SCC File Number:

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

BETWEEN:

NEVSUN RESOURCES LTD.

APPLICANT
(APPELLANT)

and

GIZE YEBEYO ARAYA, KESETE TEKLE FSHAZION and MIHRETAB YEMANE TEKLE

RESPONDENTS
(RESPONDENTS)

APPLICATION FOR LEAVE TO APPEAL OF NEVSUN RESOURCES LTD.

(pursuant to ss. 40 and 58 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 and Rule 25 of *the Rules of the Supreme Court of Canada*

VOLUME II

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MEMORANDUM OF ARGUMENT OF THE APPLICANT

PART I - OVERVIEW AND STATEMENT OF FACTS

A. <u>This case raises important questions that deserve the attention of this Court</u>

1. The proposed appeal raises cutting edge legal issues about how international law and domestic civil liability interact. These issues are not only of jurisprudential significance, but are of vital concern to hundreds of Canadian companies doing business in the global economy which participate with foreign state actors in projects for the development of the foreign state's infrastructure, technology, or natural resources. The decisions of the British Columbia courts in this case open the way to avenues of liability for these Canadian companies in relation to their foreign operations that are contrary to established precedent and break new jurisprudential ground.

2. This extraordinary expansion of potential liability is the result of the Court of Appeal's rulings on two pure questions of law. First, the Court ruled that, as a matter of law, the act of state doctrine (described in more detail below) does not prevent a Canadian court from judging the legality of the sovereign acts of a foreign state within its own borders. Second, and for the first time in Canada, the Court ruled that Canadian law does not clearly foreclose a private cause of action for damages based on alleged breaches of norms of customary international law ("CIL"). As academic and professional commentary attests, these holdings expand the scope of liability for Canadian companies conducting projects abroad, particularly those acting in conjunction with foreign sovereign states, and open the door to Canadian courts being asked by foreign nationals to adjudicate the legality of sovereign acts of their home state within its own boundaries.

3. The proposed appeal raises important questions of law at the intersection of public international law and private law claims for damages in Canada:

   (a) Does the act of state doctrine preclude a British Columbia court from judging the legality of the sovereign acts of a foreign state within its own territory?

   (b) Should Canadian common law recognise, for the first time, a cause of action for damages based on alleged breaches of CIL?

4. The first question raises issues of national importance that warrant the attention of this Court. The Court of Appeal has made a final determination, binding on the trial judge, that the applicant ("Nevsun") cannot raise the act of state doctrine as a defence in this action. Nevsun must therefore attempt to defend the conduct of the State of Eritrea (which would be immune to suit in British Columbia) without the participation of the state and without access to state witnesses or documents. Without this body of evidence, the Supreme Court of British Columbia must judge the legality of the conduct of a sovereign state, half way across the world, which faces political exigencies and social policy choices that the Court can, with respect, only dimly perceive. The act of state doctrine is intended to prevent this type of inquiry, recognizing that it offends principles of sovereign equality and international order to permit a domestic court to adjudicate the sovereign conduct of a foreign state. A ruling by the judicial branch of the Canadian government about the conduct of a neighbour state also risks harm to Canada's foreign relations.

5. The second question also warrants the attention of this Court. It raises important issues of law about when a Canadian court should recognise a new, and extraordinary, basis for the recovery of damages. The decisions of the courts below, which authorize private claims for damages based on alleged breaches of CIL, are out of step with decisions in other jurisdictions. Such claims have never been accepted in Canadian courts. The judgments below are also inconsistent with the basic structure of international law: they convert the public law obligations of states on the international plane into a source of, and parallel set of rules for, private law disputes between individuals.

6. The case, if permitted to continue as presently pleaded, will devolve into a complicated, difficult and expensive inquiry into the lawfulness of the acts of the State of Eritrea within its own territory, and the application of international law by a foreign national court, the Supreme Court of British Columbia, to those acts. A ruling now by this Court prevents the risk of such a waste of resources. A decision by this Court will also be of benefit for parallel actions that have now been commenced against Nevsun by dozens of other Eritrean nationals and which raise the same issues. More generally, a decision by

this Court will clarify legal issues of central importance to Canadian companies engaged in business in a foreign country.

7. It is appropriate for this Court to grant leave to appeal in order to address these questions of law as part of this Court's mandate to supervise the development of the common law.

B. Nature of the plaintiffs' claims

8. The plaintiffs (respondents) are refugees from Eritrea who have no connection with British Columbia. None of the plaintiffs has been granted refugee status in Canada. The plaintiffs allege that they were subjected to forced labour and abuse during the construction of the Bisha mine in Eritrea. The plaintiffs say these events occurred between 2008 and 2012.

