Notes and Comments / Notes et commentaries

Mining for Legal Luxuries: The Pitfalls and Potential of *Nevsun Resources Ltd v Araya*

En quête d'extravagances juridiques: Les lacunes et les possibilités de *Nevsun Resources Ltd c Araya*

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Abstract

Globalization has effectively enabled Canada's domestically incorporated mining companies to escape the jurisdiction of the courts of the world, allowing them to carry out human rights abuses abroad with impunity. In February 2020, however, the Supreme Court of Canada issued a landmark judgment, *Nevsun Resources Ltd v Araya*, which attempted to address this jurisdictional gap. This decision held that Canadian corporations could potentially be liable under domestic law for breaches of customary international law perpetrated abroad. The decision has been criticized for straying too far from a classically positivist conception of international law. This article argues that such criticisms are well founded insofar as the majority's judgment implicitly relies on progressive human-centric theories of international law without adequately addressing how these are reconcilable with international law as it is currently applied. It then explores the ideas that drive the majority's opinion in order to propose two

Résumé

La mondialisation a permis aux sociétés minières constituées au Canada d'échapper à la juridiction des tribunaux du monde entier, leur permettant de commettre impunément des violations des droits de la personne à l'étranger. En février 2020, cependant, la Cour suprême du Canada a rendu un arrêt historique, *Nevsun Resources Ltd c Araya*, qui tente de combler cette faille juridictionnelle. Selon cet arrêt, les entreprises canadiennes pourraient éventuellement être tenues responsables, en vertu du droit national, pour leurs violations du droit international coutumier perpétrées à l'étranger. Cette décision a été critiquée puisqu'elle s'éloigne d'une conception positiviste du droit international. Cet article soutient que ces critiques sont justifiées dans la mesure où le jugement majoritaire s'appuie implicitement sur des théories progressistes du droit international, centrées sur l'individu, sans aborder de manière adéquate la question de comment celles-ci sont compatibles avec le droit international actuel. L'article

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Vol. 58 [2020], doi:10.1017/cyl.2021.2

alternative approaches to holding corporations accountable that are more readily reconcilable with traditional state-centric conceptions of international law. Adopting these revised approaches could less contentiously lead to corporate accountability before future domestic courts. Finally, this article considers the potential international developments and repercussions to which this and other forward-looking decisions could lead.

explore ensuite les idées qui animent l'opinion de la majorité afin de proposer deux approches alternatives pour tenir les entreprises responsables, approches qui sont plus facilement conciliables avec une conception traditionnelle du droit international centrée sur l'État. L'adoption de ces approches alternatives pourrait conduire à une responsabilité moins contestable des entreprises devant d'autres instances à l'avenir. Enfin, cet article discute des développements internationaux potentiels et des répercussions que pourraient entraîner cette décision et d'autres jugements similairement progressistes.

Keywords: customary international law; doctrine of incorporation; domestic reception of international law; human-centric international law; jurisdiction; *jus cogens*; state-centric international law.

Mots clés: doctrine de l'incorporation; droit international centré sur l'État; droit international centré sur l'individu; droit international coutumier; juridiction; *jus cogens*; réception du droit international en droit interne.

Introduction

On 28 February 2020, the Supreme Court of Canada (SCC) released a landmark decision: *Nevsun Resources Ltd v Araya* (*Nevsun*).[1] This case, which was decided by a five-to-four majority, held that corporations could potentially be liable under Canadian law for breaches of customary international law abroad. This decision was appealed from the Supreme Court of British Columbia (BCSC) in 2016 and then from the British Columbia Court of Appeal (BCCA) in 2017, and, along the way, it has raised and dealt with many contentious legal questions: what is the *forum conveniens* in this case; is the act of state doctrine part of Canadian law and does it bar this claim; what is the standard to be applied in motions to strike; and, most importantly for the purposes of this article, can customary international law be applied to corporations by domestic courts?

Holding corporations accountable for grave human rights breaches has been a contentious issue for some time. Globalization has allowed Canada's domestically incorporated multinational mining companies to effectively

[1] *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 70 [*Nevsun*].

[2] Catherine Coumans, "Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency" (2010) 30 Can J Development Studies 27 at 32–33.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

escape the jurisdiction of the courts of the world.[2] Canadian courts have been reluctant to hold corporations accountable for extraterritorial actions taken by their subsidiaries, while these corporations often choose to invest in foreign jurisdictions with uncertain legal structures as well as slow and cumbersome regulatory processes, effectively escaping accountability there as well.[3] International law has done little to address this accountability gap, largely allowing corporations to carry out human rights abuses with impunity.[4] While the *Nevsun Resources Ltd v Araya* decision may be praised for attempting to address this gap, this article will strive to show both its shortcomings and the ways in which its approach may be improved to better realize this goal.

First, this article will showcase a few of the ways in which *Nevsun* strays from a classically positivist approach to international law. The dissenting opinions bring to light important shortcomings of the majority's opinion that could ultimately impair its ability to drive change as the case is sent back to be tried by the court of first instance. Second, the article will explore the motivating ideas behind the majority's arguments, as these are neither clearly addressed nor explored in the majority opinion itself. More specifically, it will explore the ways in which the majority relies on the rise of non-state actors internationally and the quasi-constitutional status of human rights under international law to ground its opinion. It will then suggest an alternate basis for the decision that would have been a clearer fit for these driving ideas — namely, that of *jus cogens* norms. This part of the article will take a closer look at the relationship between domestic courts and customary international law. In particular, it will showcase the legitimate role of domestic courts in developing and "creating" evidence of customary norms by turning towards their dual role as law enforcers and law creators, as contemplated by international law. It will also postulate that relying more heavily on the act of "judicial translation" inherent in the doctrine of incorporation could have further buttressed the case for applying these norms to corporations domestically. Finally, the article will briefly explore the potential developments and repercussions to which this decision could give rise.

Breaking It Down: *Nevsun Resources Ltd v Araya*

THE CASE

Gize Yebeyo Araya, Kesete Tekle Fshazion, and Mihretab Yemane Tekle obtained refugee status in Canada after escaping Eritrea in 2011, 2013, and 2011 respectively. Previously, the three men had been indefinitely conscripted into a forced labour regime at the Bisha mine in western Eritrea,

[3] Miles Pittman & Rick Williams, "Canadian Companies and the Effects of Foreign Operations: Out of Sight, Front of Mind" (7 April 2017), online: *CanLII Connects* <https://canliiconnects.org/en/commentaries/45340>.

[4] Coumans, *supra* note 2 at 33.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

where they were overworked, underpaid, physically abused, and held in camps during their time off.[5] In 2014, the three men brought a class action on behalf of one thousand individuals who had also worked at the Bisha mine between 2008 and 2012. The proceedings were brought in British Columbia against Nevsun Resources, a Canadian mining company that partially owned the Bisha mine.[6] The Eritrean workers sought damages for breaches of Canadian tort law, including conversion, battery, unlawful confinement, conspiracy, and negligence. Since the alleged torts took place in Eritrea, Nevsun contended that it was the *forum conveniens*, but this argument was rejected by both the BCSC and the BCCA on the basis that the *forum* in this case was equivocal and that there was a real risk of corruption and unfairness in the Eritrean legal system.[7]

However, the Eritrean workers also sought damages for breaches of customary international law — namely, the prohibitions against forced labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity. Nevsun applied to have these causes of action dismissed on the basis that they were bound to fail. While neither the BCSC nor the BCCA were convinced that it was "plain and obvious" that these claims would fail, Nevsun appealed these decisions to the SCC.[8] The SCC's ruling on this aspect of the case — namely, that there may exist a right to a civil remedy for breaches of customary international law committed by corporations outside of Canada — is the focus of this article.

THE MAJORITY'S APPROACH

In setting the stage for the SCC's majority opinion, Justice Rosalie Abella initiated a conversation about the role that domestic courts have in shaping international law.[9] She noted that, when it comes to human rights specifically, domestic courts have an active role to play in developing coherent principles. They should embrace opportunities to add their voices to the chorus of international jurisprudence by implementing and fleshing out these norms domestically, continuously reflecting on the potential international impact that their decisions could have.[10] She added that Canadian courts should continue to embrace this role, as they have done in the past, so

[5] "Forced labour regime" is also known as modern slavery. International Labour Organization (ILO), "What Is Forced Labour, Modern Slavery and Human Trafficking" (2020), online: *ILO* <www.ilo.org/global/topics/forced-labour/definition/lang–en/index.htm>.

