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 and the GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW; AMNESTY INTERNATIONAL CANADA and the INTERNATIONAL COMMISSION OF JURISTS; MINING ASSOCIATION OF CANADA and MININGWATCH CANADA

INTERVENERS

FACTUM OF THE APPELLANT NEVSUN RESOURCES LTD. IN REPLY TO THE FACTUMS OF THE INTERVENERS

(Pursuant to the order of Justice Côté dated November 22, 2018)

COUNSEL FOR THE APPELLANT:

Mark D. Andrews, Q.C.
Andrew I. Nathanson
Gavin R. Cameron
Caroline L. Senini

FASKEN MARTINEAU DUMOULIN LLP
550 Burrard Street, Suite 2900
Vancouver, BC V6C 0A3
Tel: 604 631 3131
Fax: 604 631 3232
Email: anathanson@fasken.com

AGENT FOR THE APPELLANT:

Sophie Arseneault

FASKEN MARTINEAU DUMOULIN LLP
55 Metcalfe Street, Suite 1300
Ottawa, ON K1P 615
Tel: 613 696 6904
Fax: 613 230 6423
Email: sarseneault@fasken.com

COUNSEL FOR THE RESPONDENTS:

Joe Fiorante, Q.C.
Reidar Mogerman
Jennifer D. Winstanley

CAMP FIORANTE MATTHEWS MOGERMAN
856 Homer Street, Suite 400
Vancouver, B.C. V6B 2W5
Tel: 604 689 7555
Fax: 604 690 7554
Email: jfiorante@cfmlawyers.ca

Charles M. Wright
Nicholas C. Baker

SISKINDS LLP
680 Waterloo Street
London, ON N6A 3V8
Tel: 519 672 2121
Fax: 519 672 6065
Email: nicholas.baker@siskinds.com

AGENT FOR THE RESPONDENTS:

Michael Sobkin
331 Somerset Street W.
Ottawa, ON K2P 0J8
Tel: 613 282 1712
Fax: 613 228 2896
Email: msobkin@sympatico.ca

COUNSEL FOR THE INTERVENER INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW:

W. Cory Wanless
WADDELL PHILLIPS PC
36 Toronto St., Suite 1120
Toronto, ON M5C 2C5
Tel: 647 261 4486
Fax: 416 477 1657
Email: cory@waddellphillips.ca

Professor Audrey Macklin
INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW
78 Queen's Park
Toronto, ON M5S 2C5
Tel: 416 946 7493
Fax: 416 978 8894
Email: audrey.macklin@utoronto.ca

AGENT FOR THE INTERVENER INTERNATIONAL HUMAN RIGHTS PROGRAM, UNIVERSITY OF TORONTO FACULTY OF LAW:

Jeff Beedell
GOWLING WLG (CANADA) LLP
160 Elgin Street, Suite 2000
Ottawa, ON K1P 1C3
Tel 613 786 0171
Fax: 613 788 3587
Email: jeff.beedell@gowlingwlg.com

COUNSEL FOR THE INTERVENERS EARTHRIGHTS INTERNATIONAL and the GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW:

Alison M. Latimer
Tamara Morgenthau
ARVAY FINLAY LLP
1512-808 Nelson Street
Vancouver BC V6Z 2H2
Tel: 604 696 9828
Fax: 888 575 3281
Email: alatimer@arvayfinlay.ca

AGENT FOR THE INTERVENERS EARTHRIGHTS INTERNATIONAL and the GLOBAL JUSTICE CLINIC AT NEW YORK UNIVERSITY SCHOOL OF LAW:

Michael J. Sobkin
331 Somerset Street West
Ottawa ON K2P 0J8
Tel: 613 282 1712
Fax: 613 288 2896
Email: msobkin@sympatico.ca

COUNSEL FOR THE INTERVENERS AMNESTY INTERNATIONAL CANADA and the INTERNATIONAL COMMISSION OF JURISTS:

Jennifer Klinck
JURISTES POWER LAW
401 West Georgia Street, #1660
Vancouver, BC V6B 5A1
Tel/Fax: 604 265 0340
Email: jklinck@juristespower.ca

Paul Champ
CHAMP & ASSOCIATES
Equity Chambers
43 Florence Street
Ottawa, ON K2P 0W6
T: 613 237 4740
F: 613 232 2680
Email: pchamp@champlaw.ca

Penelope Simons
University of Ottawa Faculty of Law
Fauteux Hall, Room 357
57 Louis Pasteur
Ottawa, ON K1N 6N5
Tel: 613 562 5800 ext. 3217
Email: penelope.simons@uottawa.ca