9. The Bisha mine is owned and operated by BMSC, an Eritrean corporation whose shares are held by a subsidiary of Nevsun (as to 60%) and the state-owned Eritrean National Mining Corporation (as to 40%). The chart reproduced in the plaintiffs' pleadings demonstrates visually Nevsun's indirect relationship with BMSC and the Bisha mine.[1]

10. The essence of the plaintiffs' claim is that various arms of the Eritrean State engaged in conduct within Eritrea that caused harm to the plaintiffs. The plaintiffs claim that they were conscripted into the Eritrean military pursuant to the National Service Program and forced to provide labour to two companies (Segen and Mereb) allegedly owned or controlled by Eritrea's single political party or by the Eritrean military. The plaintiffs say that these companies were engaged by Nevsun's indirect Eritrean subsidiary for the construction of the Bisha mine. They allege that the Bisha mine was built using forced labour, "a form of slavery", obtained from the plaintiffs coercively and under threat of torture by the Eritrean government and its contracting arms.[2] The plaintiffs' claims (including that the National Service Program is a crime against humanity) depend for their success on a finding that the State of Eritrea exercised its sovereign functions in Eritrean territory unlawfully, judged according to international and British Columbia law.

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[1] The indirect relationship between Nevsun and BMSC is shown at para. 23, p. 6 of the Notice of Civil Claim ("NOCC") filed November 20, 2014, Application for Leave to Appeal, Tab 7.

[2] NOCC, Leave Application, Tab 7

11. The plaintiffs base their claims on CIL, which they say is incorporated into domestic British Columbia law. The plaintiffs seek damages against Nevsun under CIL for: the use of forced labour; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. The claims against Nevsun are based in derivative liability: the plaintiffs do not assert that Nevsun itself engaged in various alleged breaches of human rights, but that its indirect subsidiary was an accessory to the asserted forced labour and abuse, with the actual perpetrators being the Eritrean State, its military, and Eritrean subcontractors controlled by the military and the government. The plaintiffs plead various forms of vicarious, accessory or secondary liability including that Nevsun "aided and abetted", "approved of", "acquiesced in", "condoned" or failed to stop the alleged use of forced labour, crimes against humanity and other human rights abuses at the Bisha mine.[3]

12. The plaintiffs also seek damages against Nevsun under domestic British Columbia law. Again, the essence of the claim is accessory or secondary liability, based on the allegation that Nevsun condoned or failed to stop certain conduct or is vicariously liable. Nevsun is said to be vicariously liable in part because "there is no functioning system of justice in Eritrea" and the plaintiffs therefore lack an effective legal remedy against the Eritrean State.[4] The plaintiffs also allege that there is no legitimate or "coherent" body of Eritrean law capable of applying to the determination of their claims, and that even if Eritrean law applied, a Canadian court could refuse to apply it as contrary to public policy.[5]

13. Adjudication of the plaintiffs' allegations would require a domestic Canadian court to sit in judgment upon fundamental pillars of the Eritrean state such as: the coherence of its body of laws; the functioning of the administration of justice; and the lawfulness of its system of National Service. This is an extraordinary proposition.

14. Nevsun denies the plaintiffs' allegations.[6]

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[3] NOCC paras. 4, 76-84, and concise summary at p. 26, Leave Application, Tab 7.

[4] NOCC, paras. 77-98, Leave Application Tab 7.

[5] Plaintiffs' Application Response re Forum Challenge, paras. 33-36, Leave Application Tab 9.

[6] Response to Civil Claim, Leave Application Tab 8.

C. The State of Eritrea and its National Service Program

15. Eritrea was annexed by Ethiopia in the 1950s. In 1991, after a 30 year war with Ethiopia, Eritrea became an independent state. In 1993 Eritrea became a member of the United Nations. Canada recognizes the government of Eritrea with direct diplomatic relations between the two countries.[7]

16. Eritrea maintains a command economy. Since independence, Eritrea has faced many economic problems including lack of resources and chronic drought. Nearly 80% of Eritrea's population remains engaged in subsistence agriculture.[8]

17. Eritrea and Ethiopia engaged in a border war between 1998 and 2000 and Ethiopia has refused to withdraw from a part of Eritrea. The Eritrean government characterizes this ongoing occupation as "hampering the exercise of normal government functions".[9]

18. The Eritrean National Service Program is a government program of military and national service administered by the Eritrean Ministry of Defence. The National Service Program consists of six months of military training and 12 months of service that may include assignment to government, the military, or other workplaces for training and skill development. There was evidence that service may extend beyond the mandated 18 months to indefinite periods before members are demobilized. The government allows demobilization on a case-by-case, individual basis.[10]

19. Witnesses and documents concerning the plaintiffs' asserted service in the National Service Program and employment by Segen and Mereb are located in Eritrea and require translation. Most documents would be in the hands of non-parties including Segen, Mereb, the Eritrean military, and the Eritrean government. There has been no indication that the State of Eritrea or the military would make witnesses or documents available to either the plaintiffs or Nevsun.[11]

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[7] *Araya BCSC*, paras. 15, 17, Leave Application Tab 7.
[8] *Araya BCSC*, paras. 39-41, Leave Application Tab 3.
[9] *Araya BCSC*, paras. 15-19, Leave Application Tab 3.
[10] *Araya BCSC*, paras. 26-30, Leave Application Tab 3.
[11] *Araya BCSC*, paras. 117-123, 245, Leave Application Tab 3.