[6] Nevsun Resources has since been acquired by Zijin Mining.

[7] *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 at para 51.

[8] The "plain and obvious" test is used in determinations of whether to strike pleadings on the ground that they do not disclose a reasonable cause of action. *Ibid* at para 29.

[9] *Nevsun*, *supra* note 1 at para 70.

[10] *Ibid* at para 72.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

as to contribute meaningfully to shaping the substance of human rights norms and international law generally.

As she dove into the issue, Abella J followed the established Canadian approach to the incorporation doctrine (known domestically as the doctrine of adoption). This doctrine treats customary international law as a true part of the common law, which must be directly implemented without the need for legislative action.[11] She started by establishing the existence of the relevant customary norms, from which she was then able to deduce common law rules. She determined that the norms in question have for the most part reached the status of *jus cogens*, of which she could uncontroversially take judicial notice without having to consider evidence of state practice and *opinio juris*.[12] Abella J then went on to discuss to what actors these norms apply and whether corporations can be held accountable for their breaches. She cited William Dodge, who holds that international law does not contain general norms of liability applicable to categories of actors and that, while some norms are of a strictly interstate character, others are rather general prohibitions.[13] Abella J relied heavily on international human rights jurisprudence, making a case for modern international law as decidedly human-centric, declaring that it has "long since evolved from [its] state-centric template."[14] She concluded that this human-centric approach gives individuals rights and obligations under international law that are enforceable against all, including private actors.[15]

Customary international law cannot be received in domestic law if there is conflicting legislation or if it would contravene the unwritten constitutional principle of the separation of powers.[16] Abella J found no Canadian laws that conflict with the adoption of the relevant customary norms. Rather, she cited government policies that have a similar thrust as her decision, including Global Affairs Canada's Ombudsperson's mandate for responsible business abroad, which does not preclude bringing legal actions against Canadian corporations.[17] However, she did not directly consider whether

[11] Phillip Saunders et al, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond Publishing, 2019) at 186; *R v Hape*, 2007 SCC 26 at paras 36, 39 [*Hape*].

[12] *Nevsun*, *supra* note 1 at paras 100–03.

[13] *Ibid* at para 105. William S Dodge, "Corporate Liability under Customary International Law" (2012) 43 Geo J Intl L 1045.

[14] *Nevsun*, *supra* note 1 at para 106.

[15] *Ibid* at para 111.

[16] The Supreme Court of Canada (SCC) has referred to the doctrine of the separation of powers as one of the essential features of the Canadian constitution. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 104, 1985 CanLII 74.

[17] See e.g. Global Affairs Canada, *Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad* (July 2019); Global Affairs

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

judicial adoption of customary norms could overstep into the domains of the legislative or executive branches of government.[18] She then moved on to consider whether civil remedies should be made available for a breach of "this part of our common law."[19] She judged that this is an area of the law that needs to evolve. The common law is imbued with flexibility for these exact situations of inconsistency (in this case, the lack of a civil remedy for breaches of Canadian law by Canadian actors), which require clarification of muddy legal principles.[20] She reminded us that, in Canada's legal context, "where there is a right, there must be a remedy for its violation."[21] Customary international law creates rights in Canadian common law, and there is therefore no reason why the latter should not also afford remedies — the law must therefore evolve to fix this discrepancy.

A number of different tort remedies had been claimed in this case. The most straightforward approach would have been to allow the Eritrean workers to recover damages under the domestic torts being claimed, as previously enumerated. However, the workers had also brought claims for breaches of customary international law, and Abella J held that it was at least arguable that the harm suffered by the workers was not adequately addressed by domestic torts. She therefore considered two different approaches to crafting a remedy for these breaches of customary law.[22] The first would be to recognize new nominate torts under the common law, inspired by customary law. The second approach would be to directly remedy breaches of customary international law in order to avoid having to create new torts, "seeing as customary international law is a part of Canadian common law."[23] She explained that creating new nominate torts is unnecessary since these norms have already been recognized by the common law and that new torts might dilute or even negate the doctrine of adoption.[24] She claimed that providing a direct remedy for a breach of customary international law would deliver a stronger response than a typical tort claim,

Canada, News Release, "Minister Carr Announces Appointment of First Canadian Ombudsperson for Responsible Enterprise" (8 April 2019); Global Affairs Canada, "Responsible Business Conduct Abroad: Questions and Answers" (16 September 2019); Yousuf Aftab & Audrey Mocle, *Business and Human Rights as Law: Towards Justiciability of Rights, Involvement, and Remedy* (Toronto: LexisNexis Canada, 2019) at 47–48.

[18] *Nevsun*, *supra* note 1 at para 115.

[19] *Ibid* at para 117.

[20] *Ibid* at para 118.

[21] *Ibid* at para 120.

[22] *Ibid* at paras 123–25.

[23] *Ibid* at para 127.

[24] *Ibid* at para 128.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

due to the public nature and the importance of the breach of the relevant customary rights.

For Abella J, then, the matter was simple: "Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not 'plain and obvious' to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed."[25] She was brief and concise in her reasoning, leaving many doors open for the trial judge to explore.

CONTENTIOUS FEATURES

As with all decisions that push the envelope by taking large judicial leaps forward, the majority's opinion has led to significant criticism and disagreement. The length of the dissenting opinions in the case attests to this; yet this section will attempt to address only two of the main sources of tension, which best capture the unexpected turn away from customary international law as it is traditionally understood, developed, and incorporated. The first tension concerns the perceived role of domestic courts in the development of international law (and customary law more specifically), as understood by the dissenting justices and more traditional conceptions of international law that approach the issue through the lens of state sovereignty. The second tension deals with which actors may be held accountable for breaches of customary international norms, also according to a positivist approach.

The Role of Domestic Courts

National Limits: The Separation of Powers

The role that Abella J envisions for the proactive development of international law by domestic courts has been discussed for many years by scholars. Domestic courts are important agents in the development and enforcement of international law, as will be discussed further in the third part of this article. However, their exact role and how empowered they should feel in this process still escapes definition and agreement. An approach such as that of Abella J, which takes the development of international law into the hands of national courts, is not one that has yet been positively implemented by nations, and it does not abide by traditional approaches to international law as espoused by national courts and constitutional arrangements.[26] This

[25] *Ibid* at para 132. However, Abella J did not establish a clear basis upon which this could be done and relied on an example from the United States without acknowledging that the United States has a statutory basis for such causes of action, the *Alien Tort Claims Act*, 28 USC § 1350 (1789).

[26] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed (Oxford: Oxford University Press, 2019) at 101.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

section will look at both the national and international limits imposed upon domestic courts as developers of international law.

The conventional approach to international law by domestic courts makes international law a concern that is secondary to the protection of the domestic legal order. National courts view themselves, first and foremost, as the guardians of the domestic legal sphere rather than the international one.[27] This is the case in Canada, which looks at international law through the lenses of the rule of law, parliamentarism, and monarchy.[28] The unwritten constitutional principle that defines the role of Canadian courts is that of protecting the rule of law — namely, by trying all domestic cases, interpreting the laws of Canada applicable to them, and declaring any law or executive act that is inconsistent with the Canadian Constitution as unconstitutional.[29] The doctrine of the separation of powers protects the independence of the judicial branch from undue influence by the two other branches of government (executive and legislative). Conversely, the separation of powers also stops the judicial branch from overstepping into these two domains. The legislative branch (parliament) is the only arm of government that can make laws, and, as such, legal changes with uncertain and broad ramifications should be left to it. As for the executive branch of the Canadian government, which formally means the monarch, it holds the royal prerogative power over foreign affairs.[30]

Abella J's approach did not strictly follow or consider this conventional perspective on international law. In their joint dissenting opinion, Justices Russell Brown and Malcolm Rowe critiqued her decision as respecting the purview of neither the legislative nor the executive branches of government. They stressed that the developments proposed by the majority are not in line with the doctrine of incrementalism, since they are likely to lead to uncertain and complex ramifications.[31] This is in breach of the principle of legislative supremacy since only the legislature has the "institutional competence and democratic legitimacy to enact major legal reform."[32] Changing the common law in this matter could also be seen as placing the courts in the unconstitutional position of conducting foreign relations, which is the

[27] Eyal Benvenisti & George W Downs, "National Courts, Domestic Democracy, and the Evolution of International Law" (2009) 20:1 EJIL 59 at 60.