François Larocque
JURISTES POWER LAW
130 Albert Street, #1103
Ottawa, ON K1P 5G4
Tel/Fax: 613 702 5560
Email: flarocque@juristespower.ca

AGENT FOR THE INTERVENERS AMNESTY INTERNATIONAL CANADA and the INTERNATIONAL COMMISSION OF JURISTS:

Paul Champ
CHAMP & ASSOCIATES
Equity Chambers
43 Florence Street
Ottawa, ON K2P 0W6
Tel: 613 237 4740
Fax: 613 232 2680
Email: pchamp@champlaw.ca

COUNSEL FOR THE INTERVENER MINING ASSOCIATION OF CANADA:

Luis Sarabia
Steven Frankel
DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, ON M5V 3J7
Tel: 416-367-7441
Fax: 416 803 0871
Email lsarabia@dwpv.com
sfrankel@dwpv.com

AGENT FOR THE INTERVENER MINING ASSOCIATION OF CANADA:

Marie-France Major
SUPREME ADVOCACY LLP
340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3
Tel. 613 695 8855 ext 102
Fax: 613 695 8580
Email: mfmajor@supremeadvocacy.ca

COUNSEL FOR THE INTERVENER MININGWATCH CANADA:

Me Bruce W. Johnston
Me Jean-Marc Lacourcière
TRUDEL JOHNSTON & LESPÉRANCE
Suite 90
750 côte de la Place-d'Armes
Montréal, Québec H2Y 2X8
Tel. 514 871-8385, ext. 202 / 209
Fax: 514 871-8800
Email: bruce@tjl.quebec
jean-marc@tjl.quebec

Me Andrew E. Cleland
4104 Saint-Denis Street
Montréal, Québec H2W 2M5
Tel. 514 691-9618
Fax: 514 700-0161
Email: andrew@clelandavocat.ca

AGENT FOR THE INTERVENER MININGWATCH CANADA:

Me Brett Hodgins
MANN LAWYERS LLP
Suite 300, Tower A
11 Holland Avenue
Ottawa, ON K1Y 4S1
Tel. 613 369-0379
Fax 613 722-7677
Email: brett.hodgins@mannlawyers.com

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PART I -OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Pursuant to the order of Justice Côté dated November 22, 2018, the appellant Nevsun Resources Ltd. ("Nevsun") files this factum in reply to the factums filed by the interveners EarthRights International and the Global Justice clinic at New York University School of Law (together, "EarthRights"), International Human Rights Program, University of Toronto Faculty of law ("IHRP"), MiningWatch Canada ("MiningWatch") and Amnesty International Canada and the International Commission of Jurists (together, "Amnesty"). Nevsun makes no reply to the factum of the intervener the Mining Association of Canada.

PART II -QUESTIONS IN ISSUE

2. The interveners articulate different questions and issues in their factums. These will not be restated here but are addressed in Nevsun's submissions below.

PART III -STATEMENT OF ARGUMENT

3. Nevsun first replies to submissions specific to the factums of the individual and joint interveners, followed by reply to issues common to two or more of the interveners' factums.

A. Reply to EarthRights

4. Jurisprudence described by EarthRights under the *Alien Tort Statute* ("ATS") cannot be separated, historically or doctrinally, from the existence of this U.S. statute granting federal courts jurisdiction over claims in tort for breaches of international law. This kind of statutory basis is absent in Canada and therefore the U.S. jurisprudence under the ATS is largely irrelevant to the issues on appeal. What *is* relevant to this appeal is the increasingly restrictive approach to ATS claims taken by the U.S. Supreme Court over recent years and the reasons for it, which include concerns about interfering with the political branches' control of foreign policy and potentially promoting conflict with foreign countries.

5. The U.S. Congress did not enact the ATS in 1789 to uphold abstract norms of international law or to provide justice for victims of international law violations anywhere in the world. As noted by the U.S. Supreme Court, "[i]t is implausible to suppose that the First

Congress wanted their fledgling Republic—struggling to receive international recognition—to" serve as a "custos morum" for the whole world.[1] Instead, when Congress drafted the ATS, its "principal objective …was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen."[2] Congress accomplished this goal in the ATS by providing federal court jurisdiction for a "relatively modest set of actions alleging violations of the law of nations."[3] The drafters of the ATS were concerned with how U.S. courts would handle a narrow set of international law violations, such as an assault on an ambassador, because such violations could "rise to an issue of war."[4] The purpose for which Congress introduced the ATS was a limited one: "[t]he ATS was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable."[5] This history helps to explain why all three of the U.S. Supreme Court's key decisions interpreting the ATS (*Sosa*, *Kiobel*, *Jesner*) have resulted in sharply cutting back, and in some cases eliminating, the ability of plaintiffs to bring ATS claims that would increase friction and conflict with foreign nations.