D. Judgment of the British Columbia Supreme Court (Abrioux J., in chambers, 2016 BCSC 1856)

20. Nevsun's preliminary applications occupied 19 hearing days. While the issues of public importance arise on the pleadings, an extensive record was developed by reason of the other issues, and was before the court. The chambers judge, who is judicially managing the action, emphasised the novel and "extremely complex" nature of the issues.[12]

21. The chambers judge recognized that the plaintiffs' case involved "the most serious allegations of egregious conduct by the State and its military". The judge acknowledged that "[a]lthough the State of Eritrea is not a party in this proceeding, it is clear from the evidence that the State's role, which includes the military, will be a most important factor in the plaintiffs' ability to prove their case and/or Nevsun to establish its defence."[13]

22. The chambers judge accepted that the act of state doctrine is a common law rule that applies in Canada and agreed that "[t]here can be no doubt that at the conclusion of the trial I will be asked to make findings regarding certain allegations concerning the actions of the State of Eritrea." The chambers judge decided, however, that the act of state doctrine is of "uncertain application" and even if it applied, it was not "conclusively engaged in the circumstances of this case" such that the action must be dismissed.[14]

23. The chambers judge also rejected Nevsun's application to strike claims founded on CIL. He accepted that "[n]o civil claims alleging breach of CIL norms, peremptory or otherwise have been advanced successfully in Canada" and acknowledged that the plaintiffs' claims would require the recognition of new nominate torts. The chambers judge nevertheless concluded that the state of the law in this area is unsettled and held that the CIL claims were not "bound to fail".[15]

24. The chambers judge also dismissed Nevsun's application for an order that the court decline jurisdiction.[16]

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[12] *Araya BCSC*, paras. 287(a), 394, 433, 469, 470-473 and 571, Leave Application Tab 3.
[13] *Araya BCSC*, paras. 280, 287, Leave Application Tab 3.
[14] *Araya BCSC*, paras. 335, 366-422, Leave Application Tab 3.
[15] *Araya BCSC*, paras. 423-429, 445-485, Leave Application Tab 3.
[16] *Araya BCSC*, paras. 237-339, Leave Application Tab 3.

25. The chambers judge ruled that the action could not proceed as a representative proceeding; this aspect of his judgment was not appealed. In the result Eritrean nationals seeking to prosecute similar claims against Nevsun must commence separate actions. At the time of writing, six further claims on behalf of 59 additional plaintiffs had been filed in the Supreme Court of British Columbia.

E. Judgment of the British Columbia Court of Appeal (Newbury, Willcock and Dickson JJ.A., 2017 BCCA 401)

26. The Court of Appeal dismissed Nevsun's appeal.[17] Newbury J.A., for the Court, acknowledged that the case "raises a number of difficult issues of transnational law….Some of these issues have never been addressed directly by a Canadian court."[18] Newbury J.A. referred to what has been described as a "fundamental change" within public international law and "a growing willingness" on the part of some courts to investigate the conduct of foreign states. Newbury J.A. said that "[t]he overarching question in this case is whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described…".[19]

27. Newbury J.A. concluded that when the act of state doctrine is invoked, the "plain and obvious" test for striking pleadings does not apply. Newbury J.A. decided that the application of the act of doctrine should be determined at the outset because "[i]t would be extremely inefficient to subject a sovereign state to trial and then to decide at the end of the process that the court was not competent to adjudicate the claim."[20]

28. Newbury J.A. agreed that the plaintiffs' claims relate substantially "to secondary or 'derivative' conduct on the defendant's part" and that "as the NOCC now stands, the company could be liable "if and only if" Eritrea, its officials or agents were found to have violated fundamental international norms."[21] Nevertheless, in what appears to be a clear

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[17] *Araya v. Nevsun Resources Ltd.,* 2017 BCCA 401 ("*Araya BCCA*"), Leave Application Tab 5.
[18] *Araya BCCA* para. 19, Leave Application Tab 5.
[19] *Araya BCCA* para. 1, Leave Application Tab 5.
[20] *Araya BCCA,* para. 129, Leave Application Tab 5.
[21] *Araya BCCA* para. 92, Leave Application Tab 5.

contradiction of this characterization of the plaintiffs' claims, Newbury J.A. rejected the application of the act of state doctrine because, in her view, a domestic court would not be obliged to rule on the legality or validity of sovereign acts of the State of Eritrea. Newbury J.A. held that a "public policy exception" would in any case prevent the application of the act of state doctrine because "the nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy".[22] The Court of Appeal's decision means that Nevsun is precluded from raising the act of state doctrine as a substantive defence at trial or on any future appeal to the Court of Appeal.