[28] Saunders et al, *supra* note 11 at 154.

[29] Joseph Magnet, "Separation of Powers in Canada" (2013), online: *Constitutional Law of Canada* <www.constitutional-law.net/>.

[30] John D Richard, "Separation of Powers: The Canadian Experience" (2009) 47 Duq L Rev 731 at 738–40.

[31] *Nevsun, supra* note 1 at para 227.

[32] *Ibid* at para 225.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

domain of the executive branch.[33] Brown and Rowe JJ advocated for a more conventional approach, very similar to the one briefly outlined above, whereby domestic courts treat their own constituting documents as supreme, leaving it to international tribunals and courts to apply the laws of their constitutive instruments.

International Empowerment: The Formation of Customary International Norms

The dissenting opinion of Brown and Rowe JJ further depicts the international limits that they perceive as restricting the role that domestic courts have in developing international law. As stipulated, the conventional approach is that each court should treat its constitutive documents as supreme and, thus, Canadian courts should apply the law of Canada.[34] International law cannot compel Canadian law to be shaped in certain directions, except inasmuch as this is allowed by the Canadian legal system. Canadian and international law should *a priori* be seen as separate, only allowing international law to have domestic effect within the predefined limits that the Canadian legal system has created for it (which include the doctrine of adoption, the treaty implementation requirement, and the presumption of conformity).

According to this view, it is international courts such as the International Court of Justice (ICJ) or the International Criminal Court that exercise international judicial functions and that should be developing international law in step with their constitutive instruments.[35] However, these institutions cannot create law; they may only ascertain and declare what international law already is.[36] The creation of international law is left to its three sources as enumerated under Article 38 of the *Statute of the International Court of Justice* (*ICJ Statute*): international conventions, international custom, and general principles of law.[37] As for customary international law, it is traditionally understood to emerge from a combination of state practice and *opinio juris* (acceptance of the practice as law) as described by Article 38(1)(b) of the *ICJ Statute*.[38] This requires searching for a practice that "has gained such acceptance among States that it may be considered to be the expression of a

[33] *Ibid* at para 148.

[34] Crawford, *supra* note 26 at 101.

[35] Antonios Tzanakopoulos, "Domestic Courts in International Law: The International Judicial Function of National Courts" (2011) 34 Loy LA Intl & Comp L Rev 133 at 137.

[36] Saunders et al, *supra* note 11 at 60; *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7, art 38(1)(d) (entered into force 24 October 1945) [*ICJ Statute*].

[37] *ICJ Statute*, *supra* note 36, art 38(1)(a)–(c).

[38] *Ibid*, art 38(1)(b).

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

legal right or obligation."[39] National courts may be called upon to identify and give effect to these norms, as is recognized by Article 38(1)(d) of the *ICJ Statute*.[40] In Canada, the doctrine of adoption stipulates that judicial notice should be taken of norms that have already been recognized. As for emerging norms, the courts must work through an identification process, whereby they establish the existence of state practice and *opinio juris*, a process outlined by the International Law Commission (ILC) in its "Draft Conclusions on Identification of Customary International Law."[41]

Abella J, in accordance with this theory, took judicial notice of the established norms invoked in this case, which have for the most part reached the status of *jus cogens*.[42] However, Brown and Rowe JJ critiqued her approach, stating that she also identified their application to non-state actors as a recognized part of the norms.[43] Their dissenting opinion held the view that the actors to which customary norms apply must be established in the same way as the norms themselves. Brown and Rowe JJ therefore found it problematic that Abella J took judicial notice of a norm's application to corporations in the same way she did the rest of the norm. They criticized her for supporting this decidedly novel aspect of the norm with references to scholarship rather than state practice and *opinio juris*.

However, not only must national courts ascertain, apply, and enforce customary norms; their decisions have also been identified by the ILC as a means by which to ascertain state practice and *opinio juris*, giving them the ability to develop the law.[44] This is known as the dual role of national courts in the identification of customary international law: they are both its enforcers and among its creators.[45] This explains why Abella J equated customary international law with the "common law" of nations, both of which must be incrementally developed by national courts.

[39] International Law Commission (ILC), "Draft Conclusions on Identification of Customary International Law, with Commentaries" (2018) 2:2 ILC Yearbook 122 at 125 [ILC, "Draft Conclusions"].

[40] While there exists disagreement as to whether the "judicial decisions" referred to in art 38(1)(d) include the decisions of national courts, the ILC does include national courts in its Conclusion 13. *ICJ Statute*, *supra* note 36, art 38(1)(d); ILC, "Draft Conclusions," *supra* note 39 at 149.

[41] ILC, "Draft Conclusions," *supra* note 39.

[42] *Jus cogens*, or "peremptory norms," are rules of international law that have been accepted and recognized by the international community of states as norms from which no derogation is permitted. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, Can TS 1980 No 37, art 53 (entered into force 27 January 1980) [*VCLT*].

[43] *Nevsun*, *supra* note 1 at paras 190–91.

[44] ILC, "Draft Conclusions," *supra* note 39 at 132.

[45] *Ibid* at 149.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

The dissenting opinion of Brown and Rowe JJ also took issue with this, stating that "the relevant distinction here is that courts have some discretion to change the common law. Courts do not have that discretion in respect of statutory law or customary international law."[46] While Abella J was correct in reminding us that judicial decisions play a "crucial role in shaping norms of customary international law," this argument must be treated with caution.[47] Part of Brown and Rowe JJ's concern likely stems from the fact that, while it has been recognized that judgments of national courts may be turned to in ascertaining state practice and *opinio juris*, judicial decisions should not mistakenly create norms that may then be used as proof of practice.[48] One is left to wonder how much space truly exists for the development of customary international law by national courts, suggesting that, while international law does carve out a space for the "law creation" role of domestic courts, domestic constitutional schemes greatly limit this ability.

The Subjects of Customary International Law

Abella J's decision is also controversial in that she opened the door to holding corporations accountable for breaches of customary law. Customary international norms are rarely applied in the domestic context because they remain staunchly state-centric, "outward looking" norms that consequently have little relevance for internal law or actors.[49] Since international law was created to govern the relationships between states, these are the main entities that have been afforded legal personality under international law.[50] As subjects of international law, states have rights and obligations. They are also the entities of import during the formation of international law, including customary law. Customary law's focus on state-derived norms is apparent in its observation of state practice and *opinio juris* (both of which have the state and the state's actions as their focus), yet this approach fails to

[46] *Nevsun*, *supra* note 1 at para 200.

[47] *Ibid* at para 78.

[48] See e.g. *Jurisdictional Immunities of the State (Germany v Italy)*, [2012] ICJ Rep 99 at para 55 [*Germany v Italy*].

[49] The law of immunities is an important exception here. Gib van Ert, "The Domestic Application of International Law in Canada" in Curtis A Bradley, *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) 501 at 509. "Outward looking" norms regulate interstate behaviour. Tzanakopoulos, *supra* note 35 at 138.

[50] Some international organizations have been granted a certain measure of legal personality. Individuals have gained international legal personality in areas of human rights protection and groups of people around the world have been afforded collective rights. Corporations do not have international legal personality. Saunders et al, *supra* note 11 at 71, 109, 131, 149.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

account for other important non-state norm-generating entities, such as international organizations and transnational corporations.[51]

This means that, for the most part, customary international law only creates obligations for states, letting transnational actors largely escape its purview. Judge James Crawford of the ICJ has said that one of the first questions to ask regarding the incorporation of customary norms is whether the norm is susceptible to domestic application. By this, he means that we must identify whether the norm is of a strictly interstate character or whether it also implicates the rights of private parties.[52] He observes that "the former may be difficult to restructure as a norm within a domestic legal system. In the case of the latter, individual rights may be more readily transposed."[53] Since customary norms tend to be state-centric, this creates a climate in which private actors are rarely held accountable for breaches of customary international law.

