Investors Beware!: The Liability of Canadian (Parent) Corporations for the Wrongful Actions of Subsidiaries in Developing Countries

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1. INTRODUCTION

Multinational corporations (MNCs) have long been accused of complicity in human-rights violations in developing countries. These violations occur primarily through the actions of subsidiary corporations, particularly in instances where they engage public and private security forces to protect their assets and installations in developing countries. These security forces sometimes engage in brutal repression of local indigenes in the course of protecting corporate assets. The increase in global trade and investment, heralded by the prevailing policy of economic globalization, has heightened the operations of subsidiary corporations in developing countries. Correspondingly, the intense competition for access to investment opportunities, coupled with the desire to attract foreign direct investment, has led to the deregulation of domestic economies across the globe. Deregulation has itself culminated in the non-enforcement of rules and standards for the responsible conduct of business; hence the specter of corporate complicity in human-rights abuses in developing countries. For example, as far back as 2006, the United Nations Special Representative on Business and Human Rights reported that instances of abuse of human rights by corporations occurred in 27 developing countries: characterized by low income, armed conflicts, weak governance, and lack of the rule of law.[1]

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[1] United Nations Commission on Human Rights, *Interim report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other*

Instances of corporate complicity in human-rights abuses in developing countries are more frequent in certain industries, such as the extractive industry, food and beverages industry, apparel and footwear industry, and information and communication technology industry.[2] However, the extractive industry is the worst culprit, as it accounts for a disproportionate number of incidences of human-rights abuse.[3] Canadian oil-and-gas and mining corporations have been implicated in such wrongful and illegal conduct in developing countries through the operations of their subsidiaries.[4] Beginning from the 2000s, when Talisman Energy Inc. was alleged to have aided the dictatorial government of Sudan to suppress the human rights of minority tribes,[5] a global spotlight has consistently been shone on the corporate irresponsibility of some Canadian extractive corporations in the developing world. A Canadian non-governmental organization, the Justice and Corporate Accountability Project (JCAP), reported in 2016 that subsidiaries of Canadian mining corporations in Latin America were complicit in violence and targeted attacks against local communities and human human-rights activists opposed to mining operations in that region.[6] According to the JCAP,

> Violence linked to Canadian mining projects spans a broad geographic range. Of the 14 countries that we studied, deaths occurred in 11; injuries were suffered in 13; and legal complaints, warrants, arrests and detentions, were issued in 12. Physical violence was by far most prevalent in Guatemala, which accounted for 27.3% of deaths, 50% of disappearances, 22% of injuries, and 73.3% of instances of sexual violence. By contrast, criminalization and legal complaints were most

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Business Enterprises, 62nd Sess UN Doc E/CN.4/2006/97 (2006) at para 27.

[2] *Ibid* at paras 25 & 26.

[3] *Ibid*.

[4] See Justice and Corporate Accountability Project (JCAP), "The Canada Brand" (24 October 2016), online (pdf): *Violence and Canadian Mining Companies in Latin America* <https://justice-project.org/wp-content/uploads/2016/10/the-canada-brand-report5.pdf> [https://perma.cc/NF6H-WQG5]. Canadian Centre for the Study of Resource Conflict, "Corporate Social Responsibility: Movements and Footprints of Canadian Mining and Exploration Firms in the Developing World" (2009), online (pdf): <http://caid.ca/CSRRep2009.pdf> [https://perma.cc/6D9V-4RK4].

[5] See "Human Security in Sudan: The Report of a Canadian Assessment Mission" (Prepared for the Minister of Foreign Affairs Ottawa, January 2000), online (pdf): <https://www.ecosonline.org/reports/2000/Human%20Security%20in%20Sudan.pdf> [https://perma.cc/7Y8S-TAYS].

[6] *JCAP*, *supra* note 4 at 12.

> prevalent in Mexico, which accounted for 42.3% of warrants and legal complaints, and 13.2% of arrests, detentions, and charges.[7]

More recently, a Canadian mining company was alleged to have engaged in serious human-rights violations linked to the expansion of the Morro do Ouro mine in Brazil; and thereby "negatively impacted the lives, land and livelihood of local people."[8]

International and domestic initiatives have been devised over the last several decades to regulate and rein in the excesses of MNCs, particularly as regards corporate complicity in human-rights violations. These initiatives include: codes of conduct, such as the Mining Principles of the International Council on Mining and Metals;[9] multilateral instruments, such as the Organization for Economic Co-operation and Development's (OECD) Guidelines for Multinational Enterprises[10] and the United Nations' Global Compact;[11] lending institutions' initiatives, such as the Equator Principles[12] and the International Finance Corporation's Sustainability Framework;[13] and multi-stakeholder initiatives such as the Voluntary Principles on Business and Human Rights.[14] A more recent international initiative is the United Nations' Guiding Principles on Business and Human Rights, which

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[7] *Ibid.*

[8] Above Ground & Justiça Global, "Swept Aside: An Investigation into Human Rights abuse at Kinross Gold's Morro Do Ouro Mine" (2017) at 1, online (pdf): <https://justice-project.org/wp-content/uploads/2018/07/Swept-Aside-Kinross-Morro-2017.pdf> [https://perma.cc/8827-XSPA].

[9] "ICMM" (2022), online: *Our Principles* <https://www.icmm.com/en-gb/about-us/member-requirements/mining-principles> [https://perma.cc/S2JD-YXHM].

[10] See "OECD Guidelines for Multinational Enterprises", OECD Publishing (2011) online (pdf): *OECD* <https://www.oecd.org/daf/inv/mne/48004323.pdf>[https://perma.cc/6XJG-HASM].

[11] See "United Nations Global Compact" (2022), online: *UN Global Compact* <https://www.unglobalcompact.org> [https://perma.cc/AFA9-N5SE].

[12] "Equator Principles" (2022), online: *About the Equator Principles* <https://equator-principles.com> [https://perma.cc/WLT2-H6H5].

[13] "International Finance Corporation" (2022) online: *IFC Sustainability Framework* <https:www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/sustainability+framework> [https://perma.cc/2B3L-T2DM].

[14] "Voluntary Principles on Security and Human Rights" (2022) online: *Security and Human Rights* <https:///www.voluntaryprinciples.org> [https://perma.cc/3YFG-KRFN].

stipulates that "business enterprises should respect human rights," meaning that they should: avoid causing or contributing to adverse human-rights impacts through their own activities; address such impacts when they occur; and mitigate adverse human-rights impacts that are directly linked to their operations, products or services.[15] At the domestic level, some countries have attempted to promote responsible business practices through institutional structures and policy instruments. Recently, for example, the government of Canada created the Office of the Canadian Ombudsperson for Responsible Enterprise with responsibility for addressing "claims of alleged human rights abuses arising from the operations of Canadian companies abroad in the mining, oil and gas, and garment sectors."[16] Likewise, the National Contact Points established by member countries of the OECD pursuant to the OECD Guidelines for Multinational Enterprises mediate disputes between local communities and corporations based in OECD countries regarding human-rights violations.[17]

Unfortunately, these regulatory initiatives have failed to produce tangible results primarily because they are voluntary. As voluntary instruments, these regulatory initiatives lack enforcement mechanisms; hence, breaches of the initiatives go unpunished. Moreover, corporations have little incentive to comply with these regulatory initiatives, because compliance efforts require financial expenditures. The failure of these voluntary regulatory initiatives has led to two significant outcomes. First, there has been a clamour for mandatory legislation regarding the operations of MNCs in developing countries. The clamour for such legislation manifested in several futile attempts in some Western countries, including

15 "Guiding Principles on Business and Human Rights" (2011) Principle 13 at 14, online (pdf): United Nations https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [https://perma.cc/4EGT-BPR9].

16 "Office of the Canadian Ombudsperson for Responsible Enterprise" (2022) online: Government of Canada <https://core-ombuds.canada.ca/index.aspx?lang=eng> [https://perma.cc/RLS7-E8N8].

17 The "NCPs assist enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines", as well as "provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines." See "National Contact Points for the OECD Guidelines for Multinational Enterprises" (2022), online: Organization for Economic Co-operation and Development (OECD) <http://www.oecd.org/investment/mne/ncps.htm> [https://perma.cc/GGP8-DELL].

Canada, Australia, the United States, and the United Kingdom, to legislate mandatory extra-territorial rules for the conduct of business. In Canada, for example, Bill C-300 (An Act Respecting Corporate Accountability for Mining, Oil or Gas Corporations in Developing Countries)[18] was introduced in the House of Commons in 2009, but, as expected, the Bill was defeated due to strong opposition from, and the lobbying efforts of, the mining and oil-and-gas industries.[19] Similarly, the Australian Corporate Code of Conduct Bill 2000 sought to impose legally enforceable "environmental, employment, health and safety and human rights standards on the conduct of Australian corporations or related corporations which employ more than 100 persons in a foreign country"; and "require such corporations to report on their compliance with the standards imposed by this Act."[20] In the United Kingdom, the Corporate Responsibility Bill 2003 attempted to impose obligations on certain corporations to produce and publish annual reports on environmental, social, economic, and financial matters.[21] The Bill also sought to impose liability on parent corporations and directors where, as a result of their failure to properly supervise their subsidiary corporations, the operations of subsidiaries adversely impact the health and safety of third parties or cause environmental damage.22 Regrettably, like their Canadian counterpart, these legislative Bills in Australia and the United Kingdom never became law.