29. In what she described as "superficial" reasons, Newbury J.A. next considered whether the chambers judge had erred in declining to strike the plaintiffs' claims founded in CIL. Newbury J.A. recognized that guidance from this Court would be of assistance: "If this case reaches the Supreme Court of Canada, … it is to be hoped that guidance can be provided as to 'where we are' in the evolution of transnational law".[23]

30. Newbury J.A. observed that "[t]hus far, courts in both the U.K. and Canada have declined to recognize a private cause of action for breaches of *jus cogens* [preremptory norms of international law] such as the prohibition against torture." The plaintiffs themselves agreed that "these torts have yet to be defined". Newbury J.A. also acknowledged that "Nevsun raised several strong objections to the claims under CIL", including that "prohibitions against slavery, torture, etc. recognized by customary international law do not give rise to private law causes of action in Canada". Newbury J.A. nevertheless suggested that "it may be that an incremental first step would be appropriate in this instance". Because the law is "in flux" and "developing", Newbury J.A. concluded that it was not "plain and obvious" that the plaintiffs' CIL claims were bound to fail.[24]

31. The Court of Appeal declined to interfere with the chambers judge's refusal to decline jurisdiction.[25]

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[22] *Araya BCCA* paras. 165-173, Leave Application Tab 5.
[23] *Araya BCCA* para. 177, Leave Application Tab 5.
[24] *Araya BCCA* paras. 177-197, Leave Application Tab 5.
[25] *Araya BCCA* paras. 119-120, Leave Application Tab 5.

PART II - QUESTIONS IN ISSUE

32. The question is whether the proposed appeal is of sufficient public importance to warrant leave to appeal being granted. In Nevsun's submission, this question should be answered in the affirmative in light of the significant issues raised in the proposed appeal:

A. Does the act of state doctrine preclude a British Columbia court from judging the legality of the sovereign acts of a foreign state within its own territory?

B. Should Canadian common law recognise, for the first time, a cause of action for damages based on alleged breaches of norms of customary international law?

PART III - STATEMENT OF ARGUMENT

A. Does the act of state doctrine preclude adjudication of a foreign state's conduct?

33. The proposed appeal raises important questions of law about the place of the act of state doctrine in litigation which directly implicates the lawfulness of governmental, not commercial, acts of a sovereign nation within its own territory. Here, the plaintiffs' claims are a wholesale indictment of the sovereign conduct of the State of Eritrea. The judgments below open the doors to similar claims against Canadian companies based on the alleged fault of sovereign states, but provide no principles to guide future litigants as to the application of the act of state doctrine.

34. The "accepted classic formulation" of the act of state doctrine is that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[26] In other words, the act of state doctrine "holds the national court incompetent to adjudicate on the lawfulness of the sovereign acts of a foreign state".[27] The doctrine applies among other things to preclude inquiries into the exercise of authority by the military and security forces of the foreign state.[28]

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[26] *Araya BCSC* at para. 349, Leave Application Tab 3, citing *Underhill v. Hernandez*, 168 U.S. 250 (1897) at p. 252; see also summary of leading English judgments in *Araya BCCA* at paras. 130-153, Leave Application Tab 5.

[27] *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 ("*Pinochet No. 3*"), pp. 268-271 (Lord Millett) and 286-287 (Lord Phillips).

[28] *Pinochet (No. 3)*, p. 269.

35. The act of state doctrine is complementary to the principle of state immunity, which precludes direct action against a foreign state. The act of state doctrine operates "by reference to the subject matter of the claim rather than the identity of the parties".[29] The act of state doctrine therefore applies even where, as in the present case, the action is between private parties and allegedly sounds in tort. The act of state doctrine prevents claimants from doing indirectly what they could not do directly, that is, require a domestic court to impeach the sovereign conduct of an immune foreign state.

36. The act of state doctrine and the right to state immunity from the jurisdiction of foreign courts, now codified in Canada,[30] share "common rationales" based on principles of comity and "the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states".[31] Sovereign equality commands non-intervention and respect for the territorial sovereignty of foreign states. The act of state doctrine, like state immunity, preserves international order by precluding domestic courts from judging the conduct of a neighbour state. It is "the constitutional responsibility of the executive to make decisions on matters of foreign affairs in the context of complex and ever-changing circumstances, taking into account Canada's broader national interests".[32] A finding by the judicial branch of government that another country has breached international law might conflict with Canadian foreign policy, harm relations with the foreign state, or embarrass diplomats engaged with the country in question. Whether a foreign state has breached international law is a question that properly belongs to international bodies charged with making such determinations, not Canadian domestic courts.

37. Now that this Court has firmly foreclosed direct claims against states and their officials on the basis of state immunity,[33] claims based on secondary or accessory liability can be expected to arise more frequently. Such claims depend on findings about the conduct of

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[29] *United Mexican States v. British Columbia (Labour Relations Board)*, 2015 BCCA 32 at paras. 5, 45, 47-48; *Belhaj v. Straw*, [2014] EWCA Civ 1394 ("*Belhaj CA*"), para. 48.

[30] *State Immunity Act*, R.S.C. 1985, c. S-18.

[31] *Araya BCCA*, para. 61; *Pinochet No. 3*, pp. 269-270 (Lord Millett); *Belhaj v. Straw*, [2017] UKSC 3 ("*Belhaj UKSC")*, paras. 118, 135 and 159 (Lord Neuberger) and paras. 199-200 (Lord Sumption), *R. v. Hape* [2007] 2 S.C.R. 292, 2007 SCC 26, para. 45.

[32] *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, 2010 SCC 3 at para. 39.

[33] *Kazemi Estate v. Islamic Republic of Iran*, [2014] 3 S.C.R. 176, 2014 SCC 62.

foreign states, and will give rise to inquiries and decisions that may affect, if not impair, Canada's relations with those states. The potential for interference with international comity is illustrated by considering the converse situation: how would Canada react if a claimant asked a court in another country to impose liability on a private entity based on alleged breaches of international law by the government of Canada in Canada?