6. In its first foray into ATS jurisprudence, the U.S. Supreme Court in *Sosa v. Alvarez-Machain* held that federal courts "should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted."[6] Even when courts found that a specific international norm had achieved universal acceptance, courts were instructed to take into account the practical foreign policy consequences of allowing such actions.[7] Applying these principles, the Court dismissed a Mexican national plaintiff's effort to sue another Mexican national for participating in an "arbitrary detention" in violation of

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[1] See *Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 at p. 123, 133 S. Ct. 1659 at p. 1668, (2013) ("*Kiobel*").

[2] *Jesner v. Arab Bank, PLC,* 138 S. Ct. 1386 at p. 1397, 200 L. Ed. 2d 612 (2018) ("*Jesner*").

[3] *Sosa v. Alvarez-Machain*, 542 U.S. 692 at p. 720, 124 S. Ct. 2739 at p. 2759 (2004) ("*Sosa*").

[4] *Sosa* at U.S. p. 715.

[5] See also *Jesner* at S. Ct. p. 1406 (citing Brief for United States as Amicus Curiae 7).

[6] *Sosa* at U.S. p. 732.

[7] *Sosa* at U.S. pp. 727–28.

customary international law. Though numerous international sources defined such detentions as a violation of international law, the Court rejected the norm as unduly broad and expressing "an aspiration that exceeds any binding customary rule having the specificity we require."[8]

7. Having sharply narrowed the set of norms permissible under the ATS to specific, universally accepted norms, the Court's second major ATS decision went even further to prevent U.S. courts from allowing ATS claims to spur international conflict and friction. The Court held in *Kiobel v. Royal Dutch Shell* that the ATS should be interpreted against a background presumption against the extraterritorial application of U.S. law.[9] Only cases that "touched and concerned the territory of the United States" in a manner sufficient to rebut the presumption would be permitted under the ATS. Applying this rule, the Court then dismissed the plaintiffs' claims against a Dutch and U.K. corporation because all of the relevant alleged conduct occurred outside the U.S. and the only U.S. connection was Shell's presence doing business in the U.S.[10] Following *Kiobel*, U.S. courts have dismissed numerous ATS claims against corporations, including U.S. corporations, accused of complicity with international law violations occurring in foreign territory.[11] The Court's decision in *Kiobel*, and subsequent case law dismissing numerous ATS cases, has led one commentator to proclaim the "end of the *Filartiga* human rights revolution."[12]

8. This did not stop the U.S. Supreme Court, again citing concerns about judicial intervention into foreign policy, from adding yet another serious limitation on ATS claims in the 2018 *Jesner v. Arab Bank* decision. In explaining its holding dismissing a claim against a Jordanian corporation, the Court cited "foreign-policy and separation-of-powers concerns inherent in ATS litigation," which might even "preclude courts from ever recognizing any new

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[8] *Sosa* at U.S. p. 738.

[9] *Kiobel* at U.S. p. 116.

[10] *Kiobel* at U.S. pp. 125, 133.

[11] *Adhikari v. Kellogg Brown & Root, Inc*., 845 F. (3d) 184, at p. 198 (5th Cir.), cert. denied, 138 S. Ct. 134, 199 L. Ed. (2d) 35 (2017); *Mujica v. AirScan Inc*., 771 F. (3d) 580, at p. 594 (9th Cir. 2014); *Doe v. Drummond Co*., 782 F. (3d) 576, at p. 595 (11th Cir. 2015); *Doe v. Cisco*, 66 F. Supp. (3d) 1239 (N.D. Cal. 2014).

[12] Roger P. Alford, "The Future of Human Rights Litigation After *Kiobel*", 89 *Notre Dame L. Rev*. 1749 at p. 1753 (2014).

causes of action under the ATS."[13] Given that U.S. law generally disfavoured judicially-created private rights actions, "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations."[14] The Court concluded that its earlier admonitions to exercise judicial caution in recognizing new private causes of action under international law is intended to "guard… against our courts triggering ... serious foreign policy consequences".[15] Allowing courts to retain any judicial discretion to create such causes of action against foreign corporations would render this judicial caution "empty rhetoric".[16] These decisions illustrate that rather than welcoming lawsuits of the kind brought against Nevsun, the U.S. Supreme Court has repeatedly limited, restricted, and largely eliminated the power of U.S. courts to recognize private causes of action against corporations for complicity with foreign government actions abroad.

