no court has ruled on the possibility of a civil action based on breach" of CIL.[29] A review of *Amicus* Briefs filed by Canada and certain other democratically-elected governments[30] in U.S. Alien Tort Statute ("**ATS**")[31] cases reveals that these governments have opposed both the imposition of civil liability for breaches of CIL and "the recognition of civil or criminal *corporate* liability under international law" (emphasis in original).[32] These governments are vocal proponents of protecting international human rights and support the creation of effective domestic remedies.[33]

21. The Respondents rely heavily on U.S. ATS cases, but those cases alone do not constitute an international movement. The ATS has been described as "unique" in offering a civil cause of action for breach of CIL.[34] Further, this Court should treat ATS jurisprudence with caution for two reasons. First, the ATS represents legislative authorization to develop a body of common law based on CIL. Second, a number of respected scholars are now declaring the death of the ATS and predict that traditional torts will take its place.[35] In *Sosa*, the Supreme Court of the United States ("**SCOTUS**") narrowed the ATS to only allow for a "very limited category [of claims] defined by the law of nations" based on the "modest number of international law violations thought to carry personal

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28 ICJ Study, at 3-4, 6.

29 *Guerrero v Monterrico Metals Plc*, [2009] EWHC 2475; see for direct claim against a parent company: *Chandler*; Kohl – Objections, at 4; BA, Tab 3 The cases cited by Respondent at para 116 of their Factum are distinguishable as while the courts considered granting a private remedy for a breach of CIL, in both cases the defendant government enjoyed either immunity or its own custom which prevented recovery: *Nevsun Resources Ltd v Gize Yebeyo Araya, et al*, Ottawa 37919 (SCC) (Factum of the Respondents *Gize Yebeyo Araya, et al*) [Respondent's Factum].

30 The United Kingdom, the Netherlands, Germany, Switzerland and Australia.

31 *Alien Tort Statute*, 28 USC § 1350.

32 These governments refused to endorse the ATS approach. See Kohl – Objections, at 2-3. BA, Tab 3

33 *ibid*.

34 Kohl – Objections, at 4. BA, Tab 3

35 See generally: Whytock; BA, Tab 3 Alford. BA, Tab 1

liability at the time" of the ATS' enactment.[36] The ATS was narrowed further in *Kiobel* and *Jesner* with the SCOTUS stating it was reluctant to create new private rights of action and that its authority to "create private causes of action" was in cast in doubt.[37] While the ATS has largely been narrowed on jurisdictional grounds,[38] the SCOTUS' reluctance to further develop the ATS suggests strongly that there is no overwhelming or compelling need to create a private cause of action for breach of CIL.

3. The Repercussions of Recognizing Causes of Action Based on Breaches of CIL

22. This Court has recognized that "complex changes to the law with uncertain ramifications should be left to the legislature".[39] Parliament is best equipped to create laws as well as "subsidiary rules and procedures relevant to their implementation".[40] There are many issues that would need to be resolved by various courts before the adoption of CIL into domestic private law could become a viable system. For instance, it is unclear whether defendants will always be able to contest the existence of a CIL norm. Given that the common law is based on *stare decisis*, courts may defer to previous judgments and find customs applicable when they have been extinguished or may decide to apply customs notwithstanding the fact the courts of foreign jurisdictions no longer recognize their existence. Private actors will also not know whether CIL applies under Quebec civil law, whether domestic limitations periods apply, or whether they are entitled to *Charter* remedies for CIL norms that may prevent the full exercise of their rights. Similarly, it is unclear whether actors in countries that have persistently objected to a CIL norm are subject to those CIL norms. Given that courts are justifiably reluctant to answer theoretical questions that do not need to be answered to dispose of cases, these questions will likely remain unanswered for years, resulting in uncertainty and creating an undesirable business environment.

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36 *Sosa v Alvarez-Machain et al*, 542 US 692 (2003) at 741 [*Sosa*]: ABA, Tab 13; According to the SCOTUS in *Jesner*, only in "certain narrow circumstances courts may recognize a common-law cause of action for claims based on the present-day law of nations". See *Jesner v Arab Bank, PLC*, 584 US (2018) at 1389-1390 [*Jesner*]: ABA, Tab 6.

37 *Jesner*, at 1389; *Kiobel v Royal Dutch Petroleum Co*, 569 US (2013) [*Kiobel*]: ABA, Tab 7.

38 See generally: *Jesner*; *Kiobel*.

39 *Salituro*, at 666; *Watkins*, at 760.

40 *Salituro*, at 668; *Watkins*, at 760-761.

23. The Respondents are not asking for an incremental change. They are asking this Court to make a change to the law on an unprecedented scale. Rather than merely extending a rule, this Court is being asked to admit an entire body of public law into private law, creating not one novel tort but an innumerable number of possible torts. Recognizing a private cause of action for breaches of CIL would, by definition, allow claimants to assert any number of novel claims based on comments made by foreign ministers that a norm exists. This would open a Pandora's box of arguments that could be used to complicate civil trials, as each concurrent cause of action—established torts and breach of CIL alike—would require the pleading of domestic and international facts.