38. This case, as presently pleaded, presents the very problems the act of state doctrine is intended to pre-empt: the plaintiffs ask the British Columbia court to find that the State of Eritrea has committed crimes against humanity, slavery, forced labour, and torture or threats of torture. The plaintiffs ask the court to ignore the laws of Eritrea and to found liability in international law. The case requires an inquiry into sovereign decisions of the State of Eritrea in respect of the National Service Program, state security, and promotion of the Eritrean economy. These questions do not arise incidentally: the courts below agreed that it is an essential part of the plaintiffs' case that they demonstrate, and have a British Columbia court determine, that the acts of the State of Eritrea are wrongful. Nevsun cannot be liable without predicate findings about the conduct of the State of Eritrea within its own territory. The act of state rule stops the pursuit of such questions at the outset, since the interference and injury to sovereign dignity of the foreign state and comity results from the inquiry itself, and not only the court's conclusion.

39. The act of state issue includes a number of sub-issues of law:

> (a) Whether the act of state doctrine, like state immunity, operates as a "prohibition on adjudication" or "subject-matter immunity" to be determined at the outset of litigation;[34]
>
> (b) Where claimants maintain that the act of state doctrine does not operate because of a "public policy exception", how and when does the court ascertain whether this exception applies? Can a determination of the asserted "public policy" be made on the basis of pleadings alone?
>
> (c) Whether other exceptions may prevent the application of the act of state doctrine, such as the so-called *Kirkpatrick* exception (which provides that the act of state doctrine does not apply if the court need not decide on

[34] *Araya BCCA*, paras. 61, 120, Leave Application Tab 5; *Yukos Capital Sarl v. OJSC Rosneft Oil Co. (No. 2)*, [2012] EWCA Civ 855 at para. 109; *Kazemi Estate v. Iran*, para. 105.

> the legality of state action, but only if it occurred) or the "commercial exception" (which allows persons who have entered into commercial transactions with states to bring disputes arising out of those transactions before the courts)?

40. This proceeding also illustrates the practical difficulties created by permitting the litigation of claims that depend on a finding of wrongful conduct by an absent foreign state. The trial of the action will require an inquiry into state acts, particularly those allegedly perpetrated by the Eritrean military operating under the National Service Program, an assessment for which the Supreme Court of British Columbia is ill-suited. It will also require determination of whether Eritrean laws are unconstitutional, and whether the State lacks basic attributes of sovereignty such as a coherent body of law capable of applying to the plaintiffs' claims. Nevsun is obliged to defend the acts of the State of Eritrea but without the participation of this necessary party, and without access to or control over state witnesses and documents. The British Columbia Supreme Court must judge the justifiability of acts of a foreign state faced with political realities that the Court cannot realistically be expected to properly understand, let alone weigh in judgment. Consistent with what Justice Newbury observed, the parties, and the trial court, will benefit from a decision about the scope of the act of state doctrine before that court is obliged to embark on this unprecedented inquiry.

41. Because the Court of Appeal ruling means that Nevsun may not raise the act of state doctrine at trial, the record in relation to that issue will not improve if deferred until after trial. This would also present serious obstacles to Nevsun's ability to raise the application of the act of state doctrine in any subsequent appeal to this Court. It is appropriate for this Court to address the act of state doctrine at this stage of the proceedings.

B. Do alleged breaches of norms of Customary International Law give rise to private claims for damages?

42. The proposed appeal also raises the following question of public importance: whether Canadian common law should, for the first time, recognise a cause of action for damages based on alleged breaches of norms of customary international law?

43. The decisions of the British Columbia courts in this case are out of step with international consensus on this issue. Other common law jurisdictions do not recognize claims for damages based on breaches of international law.[35] It has been said that it would be "extraordinary" for the English courts to treat subjects governed by international law "as mere private law torts giving rise to civil liabilities for personal injury".[36] In a similar vein, this Court has recognised that criminal prosecutions for torture and civil claims for damages for such conduct "are seen as fundamentally different by a majority of actors in the international community".[37] The U.S. authorities on which the plaintiffs have relied in the lower courts are based on a unique statute (the *Alien Tort Statute*, or *ATS*) that has no parallel in Canada.[38] The U.S. Supreme Court has now retreated from an expansive application of the *ATS*.[39] The plaintiffs' CIL claims represent an attempt to import *ATS* litigation to Canada, but without the statutory foundation and on a more expansive basis. The proposed appeal provides an appropriate vehicle for this Court to develop the Canadian law in this area.

44. The proposed appeal will also provide the Court with the opportunity to consider whether the decisions below are consistent with the basic structure of international law. The "customary international law of human rights" applies where states violate international law by, for example, engaging in or condoning slavery or torture.[40] The fact that international law has evolved to impose human rights obligations on states does not mean that individuals may enforce international law by means of private actions for damages against non-state actors: "[n]o manifestation of this concept yet exists on the international

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[35] *E.g., Jones v. Minister of the Interior for the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270 (H.L.), para. 98; E. Young, "Universal Jurisdiction, The *Alien Tort Statute* and Transnational Public-Law Litigation after *Kiobel*", 64 *Duke L.J.* 1023 (2015) ("Young"), p. 1082.