9. EarthRights also wrongly suggests that state courts in the United States would recognize private rights of action for violations of customary international law under the common law, absent the statutory basis provided by the ATS. It is highly doubtful an American court exercising general common law powers (without the aid of the ATS) would allow ATS-style actions to proceed. Outside of the ATS context, an American state court would have to rely upon its own inherent common law powers to recognize a customary international law private right of action. But if a state court tried to do so, its decision would likely be invalidated as interfering with the U.S. federal government's exclusive authority over foreign affairs. For instance, the U.S. Supreme Court has rejected efforts by the California state legislature to require disclosure of Holocaust-era insurance policies in ways that would facilitate private lawsuits, due to the state law's interference with federal foreign policy.[17] Similarly, the U.S. Court of Appeals for the Ninth Circuit, *en banc*, unanimously rejected California's legislative effort to create jurisdiction for state courts to hear insurance actions by victims of the Armenian genocide as state

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[13] *Jesner* at S. Ct. p. 1403.

[14] *Jesner* at S. Ct. p. 1403.

[15] *Jesner* at S. Ct. p. 1407, citing *Kiobel*.

[16] *Jesner* at S. Ct. p. 1407.

[17] *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, at pp. 413–14, 123 S. Ct. 2374, at p. 2386 (2003).

interference in federal foreign affairs authority.[18] These decisions indicate that a state court attempting to create a common law private right of action for violating customary international law would run into the same federal foreign affairs limitation.

B. Reply to IHRP

10. Nevsun agrees with IHRP that this Court should not borrow problems from other jurisdictions and instead should apply first principles to determine whether the act of state doctrine is sound and necessary in the circumstances.[19] In Nevsun's submission these include the first principles of sovereignty, non-interference and comity on which the international order is based. Even if this Court were to adopt IHRP's framework for investigating the conduct of a foreign state,[20] it would be necessary to consider these principles as part of the proposed test.

11. The act of state doctrine would preclude these proceedings even if IHRP's proposed test were adopted. The pleadings require the court to assess the actions of the State of Eritrea not merely collaterally, but to address "the most serious allegations of egregious conduct by the State and its military".[21] Nevsun's alleged liability is accessory only and depends on a predicate finding that the acts of the State of Eritrea, and its National Service Program in particular, are unlawful, that Eritrea's laws are unconstitutional, and that Eritrea is a rogue state. These findings are foundational and not merely collateral so as to permit adjudication under IHRP's test. Requiring a Canadian court to make such determinations does not accord with the first principles of sovereignty, non-interference and comity.

12. IHRP cites extradition requests and refugee and deportation decisions as examples where courts make findings regarding the laws and conduct of foreign states. These examples are not apt as such inquiries occur within a specific legislative framework, to achieve different objectives, where Parliament has made an express decision to incorporate international norms into domestic law.[22] Similarly, while Canadian courts may review the executive's foreign policy

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[18] *Movsesian v. Victoria Versicherung AG*, 670 F. (3d) 1067 at p. 1071 (9th Cir. 2012).
[19] IHRP factum at para. 6.
[20] IHRP factum at para. 26.
[21] *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856 at para. 287, 408 D.L.R. (4th) 383.
[22] IHRP factum at para. 11.

decisions,[23] it is Canada's constitutional framework that provides the courts with the authority to decide whether an executive act violates the *Charter*.[24] The same framework for judicial intervention does not apply to private actions between private parties, or decisions made by foreign states.

C. Reply to MiningWatch

13. MiningWatch misstates Nevsun's position regarding the executive's prerogative power in foreign affairs.[25] It is not the case that the only possible link to foreign affairs is an allegation that Nevsun committed torts in a foreign state with a foreign government. Trying actions that require Canadian courts to investigate and impeach foreign states' sovereign activities may have significant impact on diplomatic relations with affected foreign states. It is the role of the executive to balance the competing interests that arise when deciding to comment on the ongoing practices of a foreign state.

14. Nevsun does not suggest that remedying human rights violations falls under the sole purview of the executive or that its approach will give impunity to corporations that partner with foreign states.[26] Nevsun does submit that remedying international human rights violations is not the role of Canadian courts. Instead, that role is properly assumed by international tribunals, expert bodies, and states acting on the international plane through political and diplomatic action.