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[18] Bill C-300, *An Act Respecting Corporate Accountability for Mining, Oil or Gas Corporations in Developing Countries*, 2nd Sess, 40th Parl, 2009 (first reading February 9 2009). Bill C-300 was reintroduced in the House of Commons as a private member's bill by John McKay during the 3rd Session of the 40th Parliament which ended in March 2011, but the Bill was defeated. See also "Bill C-300 (Historical)", online: *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries* <https://openparliament.ca/bills/40-3/C-300/> [https://perma.cc/5PWY-J2JR].

[19] See Canadian Mining Journal Staff, "Canadian Mining Journal" (1 December 2010) online: *Canadian Mining Industry wins with Bill C-300's Defeat* <http://www.canadianminingjournal.com/features/canadian-mining-industry-wins-with-bill-c-300-s-defeat/> [https://perma.cc/3K5B-A96V].

[20] Parliament of Australia, *Corporate Code of Conduct Bill 2000 [2002]*, s. 3. <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_ResResu/Result?bId=s259> [https://perma.cc/HCM9-4ZPU].

[21] *Corporate Responsibility Bill* [HC] (UK), 2003 Sess, Bill 129, s.3. <https://publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf> [https://perma.cc/2RLU-UCJP].

[22] *Ibid* at ss 6-8.

Second, the failure of the voluntary regulatory initiatives, coupled with the unwillingness and inability of developing countries to provide judicial remedies for corporate complicity in human- and environmental-rights violations, led victims to seek alternative means for redress.[23] More particularly, victims of rights violations in developing countries are increasingly resorting to transnational tort litigation in the courts of Western countries, seeking to hold parent corporations liable for the wrongful actions of their subsidiaries in developing countries.[24] The United States was at the forefront of transnational litigation, particularly at a time when it was assumed that the *Alien Tort Statute* (ATS),[25] which vests original jurisdiction in federal District Courts in relation to "any action by an alien for a tort, committed in violation of the law of nations or a treaty of the United States," enabled foreign plaintiffs to seek transnational justice in United States. However, in *Kiobel v. Royal Dutch Petroleum Co.*[26] the Supreme Court of the United States held that the ATS does not apply extraterritorially to causes of action arising from facts that occurred in foreign countries because "nothing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."[27] The *Kiobel* decision effectively eliminates the possibility of holding US-based MNCs liable for complicity in human-rights violations in developing countries based on the ATS.

This article analyzes recent developments and trends in transnational litigation in Canada focusing, in particular, on the liability of parent corporations for the wrongful actions of their subsidiary corporations in developing countries. As a case study, the article analyzes the Supreme Court of Canada decision in *Nevsun Resources Ltd. v. Araya*,[28] a case involving allegations of breach of norms of customary international law by Nevsun

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[23] Ekaterina Aristova, "The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum [Non] Conveniens Back?" (2021) 6(3) Business and Human Rights Journal 399 at 400.

[24] See, for example, *Garcia v Tahoe Resources Inc*, 2017 BCCA 39; *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*]; *Chandler v Cape Plc* [2012] EWCA Civ. 525); *Connelly v RTZ Corporation*, (1999) CLC 533; *Lubbe v Cape Plc.* [2000] 1 WLR 1545; *Okpabi v Royal Dutch Shell Plc.* [2018] EWCA Civ. 191; [2018] Bus LR 1022.

[25] *Alien Tort Statute*, 28 U.S.C. § 1350.

[26] *Kiobel v Royal Dutch Petroleum Co* (2013), United States Supreme Court 569 U.S. 108.

[27] *Ibid.*

[28] *Nevsun*, *supra* note 24.

Resources through its subsidiary corporation in Eritrea. This decision is a significant legal development, as it advances Canadian common law on multiple fronts. First, in *Nevsun*, the Supreme Court of Canada laid to rest the 'act of state' doctrine. Second, *Nevsun* gives a legal stamp of approval to the adoption of customary international law norms (particularly peremptory norms or *jus cogens*) into Canadian domestic law, thus domesticating international prohibitions against forced labour, slavery, cruel, inhuman or degrading treatment, and crimes against humanity. Third, the decision in *Nevsun* paves the way for the recognition of a new civil claim or a new category of torts in Canada based on the adopted norms of customary international law. The article begins with a brief analysis of transnational litigation in Canada, including the procedural hurdles faced by foreign plaintiffs in Canada.

II. TRANSNATIONAL LITIGATION IN CANADA

Transnational litigation refers to situations where a citizen of a one country sues in the court of another country to seek legal remedies for wrongful actions that occurred in their home (foreign) country. In the context of transnational litigation in Canada, the facts and the cause(s) of action usually arise from a foreign country, but the plaintiffs (who are citizens of the foreign country) choose to sue in Canadian courts for legal remedies. Foreign plaintiffs may elect to seek legal remedies in Canadian courts for a multitude of reasons, including: (i) corruption within the judiciary in their home countries; (ii) lack of judicial independence in the plaintiffs' home countries; and (iii) complicity of governments in the infractions allegedly committed against the plaintiffs. The governments of many developing countries engage in business activities, particularly mineral exploitation, through joint ventures, partnerships and equity participation with MNCs. Thus, these governments may become complicit in the human-and environmental-rights violations committed by their business partners.

Since the first (reported) transnational litigation in 1998,[29] there have been several attempts to hold Canadian parent corporations liable in Canadian courts for the transgressions of their subsidiaries in developing countries. These suits are predicated on disparate legal grounds including torts, human rights, environmental rights, and norms of customary

[29] *See Recherches Internationales Québec v Cambior Inc*, 1998 CanLII 9780 (QC CS).

international law. As discussed below, two clear phases are discernable in the context of transnational litigation in Canada. The first phase involves the period between 1998 and 2012 during which transnational suits were routinely dismissed at the pre-trial stage without trial on the merits, while the second phase represents a more positive outcomes for plaintiffs in the sense that, since 2013, many transnational suits have survived pre-trial challenges and have proceeded to trial on the merits.

A. Pre-trial Challenges to Transnational Litigation

The first phase of transnational litigation in Canada occurred between 1998 and 2012 during which defendants successfully invoked jurisdiction-denying defences and doctrines, such as: (i) lack of a reasonable cause of action; (ii) lack of subject-matter jurisdiction; and (iii) *forum non conveniens*, to thwart transnational suits. Civil procedure rules in Canada allow courts to strike pleadings that disclose no reasonable cause of action. Hence, a suit can be struck at the pre-trial stage where the cause of action lacks a legal foundation or is unknown to Canadian law. Likewise, pleadings are susceptible to being struck at the pre-trial stage where the subject-matter of the action falls outside of the jurisdiction of Canadian courts. In addition, the common-law doctrine of *forum non conveniens* vests discretionary power in courts "to refuse to hear a case, even though personal jurisdiction and venue are properly established, if the forum is inappropriate or inconvenient,"[30] or if the hearing court determines that the courts of another country are in a better position to resolve the legal dispute.[31]

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[30] Allan Reed, "To Be or Not to Be: The Forum Non Conveniens Performance acted out on Anglo-American Courtroom Stages" (2000) 29:1 GA J Int & Comp L 31 at 36.

[31] Art 3135 CCQ. In regard to *forum non conveniens*, the Supreme Court of Canada has approved a list of 10 factors for determining whether or not the courts of another country are in a better position to decide a matter. These factors, none of which are individually determinant of the appropriate forum, are: (1) The parties' residence, that of witnesses and experts; (2) the location of the material evidence; (3) the place where the contract was negotiated and executed; (4) the existence of proceedings pending between the parties in another jurisdiction; (5) the location of Defendant's assets; (6) the applicable law; (7) advantages conferred upon Plaintiff by its choice of forum, if any; (8) the interest of justice; (9) the interest of the parties; and (10) the need to have the judgment recognized in another jurisdiction. See *Spar Aerospace Ltd v American Mobile Satellite Corp*, [2002] 4 SCR 205, 2002 SCC 78 at para 71. These factors were originally devised by the Quebec Court of Appeal in *Lexus Maritime Inc v Oppenheim Forfait GmbH*, [1998] Q.J. No. 2059 (QL), at para 18.