The emergence of "inward-looking" customary international human rights norms has brought about an important caveat to the dominance of the state as the main subject of international law.[54] International human rights law is said to possess a special character in that it seeks to govern the relations between states and individuals instead of inter-state relations alone. It imposes on states obligations *erga omnes* since the international community as a whole has an interest in protecting human rights. Nevertheless, as international human rights law was crafted in the wake of the Second World War, it was largely created to protect individuals against abuses originating from states and, less so, from non-state actors.[55] While some individual responsibilities under international law have been created, these are limited to criminal responsibility for mass atrocities such as genocide, crimes against humanity, and war crimes.[56] The majority in *Kazemi Estate v Republic of Iran* also noted that criminal and civil proceedings are seen as fundamentally different processes in the international community.[57] As for corporations, their human rights responsibilities were the focus of the United Nations' (UN) *Guiding Principles on Business and Human Rights*.[58] These principles

[51] Roozbeh B Baker, "Customary International Law: A Reconceptualization" (2016) 41:2 Brook J Intl L 440 at 454.

[52] Crawford, *supra* note 26 at 65.

[53] *Ibid.*

[54] "Inward-looking" norms aim to regulate state conduct within the domestic jurisdiction. Tzanakopoulos, *supra* note 35 at 138.

[55] Saunders et al, *supra* note 11 at 658.

[56] *Ibid* at 659.

[57] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at para 104.

[58] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31 (2011), online: *Office of the UN High Commissioner for Human Rights* <www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf>.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

were adopted by the Human Rights Council in 2011, but they are non-binding and unlikely to have yet crystallized into customary law.[59]

In *Nevsun*, Abella J tried to find ways to show that modern international law recognizes corporations as its subjects. Relying on academic articles by William Dodge and Harold Hongju Koh, she carved out a theory of international law in which there are no "norms of liability or non-liability applicable to categories of actors."[60] In stating that customary international law has long since evolved from its state-centric approach, she offered limited support, quoting Lord Denning in the 1977 case *Trendtex Trading v Bank of Nigeria*, who described the evolving nature of international law with the words "but it does move."[61]

Human rights discourse brought about an important shift in international law towards the recognition of the individual as one of its subjects. Yet the individual still has a very limited legal personality in international law, and corporations even less so. At least, this is the view of Brown and Rowe JJ, who affirmed that states are the only duty holders under customary international law and that "it is plain and obvious that corporations are excluded from direct liability under customary international law."[62] At best, they stated, the position of corporations is equivocal, which negates the uniformity required to establish customary international law.[63]

Building It Up: Grounding Abella J's Case

The above discussion sheds light on some of the criticisms levelled against the majority opinion based on traditional conceptions of international law endorsed by the dissenting judges. A central concern with Abella J's approach is that it lacks methodological rigour. She is not forthcoming in addressing the above issues or in how her method diverges from a positivist understanding of international law. She appears to attempt to bring about significant changes to both domestic and international law without thoroughly explaining the basis upon which she sees fit to do this. The result is a judgment that seems to espouse *lex ferenda* rather than *lex lata*, as was pointed out in the dissenting opinion of Justices Suzanne Côté and Michael Moldaver.[64] In short, while Abella J's decision pays lip service to international law, it does not seem to fully respect its limits.

[59] Saunders et al, *supra* note 11 at 658–59.

[60] *Nevsun*, *supra* note 1 at para 105, relying on Dodge, *supra* note 13 at 1046, and Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004) 7 J Intl Econ L 263 at 265–67.

[61] *Nevsun*, *supra* note 1 at para 106; *Trendtex Trading Corp v Central Bank of Nigeria*, [1977] 1 QB 529 (Eng CA).

[62] *Nevsun*, *supra* note 1 at para 205.

[63] *Ibid* at para 191.

[64] *Ibid* at para 269.

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The following sections will therefore attempt to illustrate theories upon which Abella J could have more clearly grounded her opinion. While they will embrace her conclusions, the methods for arriving there will differ. Two theories will be explored, which could have provided a stronger starting point upon which to then establish domestic corporate liability for violations of international human rights law. The first section will take a closer look at the shift from a state-centric to a human-centric conception of international law. While Abella J mentions this shift, she does not explore it in depth, nor does she explore the greater implications it could have for this case. This section will conclude with an analysis of how this case could have been more strongly grounded in *jus cogens* rather than in customary norms. The second section will look at the role national judges should play in developing customary international law, as espoused by many commentators. It will explore how the majority opinion could have taken an alternative approach in which it explicitly acknowledged the "judicial translation" process that judges must undertake when applying customary norms in the domestic context. It will be argued that this could also have offered a clearer basis upon which corporations could be held accountable domestically for violations of customary international law.

A HUMAN-CENTRIC BASIS FOR INTERNATIONAL LAW

The Rise of Non-State Actors

It is high time for international law to respect the human rights it committed to protecting when it removed them from the exclusive domain of domestic jurisdiction after the Second World War and made them a matter of international concern. It is this idea that seems to guide Abella J's judgment, and she has made this claim both in the past and in this decision. In a 2010 lecture at McGill University's Faculty of Law, Abella J pointed out that, since this shift, "we appear to be reluctant to call to account the intolerant countries that abuse their citizens, and instead hide behind silencing concepts like … domestic sovereignty."[65] For her, this is not a matter of law but, rather, a matter of willingness. This complacency has been a source of ongoing tension and disagreement in the international community since the emergence of international human rights law.

These frustrations stem from an international system that, originally created to govern state relations, has refused to let go of governing legal tropes such as "state consent" and "sovereignty," even as the individual became the fundamental unit of international law in the twentieth century. This discordance between positivist interpretations of international law and the power realities that it must reflect has only increased as non-state actors

[65] Hon Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity" (2010) 55:4 McGill LJ 871 at 881.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

with ever-greater international sway have proliferated following the birth of the UN and the rise of globalization. These non-state forces include intergovernmental organizations, peoples as collectives, rebellious groups, public opinion, and, most importantly for our purposes, multinational corporations (MNCs).[66]

These entities have an important role to play in shaping the actions and behaviours of states as well as the formation of international norms. Globalization has allowed corporations to evade conventional state oversight while also increasing their power. This power is then often used to apply pressure to nations, using economic coercion or persuasion through international institutions, or even to argue that these corporations should be allowed to define the measure of what constitutes acceptable behaviour within the international system.[67] While they often escape state oversight, international law has hardly developed to respond to this regulatory gap. There is a growing body of soft law mechanisms that attempt to regulate the behaviour of MNCs in the fields of human rights, environmental and criminal law; however, these mechanisms create no strict obligations under international law.

The main factor that accounts for the growth of corporate rights under international law (such as those granted under international investment law) without a similar growth of obligations is the lack of state consent to the latter.[68] Therefore, there is a pressing need for international law to find ways of accounting for these forces in the process of norm creation (notably in customary international law, which only looks to the practice of states, which, in turn, are reluctant to hold corporations accountable). The focus must move away from positivist debates that focus on legal tropes towards an empirical study of the conditions under which international law is formed and has effect.

A straightforward way of bringing transnational activities of corporations within the reach of international human rights law would be to extend the range of duty bearers to include non-state actors, and this is partly what

[66] Antonio Cassese, "States: Rise and Decline of the Primary Subjects of the International Community" in Bardo Fassbender & Anne Peters, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) 49 at 65–68 [Cassese, "States"].

[67] Terence C Halliday & Bruce G Carruthers, "The Recursivity of Law: Global Norm Making and National Law Making in the Globalization of Corporate Insolvency Regimes" (2007) 112 Am J Sociology 1135 at 1146–48.

[68] Marcos D Kotlik, "Defying the Theoretical Constraints of State-Centric Approaches: A Review of *Non-State Actors in International Law*" (2017) 50:1 Israel LR 87 at 98. As another commentator has pointed out, "[w]hile there appears to be a great deal of recognition of the enhanced power of transnational corporations, it is unaccompanied by effective efforts to regulate them. In many matters, international law is silent." Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy" (2001) 27 Rev Intl Studies 133 at 146.