[36] *Belhaj UKSC* at para. 234; see also paras. 252 and 257.

[37] *Kazemi Estate v. Iran*, at para. 104.

[38] Young at p. 1100.

[39] In *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013) ("*Kiobel II*") (a case alleging Shell was complicit in human rights violations in Nigeria), the U.S. Supreme Court held there is a presumption against extraterritoriality inherent in the *ATS*, displaced only by conduct which concerns the United States with "sufficient force". The U.S. Supreme Court has reserved judgment in *Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (oral argument October 11, 2017), where the issue is whether the *ATS* forecloses corporate liability.

[40] J. Crawford, ed., *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012) ("*Brownlie*"), pp. 121, 642, 655-656.

plane" and such rights must be found in domestic law.[41] Similarly, corporate liability for human rights violations is not yet recognised under customary international law.[42]

45. As the Court of Appeal's use of the term "transnational law" indicates, the claims proposed here seek to supplant settled private international law rules with a "hybrid" body of law that "blends" and "fuses" international law with the domestic law of the forum state. This development would require courts "to go beyond existing conceptual barriers between international and national law, and between public and private law".[43] Attempts by the plaintiffs' bar to change the law in this way also outflanks Parliament's refusal to create or facilitate these types of claims for damages,[44] (while at the same time creating a statutory cause of action for breach of a different rule of CIL, terrorism),[45] and by extension, Parliament's responsibility for law reform.

46. The Court of Appeal's speculation that Canadian law might one day recognize the types of claims advanced by the plaintiffs does not justify permitting radical and controversial claims to continue in this case. This approach does not exemplify permissible, incremental development of the common law, but requires a major change with uncertain consequences. As this Court said in rejecting an exception to state immunity for civil claims for torture, "[c]reating this kind of jurisdiction would have a potentially considerable impact on Canada's international relations … It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however

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[41] J. Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 81-82; see also pp. 74-75.

[42] *Brownlie*, pp. 655-656.

[43] S. Raponi, "Grounding a Cause of Action for Torture in Transnational Law", in C. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) ("Raponi"), pp. 374-376.

[44] *Araya BCSC*, at paras. 459-461; Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl, 2009 (defeated at Report Stage, Oct. 6, 2011); Bill C-584, *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*, 2nd Sess, 41st Parl, 2014, (defeated at Second Reading, Oct. 1, 2014); Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 40th Parl, 2009 (reinstated in 2010 but died on Order Paper); Bill C-323, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 1st Sess, 41st Parl. 2011 (reinstated in 2013 but died on Order Paper).

[45] *Justice for Victims of Terrorism Act*, S.C. 2012, c. 1, ss. 2 and 3.

desirable, forward-looking and reflective of values it may be, is simply not accepted by other states".[46] The same concerns apply here.

47. Authorizing such an unprecedented extension of Canadian common law has evident policy implications. Permitting tort actions in this context amounts to enforcement of international law by "'private attorneys general'", substituting national courts and even juries for international organisations, legislatures and expert agencies.[47] Proponents of such claims welcome the opportunity for national courts to "complement the work of international treaty and adjudicative bodies in enforcing international law".[48] Foreign states may be less enthusiastic of such a development. Unlike international law's acceptance of the exercise of universal criminal jurisdiction for torture and crimes against humanity, civil claims are not subject to "screening methods" exercised by government officials acting in the public interest and on the basis of investigations and legal opinions.[49] Claims for breach of international law will result in domestic courts pronouncing on the internal affairs of other nations, and may interfere with the conduct of foreign affairs by the political branches of government. These types of claims may even represent an "end run around the political branches' control of the domestic incorporation of international law",[50] a concern previously identified in this Court.[51] Similar considerations have led the U.S. Supreme Court to restrict the ambit of *ATS* claims.[52] The proposed appeal provides an opportunity for this Court to address these concerns while overseeing the orderly development of Canadian law.

48. This Court's guidance would also assist with respect to other fundamental objections to private law claims founded on CIL that were not addressed by the Court of Appeal, including: (a) CIL is not automatically adopted into Canadian law and does not supply standalone common law rules; (b) the CIL norms on which the plaintiffs rely are

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[46] *Kazemi Estate v. Iran* at paras. 107 and 109.

[47] Young at pp. 1028 and 1111.

[48] Raponi at p. 374.

[49] *Kazemi Estate v. Iran* at paras. 103 and 105.

[50] Young at p. 1056 and fn. 170.

[51] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1992] 2 S.C.R. 817, at paras. 79-81 (per Iacobucci and Cory JJ. dissenting on this point).

[52] *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at pp. 725-729.

international crimes, and because of Parliament's exclusive jurisdiction to create criminal offences, customary international criminal law cannot be the subject of adoption; (c) certain of the CIL norms (torture, cruel and inhuman treatment, crimes against humanity) are the subject of Canada's treaty obligations and already implemented in criminal legislation: claims for breach of the criminal law do not give rise to a cause of action for civil damages; and (d) the plaintiffs' CIL claims require the creation of new nominate torts, which is unnecessary in light of the scope of existing torts (which are pleaded here) and constitutes a major change in the law that must be left to the legislature.