At least four transnational suits were filed in Canadian courts between 1998 and 2012, but none of these cases survived pre-trial challenges. Two of the four cases were dismissed on grounds of *forum non conveniens*,[32] while the other two were dismissed for lack of a reasonable cause of action[33] and lack of subject-matter jurisdiction, respectively.[34] Of particular interest is the case of *Recherches Internationales Québec v. Cambior Inc.*,[35] which involves what the court described as "one of the worst environmental catastrophes in gold mining history."[36] The plaintiffs (suing in a representative capacity) alleged that the defendant, a parent corporation based in Quebec, were liable for the loss and damage suffered by the citizens of Guyana due to the contamination of the Essequibo River. The contamination arose from the rupturing of the effluent treatment plant of a gold mine operated by the defendant's subsidiary corporation in Guyana. As a result of the rupture, about "2.3 billion litres of liquid containing cyanide, heavy metals and other pollutants spilled into two rivers, one of which is Guyana's main waterway, the Essequibo."[37] The defendant challenged the suit on two grounds; namely, that Quebec courts do not have jurisdiction over the subject matter, and, alternatively, that the courts of Guyana would be a more convenient forum to resolve the dispute, that is, *forum non conveniens*. The Quebec Superior Court held that "[t]he courts of both Quebec and Guyana have jurisdiction to try the issues" raised in the suit, but declined to exercise jurisdiction over the issues because "Guyana is clearly the appropriate forum to decide the issues."[38] In the words of the court:

> The courts of both Quebec and Guyana have jurisdiction to try the issues. However, neither the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are

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[32] See *Recherches Internationales Québec v Cambior Inc supra* note 32; *Yassin v Green Park International Inc* 2010 QCCA 1455.

[33] See *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118.

[34] See *Anvil Mining Ltd v Association Canadienne Contre l'impunité*, 2012 QCCA 117.

[35] *Recherches Internationales Québec*, *supra* note 29.

[36] *Ibid* at para 1.

[37] *Ibid.*

[38] *Ibid* at paras 9 & 89.

> located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences. These factors, taken as a whole, clearly point to Guyana, not Quebec, as the natural and appropriate forum where the case should be tried.[39]

The second phase began in 2013 when, for the first time, a transnational suit survived pre-trial challenges and proceeded to trial.[40] Since then, at least two other suits have survived preliminary challenges, thus suggesting that Canadian courts are now more willing to assume jurisdiction over transnational suits.[41] Of the three cases that have thus far survived pre-trial challenges in Canada, *Nevsun Resources v. Araya* stands out, not only because it is the first case to reach the Supreme Court of Canada, but, as discussed below, it recognizes the potential for a cause of action based on customary norms of international law. Perhaps more importantly, it lays the foundation for the recognition of novel duty of care on the part of parent corporations regarding the operations of subsidiary corporations in developing countries.

Since 2013, Canadian courts have shown a clear reluctance to dismiss transnational suits at the pre-trial stage and have instead increasingly assumed jurisdiction to determine such suits on the merits. This second phase was heralded by the decision of the Superior Court of Justice for Ontario in *Choc v. Hudbay Minerals Inc*.[42] In this case, the plaintiffs, who are Indigenous Mayan Q'eqchi' from El Estor, Guatemala, brought three related actions against Hudbay Minerals (a Canadian corporation) and its subsidiary corporations. The plaintiffs alleged that the security personnel working for Hudbay's subsidiaries in Guatemala committed human-rights abuses, such as shooting, killing and gang-rapes of women, including some of the plaintiffs. The plaintiffs attempted to hold Hudbay Minerals liable for these violations because, in their view, the subsidiaries were under the control and supervision of Hudbay Minerals. The plaintiffs alleged that Hudbay Minerals

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[39] *Ibid* at paras 9-10.

[40] See *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414, 116 OR (3d) 674.

[41] See *Garcia v Tahoe Resources Inc*, 2017 BCCA 39; *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 [*Araya 2017*], *affirmed* 2020 SCC 5. However, the 2017 case of *Das v George Weston Limited*, 2017 ONSC 4129 was dismissed at the pre-trial stage by the Ontario Superior Court of Justice, which held (at para. 5) that "it is plain and obvious that the putative Class Members have no legally viable tort claims or breach of fiduciary duty claims against either Defendant, and, therefore, the Plaintiffs' action should be dismissed."

[42] *Choc, supra* note 40.

owed a duty of care to the plaintiffs and that Hudbay Minerals was directly liable for the violation of their human rights by its subsidiary corporations. To the plaintiffs, Hudbay Mineral's negligence in supervising its subsidiaries led to the alleged human right violations. Predictably, Hudbay Minerals filed motions for dismissal of the actions on grounds that: (i) they disclosed no reasonable cause of action; (ii) the actions were statute-barred under the *Limitations Act*; and (iii) lack of jurisdiction. Dismissing the motions to strike, the court held that it was not plain and obvious that the plaintiffs' pleadings disclose no reasonable cause of action, given that the plaintiffs had pleaded facts which, if proven at trial, could potentially support the imposition of a duty of care on Hudbay Minerals.[43] More specifically, the court held that if the facts alleged by the plaintiffs are proved in court, they could establish not only that the harm complained of was the reasonably foreseeable consequence of the defendants' conduct, but would also bring the defendants into proximity with the plaintiffs, thus establishing the duty of care.[44]

The plaintiffs in the more recent case of *Garcia v. Tahoe Resources Inc.*[45] faced a jurisdictional challenge based on the doctrine of *forum non conveniens*. In this case, the plaintiffs alleged that private security personnel employed at the Escobal mine in Guatemala shot and injured them during a protest outside the Escobal mine. The defendant, Tahoe Resources Inc., is incorporated in British Columbia, and it owns the Escobal mine through its wholly-owned subsidiaries operating in Guatemala. Tahoe Resources filed a motion asking the court to decline jurisdiction based on *forum non conveniens*. Tahoe Resources argued that Guatemala would be the more appropriate forum for adjudicating the plaintiffs' claims because the facts occurred in Guatemala and the plaintiffs and other witnesses reside in Guatemala. The motions judge granted the *forum non conveniens* application and stayed the action. Reversing the trial decision, the British Columbia Court of Appeal (BCCA) identified three factors that weigh against the suitability of Guatemala as a convenient forum for resolving the dispute, namely: (i) the difficulties the plaintiffs will face in bringing a suit against Tahoe Resources given the limited discovery procedures available in Guatemala; (ii) the marked uncertainty as to how the expiration of the limitation period in

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[43] *Ibid* at paras 65 & 70.

[44] *Ibid* at paras 65 & 70.

[45] *Garcia v Tahoe Resources Inc, supra* note 24.

Guatemala will be treated by Guatemalan courts; and (iii) the real risk that the plaintiffs will not obtain justice in Guatemala given the context of the dispute and the evidence of endemic corruption in the Guatemalan judiciary.[46]

B. Why Recent Cases survived Pre-trial Challenges

Why have transnational suits survived pre-trial challenges in the recent past? To put the question differently, why are Canadian courts increasingly assuming jurisdiction over transnational suits? The answer(s) to this question is/are rooted in multiple factors, including: (i) the changing societal attitude toward corporate accountability; (ii) better lawyering on the part of plaintiff counsel; and (iii) a growing judicial desire to provide access to justice for foreign victims of human-rights abuses.

In the recent past, societal attitude regarding corporate accountability appears to have changed and the Canadian society is now more amenable to holding corporations liable for the violation of the rights of other persons. Social and environmental consciousness of Canadians is at an all-time high and even businesses themselves now readily accept that corporate social responsibility (CSR) is good for business. Canadian corporations now commonly adopt strategies that set out CSR goals and targets, as well as proactively engaging with host communities.[47] As some observers have noted, in the last few years there has been a shift in CSR strategies in Canada "from ad hoc, incremental and transactional approaches, to strategic, social purpose-driven and transformational models."[48] The changing societal attitude in Canada is reflected in the recent creation of the Office of the Canadian Ombudsperson for Responsible Enterprise, as well as the introduction of "benefit companies" in British Columbia.[49] A 'benefit

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[46] *Ibid* at paras 127-130.

[47] Coro Strandberg, "Corporate Social Responsibility in Canada: Trends, Barriers and Opportunities" (2019) at 3, online (pdf): <https://corostrandberg.com/wp-content/uploads/2019/02/csr-in-canada-trends-barriers-opportunities-report.pdf> [https://perma.cc/5P7N-HYLG].

[48] *Ibid*.

[49] See Bill M 209, *Business Corporations Amendment Act (No. 2)*, 4th Sess, 41st Parl (British Columbia), 2019. A 'benefit company' means a company that has a benefit statement in its notice of articles and promotes one or more public benefits. For this purpose, "public benefit" means "a positive effect, including of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature,

company' is a company that is "committed to conducting its business in a responsible and sustainable manner and promoting one or more public benefits."[50] There also appears to be changing judicial attitude toward corporate accountability in Canada, which is itself a manifestation of the attitudinal changes in the society at large. An example of the changing judicial attitude can be found in *Araya v. Nevsun*,[51] where the BCCA opined that "an incremental first step" involving judicial recognition of a customary-international-law norm against torture as the basis for some type of private-law remedy against parent corporations "would be appropriate in this instance."[52]

Perhaps more significantly, it appears that lawyers involved in recent transnational litigation have a better understanding of the complex nature of these suits and are thus better able to articulate the legal basis for the suits. This is particularly significant because, in the past, some lawyers filed "over-ambitious claims" on behalf of foreign plaintiffs,[53] while other claims were instituted on very tenuous grounds. For example, in *Anvil Mining Ltd. v. Association Canadienne Contre l'impunité*,[54] the plaintiffs filed legal claims in Quebec even though the claims were unconnected with the defendant's activities in Quebec.[55] Moreover, plaintiff counsel in previous cases failed to articulate a clear legal predicate for legal liability, thus making it easy for defendant corporations to successfully strike the cases based on non-disclosure of a reasonable cause of action. An example of such a deficient claim can be found in *Piedra v. Copper Mesa Mining Corporation*,[56] where the

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for the benefit of (a) a class of persons, other than shareholders of the company in their capacity as shareholders, or a class of communities or organizations, or (b) the environment, including air, land, water, flora and fauna, and animal, fish and plant habitats." See *Ibid* at s 51.991.