Abella J seems to have attempted in *Nevsun*. Guénaël Mettraux of the University of Amsterdam praises this decision, stating that "the law on this point has been at a crossroads for quite some time. A majority of the Supreme Court of Canada has decided that it should follow the progressive side of the path rather than to stay stuck with directional uncertainty."[69] Irit Weiser of Queen's University similarly states that "the *Nevsun* case reflects efforts by the human rights community to hold transnational corporations accountable when traditional oversight and traditional borders no longer work. Avenues for doing this are needed."[70] However, many scholars who have grappled with this issue do not see this as a plausible solution, stating that it "would amount to nothing less than a paradigm shift within [international human rights law]" and that "advocating the (transnational) reinterpretation of existing international human rights law but not its amendment [makes] the extension of the range of duty bearers … not an option."[71] These voices identify three main issues: first, no international human rights instrument currently provides for a "direct horizontal effect" of its guarantees; second, currently there is unlikely to be sufficient state support for an extension of personality to corporate entities; and, third, the current conceptual framework of international human rights law concerns balancing individual interests with collective (public) interests, whereas MNCs do not pursue collective interests but, rather, aim at generating monetary or material benefit.[72] The pushback to these arguments will be explored in the next section.

[69] Quoted in Julianne Hughes Jennett & Marjun Parcasio, "Corporate Civil Liability for Breaches of Customary International Law: Supreme Court of Canada Opens Door to Common Law Claims in *Nevsun v Araya*" (29 March 2020), online: *Blog of the European Journal of International Law* <www.ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya/>.

[70] Irit Weiser, "*Nevsun* and Civil Liability within the Arsenal of Human Rights Strategies" (2020) 4 PKI Global Justice J 13.

[71] Tilmann Altwicker, "Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts" (2018) 29:2 EJIL 581 at 598.

[72] *Ibid*. See also John H Knox, "Horizontal Human Rights Law" (2008) 102 AJIL 1 at 10–14; United Nations (UN) Human Rights Committee, "General Comment no 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant," UN Doc CCPR/C/21/Rev1/Add 1326 (29 March 2004) at para 8.8 (observing that the *ICCPR*, *infra* note 76 does not have "direct horizontal effect as a matter of international law" as such); UN Human Rights Council, "Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie: Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts," UN Doc A/HRC/4/35 (19 February 2007) at para 34.

Human Rights as the Constitution of the World

After the Second World War, the international community decided to recognize individuals as subjects of international law. It realized that it was individuals, rather than only states, who had committed terrible wartime crimes and who must be brought to justice. This moment in history was accompanied by a plethora of human rights doctrine, which led to states being held accountable *vis-à-vis* individuals. These countries could no longer legitimately use their sovereignty (by stating that relations with citizens were purely domestic matters) as a viable defense for human rights violations.[73] The recognition of the legal personality of individuals in international law required rolling back core founding precepts of international law such as state sovereignty and state consent.[74] The instruments that emerged from this period, such as the *Universal Declaration of Human Rights* (*UDHR*) and the *UN Charter*, gave human rights a kind of quasi-constitutional status in international law.[75] The *UDHR* led to the adoption of two treaties that cemented human rights law's influence over international law (the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*), both of which were widely ratified and eventually came to be known as the "core international human rights instruments."[76] As for the *UN Charter*, it entrenches the promotion and respect of human rights among the purposes of the UN organization.[77]

However, what truly gives human rights treaties their quasi-constitutional status is that, unlike other treaties, their aim is to protect the basic rights of individuals, no matter their nationality, rather than the rights of states. Further, these are obligations that are imposed upon states *erga omnes*. This means that, instead of imposing bilateral obligations, these obligations are owed to the entire community of nations, and all entities have a legal interest in their enforcement.[78] Many of these commonly recognized human rights norms, such as the prohibitions against slavery or torture, have now also become binding customary international law norms from which countries

[73] Cassese, "States," *supra* note 66 at 15.

[74] Saunders et al, *supra* note 11 at 634.

[75] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*]; *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*].

[76] Saunders et al, *supra* note 11 at 638; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976).

[77] *UN Charter*, *supra* note 75, art 1(3).

[78] René Provost, "Reciprocity in Human Rights and Humanitarian Law" (1994) 65 Brit YB Intl L 383.

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cannot derogate. Many think that it is this "special character" of international human rights law that can address the three limitations identified above by scholars. While the predominant approach places human rights violations in a vertical and static system, many prominent authors hold that "the existence of horizontal relationships is conceptually dependent on the understanding one adopts of the meaning and purpose of human rights."[79] Hence, "the equal entitlement of every individual to live a life of dignity means — as it has been recognized by modern moral and political theory — that the 'effective realisation of human rights thus logically implies a broad conception of claims against all actors able to affect the dignity of a human person.'"[80] This conceptualization concurrently addresses the second concern surrounding the lack of state support; by adopting this broader conception of human rights obligations, states have already acceded to holding "all" accountable for breaches of human dignity.[81] As for the third concern — that MNCs do not pursue collective interests — it can safely be said that this is an outdated notion as corporations increasingly face pressure to develop robust corporate social responsibility plans to account for the effect of their power on communities.

The three issues identified at the end of the preceding section remind us that the centre of any analysis should be the right of the victim to obtain adequate reparation rather than the obstacles posed by traditional legal concepts. For example, while corporations are rarely respondents in international tribunals, this does not mean that they do not have international obligations. The Nuremberg trials illustrate this perfectly. As is the case for any trial, those defendants must have had international obligations prior to the trial. What the Nuremberg trials show us about the application of international law brings us back to Abella J's point — namely, that what we are currently seeing is a lack of political and state willingness rather than strict legal constraints.[82] Corporations and other non-state actors exercising real international power and causing real harm

[79] Kotlik, *supra* note 68 at 93. This approach has been advanced by leading authors in the field. See e.g. Andrea Bianchi, "Globalization of Human Rights: The Role of Non-state Actors" in Gunther Teubner, ed, *Global Law without a State* (Aldershot: Dartmouth Publishing, 1997) 179 at 179; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2005) at 271. Others have identified "an 'all-round' effect of human rights" in a review of non-state actors in international law. Manfred Nowak & Karolina Miriam Januszewski, "Non-State Actors and Human Rights" in Math Noortmann et al, *Non-State Actors in International Law* (Oxford: Hart Publishing, 2015) 113 at 129–32.

[80] Kotlik, *supra* note 68 at 93, quoting Nowak & Januszewski, *supra* note 79 at 127.

[81] "All" as quoted in the preceding sentence. *Ibid.*

[82] See Nowak & Januszewski, *supra* note 79 at 118–23.

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to third parties should be the subjects of a real responsibility regime under international law.

Jus Cogens

State-centric legal concepts are more common in some parts of international law than others, and Abella J could have built a stronger case had she decided to base it on a form of international law not as staunchly state-centric as customary international law. Customary international law relies on the practice of states and their belief that their actions are carried out as a matter of legal obligation. These norms revolve around the state, which makes it almost impossible to prove that there is a practice of holding corporations accountable for breaches of human rights abroad. This is especially so if we abide by a view of customary norms that encapsulates the susceptibility of actors to be held liable within the norms in question.[83]

However, Abella J seems to hold that the actors that may be held accountable under customary norms may at times not be defined by those norms themselves.[84] Even if this is the case, the starting point in the formation of these norms looks to the state, making it very difficult to interpret these norms as having horizontal effect between private parties. Roozbeh Baker's article on customary international law relies on Giovanni Sartori's "ladder of abstraction" to explain how customary law is being "conceptually stretched" as it is applied to new norms that do not have the state as their subject, without undergoing the required adaptation away from state practice and *opinio juris*.[85] While there is a need for a drastic change and an unraveling of the state-centric focus of international law, and while Abella J tries to help us imagine what this could look like, the fact that she does not directly address these tensions and difficulties might lead to this reasoning having less sway than desired.

Rather than looking towards customary international law as such, it is submitted that Abella J should have structured her decision around the *jus cogens* status of many of the norms at issue. While she mentions the *jus cogens* status of the norms, her reasoning, which looks to state practice and *opinio juris*, reflects a focus on their customary status instead. While *jus cogens* is often thought of as simply a "stronger" customary norm, they differ from one another in important ways. This is exemplified by the fact that, while the prohibition against torture is a *jus cogens* norm and often also qualified as customary law, it fits more neatly into the domain of *jus cogens*, seeing as

[83] This was the view espoused by Brown and Rowe JJ, as described above.

[84] *Nevsun*, *supra* note 1 at para 105.

[85] Giovanni Sartori was a political scientist who created the ladder of abstraction to explain the relationship between the meaning of concepts and the range of cases to which they apply. Baker, *supra* note 51 at 454.

