New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 263—NO. 53
THURSDAY, MARCH 19, 2020

Outside Counsel

Expert Analysis

Suing Corporations Under International Human Rights Law

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A landmark Canadian Supreme Court decision now opens the door to damages suits against corporations for violating international human rights law.

In *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5, the court last month ruled by 5-4 that it is not "plain and obvious" that international law grants corporations "blanket immunity" from liability. Affirming the denial of a corporate defendant's motion to strike the pleadings, the court remanded for determinations of (1) whether the particular human rights norms at issue bind corporations and if so, (2) whether a damages remedy should be grounded directly on customary international law as part of the common law, on recognition of new common law torts or, less likely, on existing torts and potential punitive damages.

Although decided under common law rather than statutory law, the Canadian ruling is at odds with the import of a 2018 U.S. Supreme Court decision under the Alien Tort Statute. In *Jesner v. Arab Bank*, 138 S. Ct. 1386, a Jordanian bank was sued for allegedly facilitating terrorist killings and injuries. In a 5-4 ruling, Justice Anthony Kennedy held for the court that foreign corporations cannot be sued under the statute for violating international law, absent congressional authorization.

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Jesner's holding addressed only foreign corporations. However, its broad reasoning could potentially shield all corporations. (A request that the Supreme Court grant a petition for certiorari to address whether the *Jesner* holding applies to U.S. companies is currently pending in *Nestle v. Doe*, S.Ct. dkt. 19-416.) Justice Kennedy found no "specific, universal and obligatory norm of corporate liability under currently prevailing international law." (Slip op. at 15.) Even if a damages remedy were viewed as a matter of domestic law, he wrote, courts must defer to Congress.

In contrast, Canada's *Nevsun* majority held that it is not clear that "corporations today enjoy a blanket immunity under customary international law from direct liability for violations of 'obligatory, definable, and universal norms of international law,'" or from indirect liability for complicity. (Par. 113.) The court ruled in a suit brought by Eritrean refugees in Canada against Nevsun, a Canadian company which (through subsidiaries) owned 60% of an Eritrean gold and minerals mine. The other 40% was owned by Eritrea's state-owned mining company.

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The plaintiffs alleged that, while working at the mine under Eritrea's national service law, they had been subjected to violations of norms of customary international law and jus cogens against forced labor, slavery, and crimes against humanity; and also to cruel, inhuman or degrading treatment, freedom from which, the majority noted, has been described by a commentator as an "absolute right." (Par. 103.)

The majority ruled that customary international law is part of the common law, enforceable by courts in the absence of contrary legislation or prior controlling judicial decision. Finding no such obstacle in this case, the court tasked the trial court on remand to determine whether any of the foregoing customary international law norms relied on by plaintiffs are of a "strictly interstate character" and, even if so, "whether the common law should evolve so as to extend the scope of these norms to bind corporations." (Par. 113.)

If any of these norms thus binds corporations, then a damages remedy could be allowed. The majority relied on the common law power of courts to recognize remedies; on Canada's duty under the International Covenant on Civil and Political Rights to provide effective remedies for violations; and on the general principle of domestic law that "'where there is a right, there must be a remedy for its violation.'" (Par. 120.)

Not only does the Canadian ruling on potential corporate liability appear inconsistent with the reasoning of the U.S. judgment in *Jesner*, it also goes beyond the recent decision of the U.K. Supreme Court in *Vedanta Resources PLC v. Lungowe et al*. [2019] UKSC 20. *Vedanta* found jurisdiction in English courts over a suit against an English company and its Zambian subsidiary for alleged contamination from a copper mine in Zambia. Until now, *Vedanta* had arguably been the high-water mark of human rights damages suits against corporations. However, unlike *Nevsun*, *Vedanta* allowed the suit to proceed exclusively under existing common law torts. It did not address corporate liability under customary international human rights law.

In addition to the Canadian Court's holdings that at least some international human rights norms may bind corporations, and that damages may be awarded for violations, *Nevsun* overcame another significant hurdle to plaintiffs' international law claims. By a vote of 7-2, the justices rejected Nevsun's defense that, under the "act of state" doctrine, Canadian judges could not pass on the validity of the acts of a foreign sovereign in its own territory—here Eritrea's subjecting the plaintiffs to its national service law, in which Nevsun was allegedly complicit.

The court held that the judicially created "act of state" doctrine has no application in Canada—unlike in Australia, the U.K. and the United States. Its purposes, said the court, are adequately served by Canadian doctrines of judicial restraint and conflict of laws. This holding is of particular importance to transnational companies engaged in joint ventures with foreign governments that allegedly violate international law.

Nevsun is the most important ruling for plaintiffs to date in the field of corporate liability for violations of international human rights law. It may inspire progeny in other common law and even civil law jurisdictions. Nonetheless, Canada's closely divided court ruled only on a preliminary motion to strike, and even then, only under the lenient "plain and obvious" standard for rejecting a claim. Its judgment could potentially be cut back on remand or on future appeals. It could also be trimmed or foreclosed if Canada's Parliament were to pass a limiting statute, a prospect perhaps made more likely by the argument of the four dissenting justices that only Parliament may subject companies to international human rights law and to concomitant claims for damages.

Meanwhile *Nevsun* merits close attention, especially by counsel for transnational corporations based in common law countries and by counsel for human rights plaintiffs.