[50] *Ibid* at s 51.992.

[51] *Araya 2017*, *supra* note 41.

[52] *Ibid* at para 196.

[53] Chilenye Nwapi, "Resource Extraction in the Courtroom: The Significance of *Choc v Hudbay Minerals Inc* for Transnational Justice in Canada" (2014) 14 Asper Rev of Intl Business and Trade L 121 at 158.

[54] *Anvil Mining Ltd v Association Canadienne Contre l'impunité*, 2012 QCCA 11.

[55] *Ibid* at paras. 91-94.

[56] *Piedra v Copper Mesa Mining Corporation*, 2011 ONCA 191, 332 DLR (4th) 118.

plaintiffs' pleading failed to connect the defendants with the alleged wrongful conduct.[57] In particular, the plaintiffs alleged that the wrongful conduct was undertaken by Copper Mesa's security forces, employees and agents, but they "failed to plead any particulars regarding the identity of the alleged perpetrators of these wrongs or any material facts supportive of an association between them and the [defendant] Directors."[58] Unsurprisingly, the Court of Appeal for Ontario held that it is 'plain and obvious' that the plaintiffs' claims disclose no reasonable cause of action, because the pleadings failed to make a viable connection between the defendants and the harms alleged.[59]

It should equally be said that some of the more recent cases have survived pre-trial challenges based on *forum non-conveniens* because justice requires that the issues raised in these cases be resolved in Canada, as opposed to the alternative forum which would likely deny the plaintiffs a fair hearing. In fact, 'access to justice' is a primary consideration for the assumption of jurisdiction by Canadian courts in recent transnational litigation. In *Choc*, *Garcia,* and *Araya*, Canadian courts assumed jurisdiction partly because the courts were fearful that the plaintiffs would be denied access to justice in their home countries. The facts of the recent cases in which Canadian courts have held that Canada is an appropriate forum (*Choc*, *Garcia* and *Araya*) occurred in countries ruled by semi-dictators and where the judiciary lacks independence from the executive arm of government.[60]

There is equally the problem of corruption within the judiciary in the home countries of the foreign plaintiffs. This scenario makes it unlikely that the plaintiffs will obtain justice in their own countries should they sue in their domestic courts. The consideration of access to justice as basis for

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[57] *Ibid* at paras 76 & 81-2.

[58] *Ibid* at para 80.

[59] *Ibid* at paras 76-82.

[60] These recent cases are significantly different from the facts and circumstances of pre-2013 cases such as *Cambior* (arising from Guyana) and *Yassin* (arising from Israel). For example, in both *Cambior* and *Yassin,* Canadian courts held that the alternative forums (Guyana and Israel, respectively) were more convenient to adjudicate the disputes partly because the countries from which the facts arose have an independent judiciary. More specifically, in *Cambior* the Court observed that Guyana's judiciary will provide the victims of the alleged wrongful acts with a fair and impartial hearing. See *Recherches Internationales Québec v Cambior Inc supra* note 29, at paras 11 & 12.

assuming jurisdiction in transnational litigation is apparent in *Araya v. Nevsun* where the BCCA held that the trial judge "was right to prefer the jurisdiction in which the plaintiffs can assert their claims in a fair and impartial proceeding, over a jurisdiction in which justice seems unlikely to be done."[61] In *Garcia*, the BCCA expressed a similar concern regarding the real risk that the plaintiffs will not obtain justice in Guatemala given the context of the dispute.[62] More specifically, the BCCA observed:

> that there is some measurable risk that the appellants [i.e., plaintiffs] will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state.[63]

In this regard, Canadian courts appear to be following the footsteps of their counterpart in England where the concept of 'natural forum' has evolved based on considerations of fairness and justice. The concept of 'natural forum' is captured in *Connelly v. RTZ Corp. plc (No. 2)*[64] where the Court observed that:

> But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.[65]

In sum, Canadian courts are now more willing to hold that Canada is a more convenient forum for adjudicating transnational claims particularly in situations where the alternative forum is likely to frustrate the plaintiffs' quest for justice.

Although foreign plaintiffs are increasingly able to survive jurisdictional challenges in Canadian courts, they still face a daunting task to establish that their claims constitute a reasonable cause of action. Foreign plaintiffs, like all other plaintiffs, must establish that their claims are predicated on recognized legal grounds, otherwise their actions are susceptible to dismissal

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[61] *Araya 2017, supra* note 41 at para 120.

[62] *Garcia v Tahoe Resources Inc supra* note 24, at paras 127-130.

[63] *Ibid* at para 130.

[64] *Connelly v RTZ Corp plc (No. 2),* [1997] IL PR 643 at 651. This statement was quoted with approval by the House of Lords. See *Connelly v RTZ Corp plc* [1997] UKHL 30 at para. 8.

[65] *Ibid* at 651.

under civil procedure rules for lack of a reasonable cause of action. To constitute a reasonable cause of action, the plaintiff's claim must fit within recognized law in Canada. Prior to the *Nevsun* decision, it was an open question whether claims alleging the complicity of Canadian parent corporations in human-rights violations in foreign countries are justiciable in Canada. If such claims are justiciable, what is the legal predicate for the liability of parent corporations? Do parent corporations owe a duty of care to third parties who are adversely impacted by the operations of subsidiary corporations? As discussed next, the seminal case of *Nevsun Resources v. Araya* attempts to resolve these questions. It provides a template for transnational litigation in Canada, one that will hopefully establish the justiciability of claims against parent corporations and culminate in the imposition of legal liability on parent corporations for the wrongful conduct of subsidiaries in foreign developing countries.

III. *NEVSUN RESOURCES V. ARAYA*

A. Background Facts

The plaintiffs brought this class action in British Columbia (BC) against Nevsun Resources, a corporation incorporated in BC, alleging that they and other individuals were compelled to work at Nevsun Resources' Bisha mine in Eritrea between 2008 and 2012. The Bisha mine (operated by an Eritrean corporation, the Bisha Mining Share Company) is owned jointly by Nevsun Resources and the government of Eritrea through a state-owned mining company, the Eritrean National Mining Corporation. The Eritrean National Mining Corporation owns 40 percent of the shares of Bisha Mining Share Company, while Nevsun Resources owns 60 percent of the shares of Bisha Mining Share Company through its subsidiary corporation. The plaintiffs alleged that through the wrongful actions of its Eritrean subsidiary, Nevsun Resources is liable for damages for breaches of Canadian domestic torts including conversion, battery, 'unlawful confinement' (false imprisonment), conspiracy and negligence. In addition, the plaintiffs alleged that Nevsun Resources and its Eritrean subsidiary breached customary-international-law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

The three principal plaintiffs are Eritrean citizens who are refugees in Canada. They alleged that they were conscripted into the Eritrean military

by the government of Eritrea under the National Service Program which requires all Eritreans who are 18 years and above to complete six months of compulsory military training, followed by 12 months of military development service. Under the National Service Program, conscripts engage in direct military service and participate in the construction of public infrastructure projects. While serving in the military, the plaintiffs were allegedly forced to work at the Bisha mine and subjected to violent, cruel, inhuman and degrading treatment. In particular, the plaintiffs were allegedly compelled to work at the Bisha mine for several years from 6:00 a.m. to 6:00 p.m. at least six days a week. To ensure that the plaintiffs and other conscripts obeyed military orders, the plaintiffs alleged that they were subjected to violent and inhuman punishment, including being ordered to roll in the hot sand while being beaten with sticks. As well, the plaintiffs' arms were allegedly tied together at the elbows behind the back, and their feet together at the ankles, and left in the hot sun. The plaintiffs alleged further that when not working, they were confined to camps and not allowed to leave unless authorized to do so.

B. The British Columbia Supreme Court and the British Columbia Court of Appeal Decisions

As is often the case in transnational litigation, Nevsun Resources filed motions before the British Columbia Supreme Court (BCSC) to strike the pleadings on several legal grounds, including (i) the 'act of state' doctrine; (ii) lack of a reasonable cause of action; and (iii) *forum non conveniens*. In relation to the act of state doctrine, Nevsun Resources argued that, because the alleged infractions were committed by the government of Eritrea, the act of state doctrine precludes Canadian courts from questioning the lawfulness of the sovereign acts of a foreign government, that is, the government of Eritrea. In addition, Nevsun Resources argued that the plaintiffs' pleadings alleging breach of customary international law should be struck because they are unnecessary and disclose no reasonable cause of action. As well, Nevsun sought a stay of proceedings on grounds of *forum non conveniens,* arguing that, because the facts occurred in Eritrea and the plaintiffs are Eritrean citizens, Eritrea is a more appropriate forum to adjudicate the dispute.