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many states still do engage in torture. While customary law must reflect state practice, *jus cogens* is not so simply captured by the combination of state practice and *opinio juris*.[86]

While there is no one agreed way in which *jus cogens* is formed, as there is with customary law,[87] most commentators agree that it is sourced in a mix of conventional international law and general principles of law.[88] The former president of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the Special Tribunal for Lebanon, Antonio Cassese, believed that, in ascertaining the birth of *jus cogens* rules, "[i]t may suffice for the majority of members of the world community in some way to evince their 'acceptance' of a customary rule as having the rank of peremptory norm. Such 'acceptance' does not necessarily involve actual conduct or a positive assertion; it may involve an express or tacit manifestation of will," which importantly takes the focus away from state practice.[89] Looking to the jurisprudence of the ICTY, the *Kupreskić* judgment is said to confirm that "our changing notions of what is considered humane can generate new binding rules in the field of international human rights and humanitarian law without recourse to the mysteries of evaluating state practice and *opinio juris*."[90] *Jus cogens* norms are much more general in nature, which allows them to not be closely tied to state-centric notions that might detract from their underlying purpose.

Unlike customary norms, which have very limited applicability to individuals, the general nature of *jus cogens* implies a very real possibility of responsibility for individuals:

> [V]iolations of *jus cogens* have been invoked outside of the law of treaties, with regard to the accountability of state and non-state actors, particularly individuals. It is the non-state actor's violation of international law that is at issue; the responsibility of any state for the acts of that individual is not determinative of the individual responsibility under international law. In fact, even where the individual has no state function (or is operating as a non-state actor) the *jus*

[86] While it could be said that the emergence of modern custom makes it possible to make a case for emerging norms based solely on *opinio juris*, this only points to further disagreement regarding customary law's formation and would be a shaky, controversial basis upon which to base an argument.

[87] *ICJ Statute*, *supra* note 36, art 38(1)(b). Whether this is truly how customary international law is formed is another question.

[88] See e.g. Emmanuel Roucounas, *A Landscape of Contemporary Theories of International Law* (Boston: Brill Nijhoff, 2019) at 588; A Gómez Robledo, "Le ius cogens international: sa genèse, sa nature, ses fonctions" (1981) 172 Rec des Cours 9.

[89] Antonio Cassese, "For an Enhanced Role of *Jus Cogens*" in Antonio Cassese, ed, *Realizing Utopia: The Future of International Law* (Oxford: Oxford University Press, 2012) 158 at 165.

[90] Clapham, *supra* note 79 at 88.

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> *cogens* norms may apply, with consequences not only for the individual, … but also for other actors.[91]

Further, the ICTY in the *Furundžija* case explained some of the special consequences that can arise in the context of a violation of the *jus cogens* norm against torture:

> [T]he victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act; … at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every state is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.[92]

The case being brought against Nevsun is not a criminal case. However, the above opens the door to victims to bring civil suits claiming damages for breaches of *jus cogens* norms. These two passages suggest that, when it comes to *jus cogens* norms, non-state actors have very real obligations and rights under international law.

A final point of interest is the overlapping nature of *jus cogens* norms and obligations *erga omnes*. As seen above, Abella J seems implicitly to base her decision on the quasi-constitutional nature of human rights and their predominance over state-centric pillars of international law. This exemplifies another way in which an argument based on *jus cogens* rather than customary law would have been more suited to her purpose. Many scholars, including Christian Tams and Eric Posner, suggest that *jus cogens* norms and obligations *erga omnes* are different facets of the same underlying concept.[93] They believe that it is futile to try to draw distinctions between the two and that what matters is that the international community accepts "the existence of a class of legal precepts that differ from ordinary rules."[94] Just like obligations *erga omnes*, the *jus cogens* concept relativizes sovereignty and is a warning sign that a limited set of rules are not subject to derogation.[95] Both focus on the protection of interests that are general to all and subject to

[91] *Ibid* at 90.

[92] ICTY, *Furundžija*, Case no IT–95–17/1–T, Trial Judgment (10 December 1998) at para 156.

[93] See Roucounas, *supra* note 88 at 586; Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2009); Eric A Posner, "*Erga Omnes* Norms, Institutionalization, and Constitutionalism in International Law" (2009) 165 J Institutional & Theoretical Economics 5.

[94] Roucounas, *supra* note 88 at 586.

[95] *Ibid* at 589.

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international legal protection, regardless of who is being harmed and who is perpetrating the harm.

DEVELOPING CUSTOMARY INTERNATIONAL LAW

In the above discussion, a hypothesis was presented as to the underlying theories propelling the majority's view of the case. The preceding section has attempted to show that these theories would have had a stronger footing based on *jus cogens* norms than on customary international law. This section will focus more closely on how the case for customary international law itself could have been more strongly put. It will first attempt to show the legitimacy of national courts developing customary law, as was done by Abella J, by looking at their dual role as law enforcers as well as law creators. Second, it will postulate that relying more heavily on the inherent act of judicial translation in the doctrine of adoption could have strengthened the application of customary norms to corporations in domestic proceedings.

Domestic Courts in International Law Creation

The majority and dissenting judgments have vastly different understandings of the role of national courts in the development of international law. This divergence of opinion stems from the oft-ignored dual role of national courts as outlined in the doctrine of sources.[96] Domestic court decisions are listed by the ILC as evidence from which to deduce state practice that is relevant to the interpretation of treaties and customary international law.[97] This accords such decisions a law creation role,[98] and it is this aspect of the domestic court's role in defining state practice that has propelled Abella J and others to describe customary international law as the "common law of nations." The second role of domestic courts in the doctrine of sources is as a subsidiary means of determining the existence and content of international law.[99] In this respect, domestic decisions are best characterized as ascertaining and enforcing law rather than creating it, and it is this role to which Brown and Rowe JJ cling. This distinction drives many of the majority's and minority's disagreements, yet this dual role of domestic courts is never directly addressed.

[96] See e.g. Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011) 60 ICLQ 57 at 59. See also Gérard V La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996) 34 Can YB Intl L 89 at 98; *ICJ Statute*, *supra* note 36, art 38.

[97] ILC, "Draft Conclusions," *supra* note 39 at 132.

[98] Law creation here refers only to the incremental development of the law by judges.

[99] *ICJ Statute*, *supra* note 36, art 38(1)(d).

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National courts have another important law creation duty when it comes to protecting the international rule of law.[100] This potential was left unrealized for a long time as national courts narrowly interpreted international rules so as to protect national interests.[101] "Avoidance techniques" used by courts included narrow interpretations of constitutional orders regarding the incorporation of international law sources, deference to the executive branch in determining the scope and status of these sources, and the use of threshold doctrines such as those related to justiciability, political questions, acts of state, standing, and others.[102] According to a 2008 article by Eyal Benvenisti and George Downs, this deference rests on a series of assumptions that have gradually become untenable. The first assumption is that the boundaries between domestic and foreign affairs as well as their associated legal orders would remain relatively well defined and distinct, and the second is that a government is capable of adequately representing and protecting the interests of its domestic constituency in its foreign diplomacy. This deference to the executive has now come to be seen as a mistake since it has limited the influence of national courts in the design and subsequent operation of rapidly expanding international regulatory apparatuses.[103] Many areas of regulation no longer purely affect international affairs but have repercussions on matters that affect every citizen, which raises democratic and constitutional concerns about excessive executive power and the erosion of the effective scope of judicial review.[104]

Globalization has altered the assessment by domestic courts of what are the primary threats to the domestic order. It has made it less obvious that governments are the best representatives of national interests abroad as transnational actors have accumulated vast amounts of power that they then wield against governments. In response, national courts are increasingly using international law as a "sword" to challenge legislative and executive actions, applying international law in a more consequential and less parochial way.[105] Courts can create clearer boundaries placing limits on executive unilateralism in the area of foreign policy so as to better safeguard domestic democratic processes and reinforce their own

[100] See Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015) 23:3 Cardozo J Intl & Comp L 1 at 7.

[101] Roberts, *supra* note 96 at 59; Eyal Benvenisti, "Judicial Misgivings Regarding the Application of International Law: An Analysis of the Attitudes of National Courts" (1993) 4 EJIL 159 at 161.

[102] Schwartz, *supra* note 100 at 3.