24. In the context of the duty of care, this Court has recognized that "potential defendants must be able to gauge the extent of the risk they incur".[41] This Court has also found that a business' "need for certainty" regarding risk allocation is a relevant consideration when determining whether to allow recovery for economic loss.[42] The uncertainty associated with claims based on breaches of CIL is perhaps best exemplified by Justice Bastarache's concurring reasons in *Hape*. Justice Bastarache questioned whether it was reasonable to expect Canadian RCMP officers to become knowledgeable about CIL, "an area of law whose content is uncertain and disputed".[43] The answer was no. As a practical matter, it was more appropriate for RCMP officers to be guided by the *Charter*, which is the domestic law they may be familiar with.[44] The same logic should be applied here.

25. While businesses already evaluate their legal and political risk, they should not be required to carefully study developments in international law in order to assess whether a custom has emerged. Such a task is best left to the executive and legislative branches, which can monitor international relationships and respond to international legal developments when they consider it appropriate.

26. States already struggle to identify CIL customs given that such customs are based on state conduct. This process is challenging because the conduct to be assessed is based not only on the head of state, whose position may alter over time, but also on various actors within government. This can lead to conflicting positions taken by the same country.[45] *Sosa* is an excellent example of how

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41 *Canadian National Railway v Norsk Pacific Steamship Co*, [1992] 1 SCR 1021 at 1139.
42 *ibid*.
43 *Hape*, at 380.
44 *ibid*, at 380-381.
45 Malcom N Shaw, International Law, 6th ed (Cambridge, United Kingdom: Cambridge University Press, 2008) at 73-74. BA, Tab 5

difficult it can be to ascertain the existence of a norm of CIL. In that case, a claimant asserted claims based on a purported CIL norm that had not previously been recognized. The matter went all the way to the SCOTUS, only for the SCOTUS to confirm that the alleged CIL norm did not exist.[46]

27. This sort of uncertainty would have significant practical implications for the Canadian mining and mineral processing industry. As of 2013, more than 50 percent of the publicly listed exploration and mining companies in the world had their headquarters in Canada. Approximately 1,500 of those companies had an interest in a total of approximately 8,000 properties in more than 100 countries around the world.[47] These companies are attracted to Canada because of its stable and predictable legal system. They accept the robust Canadian legal and regulatory framework, which already contains tools to rein in or punish corporate misconduct, because the system is predictable and fair. The application of CIL to private companies would be a competitive-disadvantage for mining companies and businesses in Canada. With the potential for claimants to argue that a CIL norm, recognized or not, has been breached, businesses will have to re-examine their decisions to incorporate, raise capital, maintain offices, employ people and otherwise do business in Canada. Even if these businesses take the risk to participate in the Canadian economy, they may re-examine their decisions to participate in developing or "higher risk" jurisdictions.

28. Ultimately, the recognition of this new cause of action could lead to reduced investment in Canada as well as reduced Canadian investment abroad. This is harmful for the international development movement as Canadian expertise and best practices would no longer be exported to foreign jurisdictions that benefit substantially from a Canadian.

PART IV - SUBMISSIONS ON COSTS

29. MAC undertakes not to seek any costs and asks that no costs be awarded against MAC.

PART V - REQUEST FOR ORAL ARGUMENT

32. MAC respectfully requests leave to present oral argument at the hearing of the appeals.

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46 *Sosa*, at 712.

47 Nevsun Application for Leave to Appeal, Volume II, Memorandum of Argument at para 55.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of January, 2019.

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28.	Criminal Code, RSC 1985, c C-46, Section 9(a) French Version	16
	Secondary Sources	
29.	Roger P Alford, "Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation" (2014) 63 Emory LJ 1089	14, 19, 21
30.	Frédéric Mégret, "Practices of Stigmatization" (2014) 76 L & Contemp Probs 287	16
31.	International Commission of Jurists, "Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes" (2008) Vol 3 Civil Remedies, online at: <https://www.icj.org/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>	18, 19, 20
32.	Oliver Jones, "The Doctrine of Adoption of Customary International Law: A future in Conflicting Domestic Law and Crown Tort Liability", (2010) 89 Can Bar Rev 401	10, 14
33.	Louis LeBel, "A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3	12
34.	Malcom N Shaw, International Law, 6th ed (Cambridge, United Kingdom: Cambridge University Press, 2008)	26
35.	Seth Davis & Christopher A Whytock, "State Remedies for Human Rights", (2018) 98 Boston U L Rev 397	14, 19, 21
36.	Uta Kohl, "Corporate Human Rights Accountability: The Objections of Western Governments to the Alien Tort Statute" (2014) 63 ICLQ 665	20, 21