The BCSC dismissed the motions to strike the pleadings or stay the proceedings. The BCSC declined to apply the act of state doctrine. It further held that the pleadings disclosed a reasonable cause of action, and that British Columbia was a convenient forum. Hence, the British Columbia

courts have jurisdiction to adjudicate the dispute.[66] The British Columbia Court of Appeal (BCCA) upheld the decision of the BCSC dismissing the motions to strike the action.[67] On the 'act of state doctrine,' the BCCA acknowledged that "some form of the doctrine, although not called so by name, was part of the English common law accepted into the law of this province in 1858,"[68] but held that the act of state doctrine does not apply in this case because:

> (1) "the plaintiffs' claims do not purport to challenge the legality or validity (the 'effect') of a foreign state's '*legislation or other laws*' nor the '*effect*' of an act of a foreign state's executive in relation to events in Eritrea"; and
> (2) "the plaintiffs only seek compensation for acts on the part of Nevsun in connection with wrongs alleged to have occurred in Eritrea that are not contemplated by any legislation or official policy."[69] Moreover, the BCCA held that the public policy exception to the act of state doctrine would clearly apply in this case because the "nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy."[70]

Regarding whether the plaintiffs' claim (which alleges breach of customary international law) disclosed a reasonable cause of action, the BCCA observed as follows:

> There is no doubt that in pursuing claims under CIL [customary international law], the plaintiffs face significant legal obstacles, including states' legitimate concerns about comity and equality and the role of the judiciary as opposed to that of the legislature. It is not necessarily the case, however, that the recognition of a CIL norm against torture as the basis for some type of private law remedy in this instance would bring the entire system of international law crashing down. As I have emphasized, no state is a party to this proceeding; Eritrea is fully protected by state immunity; and the prohibition against torture is, as the majority stated in *Kazemi*, "universally accepted." If, as the Court suggested, the development of the law in this area should be gradual, it may be that an incremental first step would be appropriate in this instance.[71]

The BCCA concluded that it cannot be said the plaintiffs' claims are 'bound to fail' given the evolutionary nature of international law which has

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[66] *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856, 408 DLR (4th) 383.

[67] *Araya (2017), supra* note 41.

[68] *Ibid* at para 123.

[69] *Ibid* at para 166.

[70] *Ibid* at para 169.

[71] *Ibid* at para 196.

culminated in the willingness of other countries to hold corporate actors accountable for violations of *jus cogens*.[72]

In determining that British Columbia is a convenient forum, the BCCA held that the plaintiffs will not be able to obtain justice in Eritrea based on several factors, including: (i) corruption within the Eritrean judiciary; (ii) its lack of independence; and (iii) the repressive tendencies of the Eritrean government.[73] In particular, the BCCA held that, although a trial in British Columbia concerning conduct in a faraway and inaccessible country, such as Eritrea, would cause some inconvenience and practical difficulties, a trial in an Eritrean court will possibly be "presided over by a functionary with no real independence from the state (which is implicated in the case) and in a legal system that would appear to be actuated largely by the wishes of the President and his military supporters (also implicated)."[74] The BCCA concluded that the Chambers Judge "was right to prefer the jurisdiction in which the plaintiffs can assert their claims in a fair and impartial proceeding, over a jurisdiction in which justice seems unlikely to be done."[75]

C. The Supreme Court of Canada Decision

At the Supreme Court of Canada, Nevsun Resources did not challenge the BCCA's decision on *forum non conveniens*. Rather, it confined its appeal to two grounds; namely (1) whether the act of state doctrine forms part of Canadian common law; and (2) whether the customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity can be legal grounds for award of damages under Canadian law?

Regarding the first ground of appeal, Nevsun Resources argued that the 'act of state' doctrine, which enjoins domestic courts to refrain from inquiring into the validity of the acts of foreign states, renders the plaintiffs' claims non-justiciable in Canada since those claims allege that the Eritrean government conscripted and forced the plaintiffs to work at Nevsun Resources' mine in Eritrea. Nevsun Resources argued that the act of state doctrine applies in Canada because it is part of the English common law

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[72] *Ibid* at para 197.

[73] *Ibid* at paras 117-120.

[74] *Ibid* at para 118.

[75] *Ibid* at para 120.

received into the law of Canada. This ground of appeal is particularly significant because if the act of state doctrine forms part of Canadian domestic law, then any claim based on the actions of a foreign state would readily be dismissed at the preliminary stage by Canadian courts in deference to the act of state doctrine.

The second ground of appeal is predicated on the plaintiffs' reliance on customary international law as basis for their claims against Nevsun Resources. The plaintiffs claimed in their pleadings that customary international law is part of the law of Canada and, as a result, a breach of norms of customary international law, such as the prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity is actionable under Canadian common law. In essence, the plaintiffs sought damages against Nevsun Resources for breaches of customary international law as incorporated into the law of Canada. Relying on British Columbia's *Supreme Court Civil Rules*, Nevsun Resources argued that the plaintiffs' customary international law claims should be struck on grounds that they disclosed no reasonable claim or cause of action and that it is "plain and obvious" that the claims have no reasonable prospect of succeeding because customary international law norms are not justiciable under Canadian domestic law.

As discussed in detail below, a majority of the Supreme Court of Canada resolved both grounds of appeal in favour of the plaintiffs and dismissed Nevsun Resources' appeal. In resolving the first ground of appeal, the Supreme Court of Canada held emphatically that the act of state doctrine is not part of Canadian law.[76] Hence "there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where 'the question arises merely incidentally.'"[77]

Regarding the second ground of appeal, the Court held that, through the 'doctrine of adoption,' customary international law is automatically adopted into domestic Canadian law without any need for legislative action.[78] Drawing on a long line of cases, the Supreme Court of Canada held that "Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of

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[76] *Nevsun*, *supra* note 24 at para 59.

[77] *Ibid* at para 49.

[78] *Ibid* at para 86.

conflicting legislation."[79] The Court observed that there is no part of Canadian law that conflicts with the adopted customary international law norms on which the plaintiffs' claims are based.[80] Rather, the adopted norms of customary international law are consistent with Canada's domestic law and policies, including policies designed "to ensure that Canadian companies operating abroad *respect* these norms."[81] The Court concluded that given "the absence of any contrary law, the customary international law norms raised by the Eritrean workers form part of the Canadian common law and potentially apply to Nevsun."[82] Thus, it is not plain and obvious that the plaintiffs' claims for breaches of customary international law would fail.[83]

IV. SIGNIFICANCE OF THE *NEVSUN* DECISION

The Supreme Court of Canada's decision in *Nevsun* "makes, and marks, a substantial contribution" to the promotion of human rights because it provides a clear affirmation that corporations could be liable for breach of international customary law norms where those norms have been incorporated into domestic law.[84] The *Nevsun* decision shatters the long-held idea that international law obligations do not apply to corporations. In this sense, the decision is "a watershed moment for human rights plaintiffs in Canada seeking to invoke customary international law" and it may well act as "a model for other national courts looking to make use of customary international law more generally."[85] The *Nevsun* decision could propel courts around the world to hold parent corporations liable for violating international human rights through their subsidiaries in developing countries.[86] It could also encourage responsible investment practices and

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[79] *Ibid* at para 90.

[80] *Ibid* at para 114.

[81] *Ibid* at para 115.

[82] *Ibid* at para 116.

[83] *Ibid* at para 132.

[84] Upendra Baxi, "*Nevsun*: A Ray of Hope in a Darkening Landscape?" (2020) 5:(2) Bus and Human Rights J 241 at 251.

[85] Beatrice A. Walton, "International Decisions: *Nevsun Resources Ltd v Araya*, Case No. 37919" (2021) 115:1 American J of Intl L 107 at 111.

[86] Eva Monteiro, "Mining for Legal Luxuries: The Pitfalls and Potential of *Nevsun Resources*

provide "the impetus for foreign investors to be more mindful of the terms and conditions under which their workers in host states are engaged."[87] Perhaps more significantly, by recognizing the adoption of norms of customary international law in Canada's domestic law, the *Nevsun* decision makes it untenable for defendants in international-human-rights-based tort claims to seek pre-trial dismissal of such claims on grounds that they "plainly and obviously will fail."[88]

This section of the article analyzes the significance of the *Nevsun* decision, particularly its laying to rest of the 'act of state' doctrine; its clear articulation of the adoption of customary international law norms as part of Canadian domestic law and thus creating a platform for enforcing the norms in Canada; its affirmation that the adopted customary-international-law-norms may well bind corporations; and the potential recognition of a new civil claim regarding the liability of Canadian parent corporations.

