Claims Against Corporate Defendant Founded on Customary International Law Can Proceed in Canada

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Eritrean mine workers who fled from that country to British Columbia sued the mine's owner, Nevsun Resources Ltd. They sought damages for various torts including battery, false imprisonment and negligence. They also sought damages for breaches of customary international law. Their core allegation was that as conscripted labourers in Eritrea's National Service Program, they were forced to work in the mine in intolerable conditions and Nevsun was actively involved in this arrangement.

Nevsun moved to strike out all of the claims on the basis of the act of state doctrine. It also moved to strike out the proceedings based on violations of customary international law because they were bound to fail as a matter of law.

In its decision in *Nevsun Resources Ltd v Araya*, 2020 SCC 5, the Supreme Court of Canada has held (by a 7-2 decision) that the act of state doctrine is not part of Canadian law (para. 59) and so does not preclude any of the claims. It has also held (by a 5-4 decision) that the claims based on customary international law are not bound to fail (para. 132) and so can proceed.

Act of State Doctrine

Justice Abella, writing for five of the court's nine judges, noted that the act of state doctrine had been heavily criticized in England and Australia and had played no role in Canadian law (para 28). Instead, the principles that underlie the doctrine were subsumed within the jurisprudence on "conflict of laws and judicial restraint" (para 44).

In dissent, Justice Cote, joined by Justice Moldaver, held that the act of state doctrine is not subsumed by choice of law and judicial restraint jurisprudence

(para. 275). It is part of Canadian law. She applied the doctrine of justiciability to the claims, finding them not justiciable because they require the determination that the state of Eritrea has committed an internationally wrongful act (para. 273).

This division raises some concerns about nomenclature. How different is "judicial restraint" from "non-justiciability"? Is justiciability an aspect of an act of state doctrine or is it a more general doctrine (see para. 276)? Put differently, it appears that the same considerations could be deployed by the court either under an act of state doctrine or without one.

The real division on this point is that Justice Cote concluded that the court "should not entertain a claim, even one between private parties, if a central issue is whether a foreign state has violated its obligations under international law" (para. 286). She noted that the cases Justice Abella relied on in which Canadian courts have examined and criticized the acts of foreign states are ones in which that analysis was required to ensure that Canada comply with its own obligations as a state (para. 304). In contrast, in this case no conduct by Canada is being called into question.

In Justice Abella's view, a Canadian court can indeed end up determining, as part of a private civil dispute, that Eritrea has engaged in human rights violations. She did not, however, respond to Justice Cote's point that her authorities were primarily if not all drawn from the extradition and deportation contexts, both involving conduct by Canada as a state. She did not squarely explain why the issue of Eritrea's conduct was justiciable or not covered by judicial restraint in this particular case. Having held that the act of state doctrine was not part of Canadian law appears to have been sufficient to resolve the issue (para. 59).

Claims Based on Violations of Customary International Law

The more significant split relates to the claims based on violations of customary international law. The majority concluded that under the "doctrine of adoption", peremptory norms of customary international law are automatically adopted into Canadian domestic law (para. 86). So Canadian law precludes forced labour, slavery and crimes against humanity (paras. 100-102). Beyond that conclusion, the majority fell back on the hurdle for striking out claims, namely that they have to be bound ("plain and obvious") to fail. If they have a prospect of success, they

should not be struck out. The majority found it an open question whether these peremptory norms bind corporations (para. 113) and can lead to a common law remedy of damages in a civil proceeding (para. 122). As a result the claims were allowed to proceed.

Four of the judges dissented on this point, in reasons written by Brown and Rowe JJ and supported by Cote and Moldaver JJ. These judges were critical of the majority's failure to actually decide the legal questions raised by the case, instead leaving them to a subsequent trial (paras. 145-147). In their view, the majority's approach "will encourage parties to draft pleadings in a vague and underspecified manner" which is "likely not to facilitate access to justice, but to frustrate it" (para. 261). The dissent was prepared to decide the legal questions and held that the claims based on violations of customary international law could not succeed (para. 148).

In the dissent's view, the adoption into Canadian law of rules prohibiting slavery, forced labour and crimes against humanity did not equate to mandating that victims have a civil claim for damages in response to such conduct (para. 172). The prohibitions, in themselves, simply did not include such a remedy (para. 153). The right to a remedy, the dissent pointed out, "does not necessarily mean a right to a particular form, or kind of remedy" (para. 214).

Further, as to whether these rules can be directly enforced against corporations, the dissent was critical of the complete lack of support for the majority's position: "[i]t cites no cases where a corporation has been held civilly liable for breaches of customary international law anywhere in the world" (para. 188). As Justice Cote added, the "widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations" (para. 269).

On this issue, one might wonder how much of a victory the plaintiffs have achieved. While the claims can now go forward, only a very brave trial judge would hold that a corporation can be sued for a violation of customary international law given the comments of the dissenting judges as to the lack of support for that position. As Justices Brown and Rowe put it, the sole authority relied on by the majority "is a single law review essay" (para. 188). Slender foundations indeed.