[103] Benvenisti & Downs, *supra* note 27 at 60.

[104] *Ibid.*

[105] Roberts, *supra* note 96 at 59.

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autonomy while also protecting internal constitutional arrangements. They can pressurize their governments to seek legislative approval of their actions or block certain policies as incompatible with constitutional and international legal texts.[106]

This process has repercussions for the role of domestic courts in the development of customary international law as well. International law supplies national courts with tools (such as substantive arrangements including international human rights and international humanitarian law that come with international backing through international institutions) that empower them and strengthen their independence so that they can help protect the global rule of law.[107] The UN adopted the *Bangalore Principles of Judicial Conduct* in 2006 so as to strengthen the above mechanisms of mutual reinforcement of international law.[108] However, there is still untapped potential for domestic courts around the world to act collectively by engaging in "a loose form of inter-judicial coordination."[109] Customary international law is one form of international law that is often fragmented and unclear. The onus is increasingly on courts to act as full partners to create a more coherent international legal framework by maintaining spaces for domestic deliberation and strengthening the capacity of governments to withstand external pressures. The potential positive and negative repercussions of such a system will be explored in the final part of this article.

It can therefore be asserted that domestic courts have both internationally and domestically imposed onuses to meaningfully contribute to the development of international law. The separation-of-powers approach of Brown and Rowe JJ not only ignores the roles played by domestic courts under international law instruments such as the *ICJ Statute*, to which Canada is a party; it also ignores the responsibility that judges have to protect domestic democratic processes from excessive powers being left in the hands of the executive branch. In contrast, Abella J's judgment, rather than overstepping the limits of judicial power, may instead have finally grown into the latter's internationally mandated role, reflecting the modern responsibility of domestic courts.

International Law in Domestic Contexts: Judicial Translation

A challenge repeatedly raised above is the state-centricity of customary international law, which mostly creates obligations for states and thus allows

[106] Benvenisti & Downs, *supra* note 27 at 64.

[107] Schwartz, *supra* note 100 at 5.

[108] UN Office on Drugs and Crime, *The Bangalore Principles of Judicial Conduct*, UN Doc ECOSOC 2006/23 (2006).

[109] Benvenisti & Downs, *supra* note 27 at 59.

other transnational actors to escape its purview. The following discussion will briefly summarize the "part versus source" debate regarding the incorporation doctrine. It will look to this distinction to show that treating customary law as one or the other in relation to domestic law has important repercussions for the role of the judge. Whereas Abella J treats customary law strictly as a part of the common law throughout her opinion, the following will explore how treating it as a source of the common law might actually have given her a stronger foundation from which to apply customary norms to corporations.

Judges and academics from one common law country to another cannot agree as to whether to treat and describe customary law as a true part of the common law (as it is often described) or as one of its sources. This debate relates to defining the task of the judge, who plays a subtle yet central role in the incorporation process as he or she applies customary norms in domestic contexts. Roger O'Keefe argues that even when judges directly identify and apply relevant customary international law, they undertake a process of "judicial translating."[110] To say that customary law is a true part of the common law is to turn a blind eye to the judge's task and implies rote and direct application of these norms to their main subject, the state. Rather, O'Keefe argues, judges look to customary law binding on the state and translate it into common law rules binding on the relevant branch of government.[111] During this process, judges create rules of common law that become applicable in the state's courts and for which the customary rules serve merely as the "historical or persuasive sources."[112]

Under this theory, it becomes clear that customary international law is not truly a part of the common law but should more aptly be described as one of its sources. Customary international law has come to be recognized as a source of English common law, although in that country the impact of this approach has been to reduce the adoption and impact of customary law rather than enabling the recognition of the judge's role as judicial translator.[113] As early as 1737, it was considered settled that customary international law was to be directly incorporated into England's common law (and was therefore treated as a part of it). However, the English doctrine of incorporation has since undergone significant modifications and, by the beginning of the twentieth century, customary international law had become just another source of the common law: "As a mere source, it has validity in domestic courts today only

[110] Roger O'Keefe, "The Doctrine of Incorporation Revisited" (2009) 79:1 Brit YB Intl L 7 at 58.

[111] *Ibid.*

[112] *Ibid* at 60.

[113] Crawford, *supra* note 26 at 64; James L Brierly, "International Law in England" (1935) 51 Law Q Rev 24 at 31.

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insofar as its principles are adopted by such courts."[114] Yet Canadian judges persistently refer to rules of customary international law as parts of the common law (as seen in Abella J's judgment in *Nevsun*).[115] This was affirmed in *R v Hape* where Justice Louis LeBel held that customary law is directly or automatically incorporated into Canadian law (wording used to describe it as a part of the common law, as LeBel J later confirmed in extrajudicial writing).[116] As O'Keefe notes, "incorporation has nothing to do with the metaphysical unity of customary international law and the common law."[117]

This debate as to whether customary law is a source or a part of the common law has important ramifications for what judges understand their task to be in incorporating its norms. Describing it as a source recognizes the role that judges play in interpreting its norms and finding an equivalence in the common law that will give them their intended effect. Further, its status as a source rather than a part should not diminish the obligation that judges have to consider and give effect to applicable customary rules.[118] The origin of the courts' duty to incorporate a rule of customary international law is a freestanding common law one, "imposed on the courts by the courts themselves through their enunciation and consistent affirmation of the doctrine of incorporation."[119] However, O'Keefe points out that characterizing customary law as a source of the common law makes room for recognizing two other aspects of the doctrine of incorporation. First, it helps identify the role that judges play in translating customary rules into common law ones. Second, the mandatory nature of the common law rule that customary law is to be incorporated allows us to recognize that the method of incorporation lies within the common law itself (that is, how the case law and past judges have habitually incorporated customary law) and is not something intrinsic to the customary norm.[120] This theory therefore helps distinguish the role that judges play in understanding and applying norms from the norms themselves. It also illustrates how different judges might interpret and apply norms differently depending on what they understand their task to be, which likely accounts for the different approaches taken by national courts around the world.

[114] Richard B Lillich, "The Proper Role of Domestic Courts in the International Legal Order" (1970) 11:1 Va J Intl L 9 at 14. Lebel J also writes of the qualified and limited nature of the incorporation doctrine in England. Louis Lebel, "A Common Law of the World: The Reception of Customary International Law in the Canadian Common Law" (2014) 65 UNBLJ 3 at 9.

[115] *Nevsun*, *supra* note 1 at para 87.

[116] *Hape*, *supra* note 11 at paras 38–39; Lebel, *supra* note 114 at 6, 14.

[117] O'Keefe, *supra* note 110 at 60.

[118] *Ibid* at 61.

[119] *Ibid* at 60.

[120] *Ibid* at 61.

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Such a theory could also allow a domestic judge to take a general customary norm, such as the prohibition of slavery, and in the process of incorporation apply the norm to corporate actors such as Nevsun, which are indisputably subjects of national law. In other words, it would allow the separation of the norms from the actors to which they apply, which is what Abella J tries to do. States have discretion in how to implement international law domestically, and, as part of that discretion, domestic courts can choose to hold non-state actors accountable.[121] International human rights law is agnostic as to how states fulfill their international human rights obligations. The interpretation of customary norms is separate from their identification, which has often been reiterated in the judgments of international courts.[122] The correct methods of interpreting customary international law have not been codified, as they have been for the interpretation of treaties in the *Vienna Convention on the Law of Treaties*, thereby leaving considerable discretion to domestic courts in interpreting and applying customary norms domestically.[123] However, interpretation and application by a single national court will only meaningfully contribute to the development of international law if shared by other domestic courts. While this creates room for national judges to give customary law the domestic role they see fit, this may ultimately limit the wider effect of a domestic court's decisions on the development of customary law.

Impact: Proliferation or Fragmentation?

Nevsun, a judgment of Canada's highest court, has opened the door to the possibility of domestic civil liability for corporate violations of customary international law. Regardless of whether the trial judge pursues the majority's reasoning, the precedent remains. Will other national courts follow suit? The first section of this part will look at one potential chain reaction that this decision could set off, propelling other national courts around the world to hold corporations accountable for violations of international human rights law. The second section will look at the potential fragmentation of international law to which this decision and others of similar innovative character could lead.

[121] Julie Fraser, "Challenging State-centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law" (2019) 23:6 J Human Rights 974 at 978.