49. The Court of Appeal deferred substantive consideration of the plaintiffs' CIL claims, anticipating that this Court will undertake a more thorough examination of the issues. Again, the Court of Appeal judgment provides no principled analysis that will guide future litigants. Instead, the judgments below foster uncertainty.

50. A decision from this Court also has the potential to narrow the issues and avoid the risk of a vast, and ultimately pointless, exploration of the intersection of public international law with domestic common law. Guidance from this Court will assist the parties, the courts, and Canadian businesses that operate abroad.

C. A decision from this Court will have direct consequences for this litigation and will provide guidance for other cases and for Canadian businesses operating abroad

51. A decision by this Court would have immediate and practical consequences for this litigation and implications ranging far beyond the immediate dispute.

52. Clarification about the application of the act of state doctrine and the availability of private remedies for breaches of CIL will directly affect the conduct of this complex action. The preliminary motions alone occupied 19 hearing days. A trial will take months and cost millions on both sides; if the claims are eventually dismissed, Nevsun has no prospect of recovering costs from the plaintiffs. These considerations, together with the injury to comity caused by permitting adjudication of Eritrea's sovereign conduct to continue, favour this Court's early intervention. As noted, the Court of Appeal's ruling on act of state forecloses exploration of this issue of law at trial or at any subsequent appeal.

53. A decision in this case also has direct consequences for the additional actions commenced against Nevsun on behalf of another 59 plaintiffs. All arise out of similar alleged conduct, plead CIL, and give rise to the same act of state issues.

54. More generally, a decision in this case will have ramifications for potential litigation against Canadian businesses operating abroad. Canadian courts are seeing growing numbers of claims against local defendants alleging that they are responsible, directly or indirectly, for misconduct alleged to have taken place in other countries (such as human rights abuses), including those committed by subsidiaries or related entities.[53]

55. Mining companies, in particular, are increasingly facing such claims. As of 2013, more than 50 percent of the world's publicly listed exploration and mining companies had their headquarters in Canada. 1,500 companies based in Canada had an interest in some 8,000 properties in more than 100 countries around the world. Canadian companies account for more than 50% of the mining in Latin America.[54] Exploration and mining depend on state grants and often involve agreements with state entities. The same concerns arise for Canadian construction, engineering, technology and energy firms which contract with states for resource and infrastructure projects. Talisman Energy was the subject of such a claim, brought under the *ATS*, alleging that it aided the Government of Sudan in the commission of genocide, war crimes and crimes against humanity in connection with a subsidiary's project there. The action was finally dismissed without a trial, but only after nine years of litigation.[55] The judgments below magnify the risk that Canadian companies will face more of these types of claims, now brought in Canada.

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[53] *E.g., Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414 (alleged human rights abuses in Guatemala); *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39, leave to appeal to dismissed June 8, 2017, SCC File No. 37492 (alleged criminal conduct in Guatemala); *Anvil Mining Ltd. c. Association canadienne contre l'impunité*, 2012 QCCA 117 (alleged abuses committed by military in Congo); *Piedra v. Copper Mesa Mining Corporation*, 2011 ONCA 191 (alleged human rights abuses in Ecuador); *Das v. George Weston Limited*, 2017 ONSC 4129 (alleged liability for damage suffered in Bangladesh); *Yassin c. Green Park International Inc.*, 2010 QCCA 1455 (claim for aiding and abetting alleged war crimes in Israel).

[54] S. Daley, "Guatemalan Women's Claims Put Focus on Canadian Firms' Conduct Abroad", New York Times (April 2, 2016), online: https://www.nytimes.com/2016/04/03/world/americas/guatemalan-womens-claims-put-focus-on-canadian-firms-conduct-abroad.html?_r=0 (and further sources cited there).

[55] *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F. 3d 244 (2d Cir. 2009), cert. denied 562 U.S. 946.

56. The potential consequences of the judgments in this case have been widely noted.[56] Indeed, counsel for the plaintiffs has been quoted as saying that "[w]here Canadian companies are alleged to have been involved in human rights abuses overseas, they can expect that those cases will now be brought in courts in Canada, and the courts will be open to hearing them. That's the broader implication:[57]

57. The implications have also been noticed by commentators advocating for the potential liability of corporations for human rights violations under international law.[58] The Court of Appeal's decision has been described as "a novel and significant step in the development of 'transnational law' that could expand the scope for liability for corporations conducting resource development projects abroad".[59] Commentators highlight the extraordinary doctrinal basis of the CIL claims, referring to them as "customary international law torts" and "extraterritorial corporate criminal prosecution".