A. The 'Act of State' Doctrine is Laid to Rest

As conceptualized under English law, the act of state doctrine is a domestic rule of law which prescribes that courts of one country are "incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state."[89] This rule prevents the courts of England from questioning the validity of the acts of foreign states unless, for example, those acts constitute "so grave an infringement of human rights" or there is an overriding public policy requiring the acts to be questioned by the courts of England.[90] The act of state doctrine is frequently invoked by corporations engaged in natural resource extraction because their operations in developing countries are characterized by partnership and joint-venture arrangements with the governments of these countries. Corporations engaged in the extraction of natural resources often enter into partnership

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Ltd v Araya" (2020) 58 Canadian Yearbook of Intl L 331 at 357.

[87] Jason Haynes, "The Shifting Pendulum: Foreign Investors' Liability under Canada's Common Law for Breaches of Customary International Law" (2021) 36:3 Can J of L and Society 447 at 459.

[88] H. Scott Fairly, "International Law Matures within the Canadian Legal System: *Araya et al v Nevsun Resources Ltd*" (2021) 99 Canadian Bar Rev 193 at 211.

[89] *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 at 269 (H.L.).

[90] *Oppenheimer v Cattermole*, [1976] AC 249 (HL), at 278.

and joint-venture arrangements with governments of developing countries; hence the property and assets of mining and oil and gas corporations are sometimes protected by the security agents of developing countries. In Africa, for example, the African Union has urged "member States to explore equity participation in mineral ventures so as to capture a greater share of benefits for the people of Africa."[91]

State participation in mineral exploitation can be achieved through the acquisition by the host state of an equity stake in mining and oil and gas projects, or through 'carried equity' arrangements in which the MNC bears the costs associated with a project after which compensation is paid to the MNC out of the project itself.[92] Likewise, the host state may engage in 'free equity participation' encompassing the mandatory grant of an equity stake in a mining or oil and gas project to the government without any financial obligation on the part of the government.[93] As well, the host state may engage in a 'production sharing' arrangement involving the grant of a prescribed percentage of profits or recovered minerals to the state after deduction of the cost of production incurred by the MNC.[94] Irrespective of the model adopted by the host country, state participation in mineral exploitation culminates in the alignment of the economic interests of MNCs with those of the host states; hence, the governments of developing countries often suppress civil agitations and protests against mining and oil and gas MNCs in these countries. The host state's security agents sometimes engage in brutal repression of the rights of local communities in an attempt to protect mining and oil and gas projects jointly owned by MNCs and host governments.[95]

The act of state doctrine is not confined to England, as it applies in many other countries. In the United States, for example, the act of state doctrine

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[91] "Addis Ababa Declaration on Building a Sustainable Future for Africa's Extractive Industry – From Vision to Action" (16 December 2011), online (pdf): <https://wsrw.org/files/dated/2012-07-27/addis_declaration_ei_2011.pdf> [https://perma.cc/C7KR-NCXP].

[92] See Charles McPherson, "State Participation in the Natural Resource Sectors: Evolution, Issues and Outlook" in Philip Daniel, *et al* (eds.), *The Taxation of Petroleum and Minerals: Principles, Problems and Practice* (London: Routledge, 2010) 263 at 266-7.

[93] *Ibid* at 267.

[94] *Ibid*.

[95] See Evaristus Oshionebo, *Regulating Transnational Corporations in Domestic and International Regimes: An African Case Study* (Toronto: University of Toronto Press, 2009) at 14-22.

enjoins US courts to give legal effect to the actions undertaken by foreign governments in exercise of their sovereign legal power "even if those exercises of power are contrary to international law."[96] The Supreme Court of the United States has stated that, although "Courts of the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them," the act of state doctrine "requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdiction shall be deemed valid."[97] Based on the act of state doctrine the Supreme Court of the United States has in the past given effect to a Cuban law that seized and expropriated a consignment of sugar in Cuba without questioning the validity of the law and without considering whether the law was contrary to international law regarding expropriation of property and assets.[98]

Unlike England and the United States, however, the act of state doctrine has not taken firm roots in Canadian legal jurisprudence. While Canadian courts exercise considerable restraint in dealing with acts of sovereign states or when considering legal questions arising from the laws of foreign countries, no Canadian court has ever applied the act of state doctrine.[99] Rather, the Supreme Court of Canada has long held that nothing bars Canadian courts from considering the validity of the act of a foreign state or the laws of a foreign state where "the question arises merely incidentally."[100] Given this state of the law, a strong majority (seven to two) of Supreme Court of Canada readily dismissed Nevsun Resource's arguments regarding the applicability of the act of state doctrine in Canada. The Supreme Court of Canada noted that, although the act of state doctrine is applied in England and while Canadian common law grew from the same roots as the common law of England, in practice, Canadian law has developed its own approach to addressing the twin principles of conflict of laws and judicial restraint underlying the act of state doctrine.[101] Thus,

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[96] John Harrison, "The American Act of State Doctrine" (2016) 47(2) Georgetown J of Intl L 507 at 511.

[97] *W.S. Kirkpatrick Co v Environmental Tectonics Corp*, 1990 493 U.S. 400 at 409.

[98] *Banco National de Cuba v Sabbatino*, 1964 376 U.S. 398.

[99] *Nevsun, supra,* note 24 at para 56.

[100] *Hunt v T&N plc*, [1993] 4 S.C.R. 289 at 309.

[101] *Nevsun, supra* note 24 at para 44.

> our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference, but allow for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law.[102]

Under the Canadian approach, courts exercise judicial restraint when considering foreign-law questions, meaning that Canadian "courts will refrain from making findings which purport to be legally binding on foreign states."[103] However, Canadian "courts are free to inquire into foreign law questions when doing so is necessary or incidental to the resolution of domestic legal controversies properly before the court."[104] The court concluded emphatically that "[t]he doctrine is not part of Canadian common law, and neither it nor its underlying principles as developed in Canadian jurisprudence are a bar to the Eritrean workers' claims."[105]

In the context of transnational justice, the position adopted by the Supreme Court of Canada is preferable to the situation in England and the United States. As applied in both England and the United States, the act of state doctrine enables foreign dictatorial and irresponsible governments to avoid legal scrutiny in the courts of Western countries. Of course, there are established exceptions to the act of state doctrine (such as overriding public policy and gross human-right violations) and the Parliament can create additional exceptions to the doctrine. Even with these exceptions, the application of the doctrine as it currently exists in many countries prevents plaintiffs from questioning the legality and validity of the acts of foreign states and their officials. In this sense, the act of state doctrine could embolden autocratic and irresponsible governance in the developing world. By laying the act of state doctrine to rest, the Supreme Court of Canada has effectively eliminated one of the procedural obstacles encountered by plaintiffs in transnational litigation. As a result of the majority decision in *Nevsun*, lawyers representing defendant corporations in transnational litigation in Canada have one less weapon with which to seek the dismissal of suits at the preliminary stage.

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[102] *Ibid* at para 45.

[103] *Ibid* at para 47.

[104] *Ibid* at para 47. On this point, the Supreme Court of Canada relied on its earlier decision in *Hunt v T&N plc*, *supra* note 100.

[105] *Nevsun, supra* note 24 at para 59.

B. Adoption of Norms of Customary International Law as part of Canadian Domestic Law

As discussed above, in *Nevsun Resources v. Araya*, the plaintiffs based their claims partly on the notion that norms of customary international law have been incorporated into Canadian common law; hence, they argued that a breach of the norms of customary international law constitutes a breach of Canadian law. The plaintiffs alleged further that, because norms of customary international law form part of Canadian law, they are entitled to seek legal remedies in Canadian courts against Nevsun Resources for forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity.[106] The plaintiffs argued that breach of these norms of international law by a Canadian citizen or business entity amounts to breach of Canadian domestic law; hence, they are entitled to remedies under Canadian law.

The plaintiffs' legal claims raise two fundamental questions. First, do the claims by the plaintiffs (that is, forced labour; slavery; cruel, inhuman and degrading treatment; and crimes against humanity) constitute customary international law? Under international law, a norm is recognized as customary if the norm is a general (though not necessarily universal) practice, and if the international community regards the norm as a legal obligation (that is, *opinio juris sive necessitatis*).[107] In essence, customary international law consists of those norms that are generally accepted as imposing legal obligations or creating and vesting rights. As the Supreme Court of Canada observed, "[w]hen an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law."[108]

However, norms of customary international law have different legal significance depending on the obligations they impose or the rights they confer. There are certain fundamental norms of customary international law that impose absolute obligations and from which no derogation is permitted. Such norms are commonly referred to as *jus cogens* or peremptory norms.

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[106] *Ibid* at para 60.

[107] B. S. Chimni, "Customary International Law: A Third World Perspective" (2018) 112(1) American J of Intl L 1 at 2 (stating that "There is a degree of consensus among international law scholars that the two elements that must come together for a rule of CIL to emerge are state practice and *opinio juris sive necessitas.*")

[108] *Nevsun, supra* note 24 at para 80.