15. MiningWatch also raises new issues not addressed in the courts below, arguing that the nature and scope of the act of state doctrine should be limited by the availability of the doctrine of forum of necessity.[27] In Nevsun's submission these arguments are impermissible. The order granting leave to intervene provides that "[t]he interveners … are not entitled to raise new issues". MiningWatch's submissions are also unhelpful as they oblige this Court to venture into unsettled issues of law that have not been raised by the parties or addressed by the courts below.

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[23] IHRP factum at para. 10.
[24] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at para. 37, [2010] 1 S.C.R. 44.
[25] MiningWatch factum at para. 5.
[26] MiningWatch factum at para. 6.
[27] MiningWatch factum at para. 20.

16. MiningWatch invokes the hypothetical situation where "a plaintiff has no forum … to bring suit".[28] But the situation postulated by MiningWatch does not arise in this case. The plaintiffs have never invoked the forum of necessity doctrine, which arguably permits a court to adjudicate in the absence of territorial competence or jurisdiction *simpliciter*. Territorial competence is not in issue as Nevsun is a B.C. resident and the Supreme Court of British Columbia has jurisdiction *simpliciter*. Nevsun did ask the lower courts to decline jurisdiction on *forum non conveniens* grounds but has not appealed from the ruling against it on this issue. It is not appropriate for this Court to examine an issue where neither its "proper contours" nor its implications were fully argued by the parties or considered by the courts below and a ruling by this Court may have unforeseen consequences.[29]

17. Moreover, this Court should decline to consider forum of necessity when the scope of the doctrine is unsettled. The Ontario Court of Appeal described the "emergence" of the doctrine in *Van Breda v. Village Resorts Ltd*.,[30] but this Court declined to address the issue as it was not before the Court on appeal.[31] In *West Van Inc. v. Daisley*, the Ontario Court of Appeal declined to take jurisdiction on the grounds of necessity, repeating that forum of necessity is a "relatively new Canadian doctrine".[32] In 2015, in its latest judgment in the *Bouzari* litigation,[33] the Ontario Court of Appeal emphasized that "the contours of the nascent jurisprudence regarding 'forum of necessity' would best be decided in a case in which jurisdiction *simpliciter* on this basis has been directly raised and argued by the parties".[34] That caution applies here.

18. This Court should also decline to embark upon an inquiry which involves unresolved constitutional issues. In British Columbia, forum of necessity is codified in s. 6 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28. Provinces must legislate within

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[28] MiningWatch factum at paras. 20-21, 25.

[29] *R. v. Vice Media Canada Inc*., 2018 SCC 53 at para. 103, per Moldaver J. for the majority.

[30] *Van Breda v. Village Resorts Ltd*., 2010 ONCA 84 at paras. 54, 100, 316 D.L.R. (4th) 201.

[31] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 59, 82, 86, 100, [2012] 1 S.C.R. 572.

[32] *West Van Inc. v. Daisley*, 2014 ONCA 232 at para. 18, 119 O.R. (3d) 481, cited at para. 26 of MiningWatch factum.

[33] Described in part at para. 26 of MiningWatch factum.

[34] *Bouzari v. Bahremani*, 2015 ONCA 275 at para. 35, 385 D.L.R. (4th) 332 (judgment staying action in Ontario).

territorial limits.[35] Concerns have been expressed about the constitutionality of provincial legislation (and about any common law doctrine) which permits the assumption of jurisdiction without a real and substantial connection to the forum.[36]

D. Reply to Amnesty

19. Amnesty submits that courts must not apply the act of state doctrine in proceedings of this type, and must recognize novel claims for breaches of customary international law ("CIL"), based on its assertion that the right to an effective remedy for human rights abuses and violations is a fundamental human right that is protected by CIL.[37] But Amnesty fails to demonstrate that such a rule of CIL actually exists. Each of the various statements, reports, comments and resolutions of the United Nations General Assembly, United Nations Human Rights Committee ("UNHRC") or other international human rights bodies cited by Amnesty are non-binding or aspirational. The international human rights conventions referred to by Amnesty are international treaties and treaties cannot create a rule of CIL or conclusively attest to its existence or content.[38] Amnesty is unable to point to a consistent state practice allowing private claimants to seek civil remedies in domestic courts against companies alleged to have participated in extraterritorial human rights violations. Canada has said that attempts to impose international human rights law obligations directly on companies go beyond the express language of international human rights instruments, which necessarily means there is no *opinio juris*.[39] This is fatal to Amnesty's assertion that CIL includes a right to a remedy against companies that participate in human rights violations because "[i]n the absence of consistent state practice one way or another, and of *opinio*

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[35] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42 at para. 73, [2015] 3 S.C.R. 69.