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[56] Dozens of articles, comments and press releases have been published including G. Giroday, "Application by B.C. mining company to have class action dismissed fails", *Canadian Lawyer* (Nov. 27, 2017), online: http://www.canadianlawyermag.com/legalfeeds/author/gabrielle-giroday/application-by-bc-mining-company-to-have-class-action-dismissed-fails-15009/ ; D. Quan, "'New era': Canadian mining industry closely watching three civil cases alleging human rights abuses", *National Post* (Nov. 27, 2017), online: http://nationalpost.com/news/canada/new-era-mining-industry-closely-watching-three-civil-cases-alleging-human-rights-abuses; K. Rolfe, "Nevsun's bid to have human rights case moved to Eritrea dismissed by B.C. court", *CIM Magazine* (Nov. 22, 2017; updated Nov. 27, 2017), online: http://magazine.cim.org/en/news/2017/nevsun-human-rights-lawsuit-to-go-ahead-in-bc/; N. Bennett, "Appeal Court allows slavery suit claim against Nevsun", *Business in Vancouver* (Nov. 21, 2017), online: https://www.biv.com/article/2017/11/appeal-court-allows-slavery-suit-claim-against-nev/

[57] I. Mulgrew, "Vancouver mining company faces trial over slavery claims", *Van. Sun* (Nov. 21, 2017), online: http://vancouversun.com/opinion/columnists/vancouver-mining-company-faces-trial-over-slavery-claims .

[58] *E.g.,* M-P. Lavoie, "Canadian Courts Are Taking a Step Toward Corporate Liability of Multinationals for Wrongdoings Abroad" (Nov. 15, 2017), online: https://blogs.loc.gov/law/2017/11/canadian-courts-are-taking-a-step-toward-corporate-liability-of-multinationals-for-wrongdoings-abroad/; I. Weiser, "Thoughts on a Customary International Law Tort and the Canadian Legal System" (2017) 1 *PKI Global Just. J.* 17, online: http://www.kirschinstitute.ca/thoughts-customary-international-law-tort-2/; P. Simons, "Unsustainable International Law: Transnational Resource Extraction and Violence against Women", *Transnational Law and Contemporary Problems*, Vol. 26, Issue 2 (Summer 2017), pp. 415-434 at p. 434 ("a growing number of civil suits being brought in Canada against Canadian extractive companies for transnational violations of human rights"); C. Nwapi, "Accountability of Canadian Mining Corporations for Their Oversees Conduct: Can Extraterritorial Corporate Criminal Prosecution Come to the Rescue?", 54 *Can. Y.B. Int'l L.* 227 (2016) at pp. 228-229 ("growing number" of civil lawsuits brought by victims of human rights abuses in Canadian courts).

[59] R. Williams *et al.*, "'Forced Labour' Case To Go To Trial" (December 8, 2017), online: http://www.mondaq.com/canada/x/654108/trials+appeals+compensation/Forced+Labour+Case+To+Go+To+Trial ("increasing number of lawsuits against Canadian parent companies for the conduct of their foreign subsidiaries"); comments by N. Baker of counsel for the plaintiffs, "Eritrean Refugees Can Sue for Slavery and Forced Labour, B.C. Court of Appeal says" (Nov. 24, 2017) online: https://www.siskinds.com/eritrean-refugees-can-sue-slavery-forced -labour/: "the plaintiffs seek a civil remedy for corporate complicity in alleged breaches of *jus cogens* norms of customary international law (something not seen in Canada before)", and seek recognition of "a new nominate tort for the alleged breaches".

The judgment of the chambers judge has even been cited in briefs filed with the U.S. Supreme Court in an appeal concerning corporate liability under the *ATS*. [60]

58. If this case is permitted to proceed as presently pleaded, Canadian courts can expect an increase in suits claiming that Canadian companies, or their direct and indirect subsidiaries, are liable in damages for conduct in foreign states, including conduct allegedly perpetrated by state actors in the discharge of their sovereign functions.

59. The questions of pure law presented here can appropriately be decided at the pleadings stage. It is fitting for this Court to rule on questions of law, such as the definition of causes of action or the application of an immunity, to forestall fruitless litigation. Nevsun seeks leave to appeal to assist in resolving the plaintiffs' unprecedented claims.

PART IV - SUBMISSIONS ON COSTS

60. The Court should follow its usual practice and award costs of the application in the cause.

PART V - ORDERS SOUGHT

61. That the application for leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: January 17, 2018

Mark D. Andrews, Q.C.
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Nevsun Resources Ltd.

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[60] In *Jesner v. Arab Bank LLC*, U.S.S.C. Docket No. 16-499: "Brief of Canadian International and National Security Law Scholars as *Amici Curiae* in support of Petitioners" (June 27, 2017), at pp. 18-21: "in Canada, the common law can be used to assert tort claims against multinational corporations for violations of customary international law…".;online: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-499-amicus-pet-canadian-international-and-national-security-law-scholars.authcheckdam.pdf; "Brief of *Amici Curiae* of Comparative Law Scholars and Practitioners in support of Petitioners" (June 27, 2017), at pp. 18-19, online: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-499-amicus-pet-comparative-law-scholars.authcheckdam.pdf; "Brief of *Amici Curiae* Center for Constitutional Rights and International Federation for Human Rights in support of neither party" (June 27, 2017), at pp. 17-18, online: https://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-2017-2018/16-499-amicus-np-center-for-constitutional-rights-and-international-federation-for-human-rights.authcheckdam.pdf

PART VI - TABLE OF AUTHORITIES

PART VII - RELEVANT STATUTORY PROVISIONS

N/A