The international community has long accepted and recognized *jus cogens* or peremptory norms as norms "from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[109] As of today, the prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity are generally (and in fact, universally) accepted as *jus cogens* or peremptory norms of international law. The prohibitions are absolute, universal, and permit of no derogation. Hence, a majority of the Justices of the Supreme Court of Canada readily concluded that the norms relied on by the plaintiffs, that is: crimes against humanity; the prohibition against slavery; the prohibition against forced labour; and the prohibition against cruel, inhuman and degrading treatment, are generally accepted and recognized by the international community as *jus cogens* or peremptory norms of international law from which no derogation is permitted.[110]

Second, are these *jus cogens* or peremptory norms of international law part of Canadian domestic law? In modern times, nations internalize peremptory norms of international law through a judicial process known as the doctrine of adoption in Canada, or the doctrine of incorporation in other countries. The doctrine of adoption is a naturally occurring process whereby, in complying with their international obligations (particularly obligations relating to human rights and human dignity), states take legal steps to bring their domestic legal regimes in conformity with international law. Such legal steps may take the form of legislation that not only ratifies a treaty, but expressly provides that the provisions of the treaty shall be deemed to be part of the country's domestic law. Such legal steps may equally manifest in the form of judicial decisions that expressly adopt and incorporate the norms of customary international law into the domestic legal system.[111] Thus, absent a contrary statute, norms of customary international law that are consistently applied by domestic courts become part and parcel of domestic law.

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[109] *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 (entered into force 27 January 1980), art 53.

[110] *Nevsun, supra* note 24 at paras 100-103.

[111] See Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015) 109 American J of Intl L 514 at 528.

In Canada, the doctrine of adoption is succinctly captured in *R. v. Hape*[112] where the Supreme Court of Canada observed as follows:

> [T]he doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law.[113]

In *Nevsun*, a majority of the Supreme Court of Canada (five of nine Justices) followed *R v. Hape* and held emphatically that "[t]here is no doubt then, that customary international law is also the law of Canada."[114] The majority continued as follows:

> Therefore, as a result of the doctrine of adoption, norms of customary international law — those that satisfy the twin requirements of general practice and *opinio juris* — are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law .... Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect .... To suggest otherwise by requiring legislative endorsement, upends a 250 year old legal truism and would put Canada out of step with most countries ....[115]

The majority decision in *Nevsun* is significant not only because it confirms that norms of customary international law are automatically incorporated into domestic Canadian law through the doctrine of adoption,[116] but also because it re-affirms that "established norms of customary international law are law, to be judicially noticed" in Canada.[117] In essence, like other nations, Canada does not require evidentiary proof of norms of customary international law in order for these norms to be applied by Canadian courts.

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[112] *R v Hape*, 2007 SCC 26.

[113] *Ibid* at para 39.

[114] *Nevsun, supra* note 24 at para 95.

[115] *Ibid* at paras 94.

[116] *Ibid* at para 90.

[117] *Ibid* at para 97.

Norms of customary international law receive judicial notice in Canada because, "just as the law of contracts, labour law and administrative law are accepted without the need of proof, so too is customary international law."[118]

C. Norms of Customary International Law Adopted in Canada May Apply to Corporations

A more intriguing question before the Supreme Court of Canada was whether corporations are liable for breach of the adopted norms of customary international law. To put the question differently, are customary-international-law-norms (adopted in Canada) applicable to corporations and other non-state actors? This question arises from the position under international law that holds that only states are the subjects of international law. The current international legal system is state-centric in the sense that international law applies almost exclusively to states and is rarely applicable to non-state actors. International law has long held on to the idea that its obligations are binding on states only, hence international legal obligations including those of international human rights are not expressly imposed on non-state actors such as corporations. The non-applicability of international legal obligations to corporations is premised on the notion that corporations are not subjects of international law. Traditional international-law doctrine holds that "a subject of international law is an entity capable of possessing international rights and duties and endowed with the capacity to take legal action in the international plane."[119] Corporations are not regarded as subjects of international law because they lack some of the requirements for subject-hood under international law, which requires its subjects to possess the following: (i) the capacity to bear privileges and immunities from national jurisdictions (that is, sovereignty); (ii) the ability to enter into international treaties and agreements; and (iii) the capacity to seek remedies for breach of international law.[120] While corporations can enter into international contracts (such as investment contracts between MNCs and host countries), corporations are neither sovereign entities nor can they claim immunity from national jurisdictions. Unlike states (the traditional subjects of international

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[118] *Ibid* at para 98.

[119] P. K. Menon, "Subjects of Modern International Law" (1990) 3 Hague Yearbook of Intl L 30 at 31.

[120] For analysis of the status of corporations under international law, see Jose E. Alvarez, "Are Corporations 'Subjects' of International Law?" (2011) 9 Santa Clara J of Intl L 1-35.

law) that occupy and control an identifiable geographic territory, corporations do not exercise *de jure* control over an identifiable geographic territory.

Relying on the state-centric nature of international law, Nevsun Resources argued that even if the norms of customary international law, such as those relied on by the plaintiffs, form part of the common law of Canada through the doctrine of adoption, it is immune from their application because it is a corporation. In effect, Nevsun Resources posited that, because it is not a subject of international law, it is not bound by legal obligations under the customary international law adopted in Canada.

The majority of Justices held that, although international law was once state-centric in the sense that it focused almost exclusively on inter-state relations, in modern times, international law has evolved to the extent that non-state actors including individuals have also become the focus of international rights, responsibilities and duties. According to the majority:

> In fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states. The past 70 years have seen a proliferation of human rights law that transformed international law and made the individual an integral part of this legal domain, reflected in the creation of a complex network of conventions and normative instruments intended to protect human rights and ensure compliance with those rights.[121]

This being the case, the majority held that the norms of customary international law adopted as part of Canadian domestic law may well apply to private actors, including corporations such as Nevsun Resources.[122] Thus, the majority concluded that:

> [I]t is not "plain and obvious" that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of "obligatory, definable, and universal norms of international law", or indirect liability for their involvement in what Professor Clapham calls "complicity offenses" .... However, because some norms of customary international law are of a strictly interstate character, the trial judge will have to determine whether the specific norms relied on in this case are of such a character. If they are, the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations.[123]

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[121] *Nevsun, supra* note 24 at para 107.

[122] *Ibid* at paras 111 & 114

[123] *Ibid* at para 113.

In their dissenting opinion, Justices Côté and Moldaver faulted the majority's opinion that norms of customary international law apply to corporations. Reasoning that "the extension of customary international law to corporations represents a significant departure in this area of the law,"[124] the dissenting Justices posited that:

> While my colleague recites the rigorous requirements for establishing a norm of customary international law (at paras. 77-78), when it comes to actually analyzing whether international human rights law applies to corporations, she does not engage in the descriptive inquiry into whether there is a sufficiently widespread, representative and consistent state practice. Instead, she relies on normative arguments about why customary international law ought to apply to corporations: see paras. 104-13. A court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences.[125]

While agreeing with the majority that "international law does move," the dissenting Justices opined that international law "moves only so far as state practice will allow."[126] In the view of the dissenting Justices, the "widespread, representative and consistent state practice and *opinio juris* required to establish a customary rule do not presently exist to support the proposition that international human rights norms have horizontal application between individuals and corporations."[127] Thus, they concluded that "corporate liability for human rights violations has *not* been recognized under customary international law."[128]

1. Tenability of the Majority Decision Regarding the Application of the Adopted Norms of Customary International Law to Corporations

As noted previously, the notion that norms of customary international law or international human rights do not apply to corporations is predicated on the fact that, as of today, corporations are not regarded as subjects of international law. However, many authors have argued that, given modern economic and social realities, corporations ought to be regarded as subjects of international law and hence, bear obligations under international law. For

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[124] *Ibid* at para 268.

[125] *Ibid* at para 269.

[126] *Ibid.*

[127] *Ibid.*

[128] *Ibid* at para 191.

example, Beth Stephens argues that customary norms of international law (particularly peremptory norms or *jus cogens* relating to human rights) are binding on corporations and other non-state actors.[129] Stephens argues further that given the widespread recognition of corporate accountability within domestic legal systems, the application of norms of customary international law to corporations is a logical extension of domestic corporate liability for human-rights violations.[130] Likewise, Harold Koh observes that, because "states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations."[131] Koh argues further that given the reality that states and individuals are liable for violation of international law, they can insulate themselves from legal liability by acting through corporations. It is thus counterproductive to the protection of human rights to let states and individuals immunize themselves from liability for gross violations of international law through the mere artifice of corporate formation.[132]

It is no longer tenable for the international community to retain the idea that corporations are not subjects of international law, given the steady growth in the power and influence of MNCs, coupled with the precipitous decline in the power of states as a result of globalization.[133] MNCs should be bearers of duties under international law because they are international actors that participate actively in making some of the rules of international law, particularly rules governing international commerce.[134] Moreover, MNCs and other corporations enjoy human rights and other privileges

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[129] Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002) 20 Berkeley J of Intl L 45 at 70-71. See also Stephen A. Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111 Yale L J 443 at 449; William S. Dodge, "Corporate Liability under Customary International Law" (2012), 43 Georgetown J of Intl L 1045; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006) at 58.