[36] Elizabeth Edinger, "New British Columbia Legislation: The *Court Jurisdiction and Proceedings Transfer Act*; the *Enforcement of Canadian Judgments and Decrees Act*" (2006) 39:2 UBC L. Rev. 407; *Lailey v. International Student Volunteers, Inc*., 2008 BCSC 1344 at para. 49, 88 B.C.L.R. (4th) 357; Tanya Monestier, "(Still) a Real and Substantial Mess: The Law of Jurisdiction in Canada" (2013), 36 Fordham Int'l L.J. 396 at p. 455.

[37] Amnesty factum at paras. 3, 11, 17.

[38] See International Law Commission, *Draft Conclusions on Identification Of Customary International Law, with Commentaries*, U.N. Doc. A/73/10 (2018) at p. 143.

[39] Canada, *Submission to the High Commissioner for Human Rights on the Responsibilities of Business Enterprises with regard to Human Rights*, at s. 2.2, online: www2.ohchr.org/english/issues/globalization/business/docs/canada.doc.

juris as to the binding effect of a state practice, no rule of customary international law is established."[40]

E. Canadian law does not provide a remedy for every asserted wrong

20. Several of the interveners submit, directly or by implication, that Nevsun's arguments are inconsistent with the demands of fundamental justice and international law and suggest the law must provide a remedy for every alleged wrong. Canadian law does not provide a remedy for every alleged wrong, wherever committed. As noted in *Kazemi*, an effective remedy is not guaranteed for every alleged violation of rights.[41] And there are many examples in Canadian law where the claim to a remedy is subordinated to other concerns: "Society does not always deem it essential that the right to a remedy 'trump all other concerns in the administration of justice'."[42] The right to a civil remedy is never unlimited and may "give way to procedural bars that are crucial to the functioning of sovereign equality".[43] Again, as noted above, this is not to say that impunity is granted to foreign states which are said to have engaged in wrongs. It is to say that trying such matters is not the role of Canadian courts.

F. No Automatic Incorporation

21. The interveners' submissions fail to distinguish between mandatory and permissive CIL rules, leading them to mischaracterize the Canadian law of reception by suggesting that all rules of CIL are adopted into Canadian law absent express legislation to the contrary.[44] This is not accurate. As discussed in Nevsun's factum at paras. 63 and 68, this court has held that permissive CIL rules are not adopted into Canadian law except by legislation.[45] Even if the underlying rules of CIL at issue in this appeal are accepted as *jus cogens* (i.e. non-derogable) rules of international law, Nevsun submits that these rules are permissive, in the international law

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[40] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 102, [2014] 3 S.C.R. 176 ("*Kazemi*").

[41] *Kazemi* at para. 159.

[42] *Kazemi* at para. 162.

[43] *Kazemi* at para. 163.

[44] Amnesty factum at para. 17.

[45] *Kazemi* at para. 61.

sense, insofar as states are left to decide for themselves how to comply with these obligations.[46] When CIL affords states discretion over how prohibitions or requirements are to be implemented domestically then it is beyond the power of the courts to adopt those prohibitions or requirements directly into domestic law absent express legislation.[47]

22. In any event, as discussed in Nevsun's factum at para. 68, whether or not CIL rules are permissive or mandatory, none of them can be construed as including a private right to a damages remedy, which is an essential building block of the interveners' submissions on this point, the absence of which renders the remainder of their assertions academic.

PART IV -SUBMISSIONS ON COSTS

23. Pursuant to the order of Justice Côté, the interveners must pay disbursements resulting from their interventions. Nevsun seeks no additional costs order relating to the interventions.

PART V -ORDER SOUGHT

24. The interveners do not take positions on the outcome of this appeal and no additional order is required.

All of which is respectfully submitted.

Dated at the City of Ottawa, Province of Ontario, this 14th day of January, 2019.

Sophie Arseneault
Agent for the Appellant Nevsun Resources Ltd.

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[46] Gib Van Ert, *Using International Law in Canadian Courts,* 2nd ed (Toronto: Irwin Law, 2008) at pp. 218-27.

[47] See dissenting reasons of La Forest J. in *R. v. Finta*, [1994] 1 S.C.R. 701 at pp. 734-35, 112 D.L.R. (4th) 513.

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