[122] See e.g. ICSID, *Mondev International Ltd v United States of America*, ICSID Case no ARB(AF)/99/2, Award (11 October 2002) at para 113; Nina Mileva, "The Role of Domestic Courts in the Interpretation of Customary International Law: How Can We Learn from Domestic Interpretive Practices?" in Panos Merkouris et al, eds, *The Theory, Practice and Interpretation of Customary International Law* (Cambridge: Cambridge University Press, 2021) 5, online: *SSRN*<https://ssrn.com/abstract=3598255>.

[123] *VCLT*, *supra* note 42.

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PROLIFERATION: UNIFYING DOMESTIC COURTS

As elaborated upon in the previous section, there is growing potential for national courts around the world to see the expanding scope and fragmented character of the international regulation of MNCs as an opportunity to act collectively, engaging in loose forms of inter-judicial coordination.[124] By seriously engaging in the interpretation and application of international law while referring to one another's decisions, national courts could come to be seen as full partners of international courts with the potential of providing an effective check on executive and corporate power, promoting the ideals of the rule of law in the global sphere.[125] Collective action could increase the ability of the courts of the world to resist external pressures exerted on their respective governments, reducing the likelihood that any one court would be singled out as an outlier by domestic or foreign actors.[126] Importantly, whether or not national courts decide to add meaningfully to international law by collaborating with other courts, a court that chooses silence and national interests over international collaboration is still making a statement. Brown and Rowe JJ's approach, for example, had it been a majority opinion, would also have shaped international law, helping to limit the role of national judiciaries in its development.

A problem that arises in thinking about the collaboration of courts is that of consensus. While consensus among courts is important, focusing too heavily on this criterion may also limit the law creation potential of national courts by overplaying their roles as law enforcers. Therefore, requirements for proof of consensus should not be so stringent as to be counterproductive since disagreements will inevitably arise in the process of nationalizing international law.[127] Disagreements are also likely to arise based on different understandings of the role of courts as law enforcers or law creators. This was seen in *Ferrini v Germany*, where the Italian Supreme Court embraced its role as a law creator, making the case that it was contributing to an emerging norm of customary law to the effect that serious human rights violations gave rise to an exception to the state immunity doctrine.[128] In response, Germany brought proceedings before the ICJ, claiming that the Italian court had not applied international law as it is currently in force – a claim that ultimately prevailed.[129] Similar to *Nevsun*, some had heralded the Italian court's decision in *Ferrini* as a progressive development of international law, while others critiqued it for overstepping

[124] Benvenisti & Downs, *supra* note 27 at 60.

[125] *Ibid.*

[126] *Ibid.*

[127] Roberts, *supra* note 96 at 92.

[128] *Ferrini v Germany*, Cass no 5044/04, Appeal Decision, ILDC 19 (IT 2004).

[129] *Germany v Italy*, *supra* note 48.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

the current consensus.[130] However, the decisions differ in that, if the international community does not agree with the *Nevsun* majority's approach, the fact that the defendant is a Canadian corporation rather than a state means that the decision is not likely one that will be challenged before the ICJ.[131]

FRAGMENTATION: MAKING ROOM FOR THE NEW ARCHITECTS

The problematic requirement of consensus, however, must be stressed for a different reason — namely, that of truly representing the diversity of opinions that ought to be constitutive of international law. In looking for reasonable proof of consensus, it is often the same European and American courts that are looked to time and time again. This is likely the case for two reasons: first, because of the old paradigm that has shaped international law — that of "civilized nations" — and, second, for logistical reasons such as the challenge of finding and understanding decisions in unfamiliar languages and legal systems.[132] However, as new world powers are emerging, taking these decisions into account is of the utmost importance if we want to avoid fragmenting the international legal system. Rising powers such as China, Russia, India, Iran, and Brazil have increasingly been expressing dissatisfaction with the existing global governance architecture and their roles within the international system.[133] The inability of the current system to make room for these new "builders" of international law, with their transformative geopolitical and economic developments, may cause these states to challenge or reject current rules and norms.

Many of the norms and customs of these new architects conflict with Western ideals and extant international law, which will therefore have to change in response to these new law creators. In 2017, China issued a white paper on international law, not so subtly attacking the Western narrative.[134] It made no mention of human rights, focusing rather on

[130] Roberts, *supra* note 96 at 67.

[131] See *ICJ Statute*, *supra* note 36, art 35(1), confining the ICJ's contentious jurisdiction to states.

[132] "Civilized nations" is referred to in art 38(1)(c) of the *ICJ Statute*, *supra* note 36 and is understood to refer to "municipal systems of law that have reached a comparable stage of development." Yet, in practice, this often limits the development of international law to reflect only a fraction of the nations of the world (historically Western European states), barring those not deemed "civilized" enough. Saunders et al, *supra* note 11 at 45; ICTY, *Prosecutor v Drazen Erdemovic*, Case no IT-96-22-A, Appeal Judgment, Appeals Chamber (7 October 1997).

[133] Joel Slawotsky, "The Clash of Architects: Impending Developments and Transformations in International Law" (2017) 3 Chinese J Global Governance 83 at 88.

[134] See Ministry of Foreign Affairs of the People's Republic of China, "China's Policies on Asia-Pacific Security Cooperation" (2017), online: *FMPRC* <www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1429771.shtml>.

https://doi.org/10.1017/cyl.2021.2 Published online by Cambridge University Press

sovereign equality, non-interference in internal affairs, and the non-use of force. It also stipulated that international law should not be dictated by any one country and that "rules of individual countries should not automatically become 'international rules.'"[135] It further criticized the extraterritorial application of domestic law, which is effectively what is at issue in *Nevsun* (even though the defendant in the case has a nationality link to Canada).[136]

The concern here is twofold. First, if national courts use their law creation role to more aggressively enforce human rights law, this might alienate countries that do not consent to this role. This can be seen in the discourse surrounding corporate social responsibility, for example, which is often perceived by "new architects" as a way of stifling the economic development of developing states. These states often view their primary duty as spurring development so as to better promote and protect the interests of their citizens.[137] The second concern is that encouraging national courts to participate more actively in law creation could, conversely, lead to the emergence of new, perhaps more permissive, norms regarding torture, forced labour, and discrimination. These practices could become acceptable or sometimes even obligatory as emerging powers begin actively contributing national judicial decisions to the international discourse.[138]

Both of these paths may lead to a fracturing of the global enforcement of international law, reduced protection of human rights and prosperity, as well as heightened conflict. *Nevsun v Araya*, with its attempt to extend the scope of human rights enforcement, is exactly the kind of decision that could lead to backlash from these emerging powers.

Conclusion: On Legal Luxuries

The memorable first paragraph of Abella J's opinion begins: "This case involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical

[135] *Ibid.*

[136] The primary working rule is that the state in whose territory a crime is committed has jurisdiction over the offence, which is Eritrea in this case. However, the nationality of the offender is also accepted as a basis for jurisdiction in international law. Saunders et al, *supra* note 11 at 321, 328.

[137] Slawotsky, *supra* note 133 at 144.

[138] For example, China's top judge has reportedly urged judges to "bare [their] swords towards false western ideals like judicial independence." Lucy Hornby, "China's Top Judge Denounces Judicial Independence," *Financial Times* (17 January 2017), online: <www.ft.com/content/60dddd46-dc74-11e6-9d7c-be108f1c1dce>; Slawotsky, *supra* note 133 at 154.

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aspirations or legal luxuries, but moral imperatives and legal necessities."[139] Throughout her decision, Abella J holds steadfast to her goal of turning corporate responsibility for human rights abuses into a legal necessity. This article has attempted to show that there exists a very real need for the international system to evolve in order to better reflect the international actors that contribute to the formation of its norms. It has also tried to show that national courts should consider taking a more proactive approach to developing the international rule of law, even if the consequences of doing so are difficult to predict.

Unfortunately, the majority judgment in *Nevsun* leaves many stones unturned and arguably raises more questions than it answers. Yet what it lacks in methodological rigour, it makes up for in vision and potential. It is to be hoped that subsequent decisions of domestic courts, perhaps even in the ongoing *Nevsun* proceedings themselves, are better able to match rigour to vision — lest the latter remain in the realm of legal luxuries.

[139] *Nevsun*, *supra* note 1 at para 1.

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