[130] Stephens, *ibid* at 76.

[131] Harold H. Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004) 7(2) J of Intl Economic L 263 at 265.

[132] *Ibid* at 265.

[133] *Oshionebo, supra* note 95 at 144-151.

[134] See Vaughan Lowe, "Corporations as International Actors and International Law Makers" (2004) 14 Italian Y.B. Intl L. 23-38.

under international law.[135] The imposition of international-law obligations on MNCs is justified because,

> Like states, TNCs [transnational corporations] have the practical capacity to exercise authority over, repress, or alienate individuals be they employees or members of host communities. They negotiate and enter into concession contracts and agreements with states, sometimes with greater bargaining powers than those states. They have status in international economic forums and exert tremendous influence over global economic policies, especially by participating directly or indirectly in the negotiation of trade agreements and international patent protections. They enjoy the benefits of international human rights as well as rights and privileges accruing from international financial and commercial adjudicatory mechanisms, such as those on arbitration.[136]

The direct application of the adopted norms of customary international law to corporations obviates the need to impute liability to parent corporations through lifting of the corporate veil. In the context of a parent-subsidiary relationship, the veil of incorporation is disregarded where the court is "satisfied that: (i) there is complete control of the subsidiary, such that the subsidiary is the 'mere puppet' of the parent corporation; and (ii) the subsidiary was incorporated for a fraudulent or improper purpose or used by the parent as a shell for improper activity."[137]

The corporate veil is also lifted where a statute requires the veil to be lifted. While it is theoretically possible to lift the corporate veil, in practice, the veil of incorporation is rarely lifted by courts. This is because, the principle of separate legal personality (a cornerstone of the capitalist system) is jealously guarded by the courts. The Supreme Court of Canada has held, for example, that "unless there is a legal basis for ignoring the separate corporate personality of separate corporate entities, those separate corporate existences must be respected."[138] Thus, the mere fact that a parent corporation or its subsidiary has engaged in some impropriety is not a ground for piercing the corporate veil. As one court has observed, "it is not

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[135] Oshionebo, *supra* note 95 at 144-151.

[136] *Ibid* at 147.

[137] *Yaiguaje v Chevron Corporation*, 2018 ONCA 472 at para 66.

[138] *Sun Indalex Finance v United Steelworkers*, [2013] 1 S.C.R. 271, at para 238. See also *Chandler v Cape PLC*, 2012 EWCA Civ 525 at para 69 where the England and Wales Court of Appeal observed that courts are reluctant to pierce the corporate veil because a "subsidiary and its [parent] company are separate entities [and] [t]here is no imposition or assumption of responsibility by reason only that a company is the parent company of another company."

permissible to lift the veil simply because a company has been involved in wrong-doing, in particular simply because it is in breach of contract." [139] In effect, the separate legal personality principle "applies even where the evidence demonstrates that the corporation has been involved in impropriety."[140] In this sense, the separate legal personality principle is a significant barrier to the imposition of liability on parent corporations for the wrongful actions of their subsidiaries. However, the application of the adopted customary norms of international law to corporations could eliminate this barrier.

D. Potential Recognition of a New Civil Claim regarding Liability of Parent Corporations

In the context of transnational litigation in Canada, *Nevsun* is novel in the sense that it is the first case (before the Supreme Court of Canada) to articulate a cause of action based on alleged breaches of customary international law norms.[141] While the plaintiffs instituted this action partly based on conventional tort claims such as unlawful confinement and negligence, they also relied on a novel cause of action based on customary international law norms. In response, Nevsun Resources argued that the harms caused by the alleged breaches of customary international law can be adequately addressed under the recognized torts of conversion, battery, unlawful confinement, conspiracy and negligence. A majority of the Justices of the Supreme Court of Canada held that "it is at least arguable that the Eritrean workers' allegations encompass conduct not captured by these existing domestic torts."[142] The majority noted that:

> Customary international law norms, like those the Eritrean workers allege were violated, are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms "shock[s] the conscience of humanity."[143]

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[139] *Dadourian Group International Inc v Simms & others*, 2006 EWHC 2973 at para 683, affirmed 2009 EWCA Civ 169.

[140] *Shoppers Drug Mart Inc v 6470360 Canada Inc,* 2012 O.J. No. 4320, 2012 ONSC 5167 at para 72.

[141] Earlier cases such as *Garcia v Tahoe Resources Inc, supra* note 24 raised similar claims, but these cases did not get to the Supreme Court of Canada.

[142] *Nevsun, supra* note 24 at para 123.

[143] *Ibid* at para 124.

Thus,

> [r]efusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct.[144]

Given the preliminary nature of this decision and mindful of the fact that the merits of the case have yet to be determined, the Supreme Court of Canada declined to make a categorical determination that the Plaintiffs' claims (based on norms of customary international law) constitute a new tort or new civil claim. However, it left open the possibility that these claims could constitute a new tort or new civil claim. In particular, the majority observed that:

> The workers' customary international law pleadings are broadly worded and offer several ways in which the violation of adopted norms of customary international law may potentially be compensable in domestic law. The mechanism for how these claims should proceed is a novel question that must be left to the trial judge. The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims.[145]

Interestingly, the majority opined that the adoption of norms of customary international law in Canada may not necessarily require the creation of a new category of torts for purposes of legal liability for breach of the adopted international law norms. The majority observed that:

> A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.[146]
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> ...
>
> The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation

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[144] *Ibid* at para 125. Unlike the majority, the dissenting Justices held that norms of customary international law cannot ground a legal claim in Canada and that the court cannot "change the doctrine of adoption so that it provides a civil liability rule for breaches of prohibitions at customary international law." See *Ibid* at para 224. The dissenting Justices held further that the recognition of a domestic civil claim based on customary international law norms is a "fundamental reform to the common law [that] must be left to the legislature, even though doing so by judge-made law might seem intuitively desirable." *Ibid* at para 228.

[145] *Nevsun, supra* note 24 at para 127.

[146] *Ibid.*

> to the contrary ... That may mean that the Eritrean workers' customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application.[147]

Based on the majority decision in *Nevsun*, one can theorize that the liability of corporations for breach of the adopted norms of customary international law may be predicated on (1) a direct-liability regime, (2) creation of new nominate torts, and (3) existing categories of torts such as negligence.[148] Although the majority decision alluded to these potential predicates for corporate liability, it declined to expressly pronounce on any of these predicates as the law. In essence, while the majority of the Justices recognized the potential for a new civil claim in Canada based on the adopted norms of customary international law, they stopped short of creating a new cause of action in *Nevsun*. The majority decision in *Nevsun* has been criticized as "a seemingly cowardly approach" to corporate liability because, while it alluded to the potential recognition of a new civil claim based on the adopted norms of customary international law, it declined to expressly create or recognize such new claims and chose instead to leave the issue for the trial judge to resolve.[149]

The majority may have declined to expressly create a new tort or new civil claim because the issues before the court were preliminary in nature. They may also have wanted the lower courts to weigh in on whether a new civil claim should be recognized based on the adopted norms of customary international law. This is evident from the Supreme Court of Canada's exhortation to the trial judge to determine whether the character of the specific norms relied on in this case is strictly inter-state, and if so, whether the common law should evolve so as to extend the scope of those norms to bind corporations.[150] The Court may have deferred to the lower courts in order to enable the organic evolution of Canadian common law from the bottom up.

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[147] *Ibid* at para 128.

[148] See *ibid* at paras 127-129.

[149] Haynes, *supra* note 87 at 458.

[150] *Nevsun, supra* note 24 at para 113.

In the view of this author, however, the Supreme Court of Canada would have been on firm grounds had it expressly created a new tort or civil claim regarding the liability of parent corporations for the wrongful actions of their subsidiaries. First, the issue of liability of parent corporations was before the Court based on the second ground of appeal, which is, whether the prohibitions in customary international law against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity ground a claim for damages under Canadian law? Arising from this ground of appeal is a subsidiary issue argued before the Supreme Court of Canada as to whether the adopted customary-international-law norms apply to Nevsun Resources and other corporations.[151] Regarding this issue, Nevsun Resources argued that "that even if customary international law norms such as those relied on by the Eritrean workers form part of the common law through the doctrine of adoption, it is immune from their application because it is a corporation."[152]

Second, the Supreme Court of Canada could have created a new tort or new civil claim (or expressly predicate corporate liability on existing tort categories) without pronouncing on the culpability of Nevsun Resources. This is the approach taken recently by the United Kingdom Supreme Court (UKSC) in *Vedanta Resources PLC and another v. Lungowe and others,*[153] which, like *Nevsun,* was decided on a preliminary basis. As discussed below, in *Vedanta*, the UKSC expressly recognized a duty of care on the part of parent corporations, even though the case was decided on a preliminary basis.

By declining to expressly provide a legal predicate for corporate liability for breach of the adopted norms of customary international law, the Supreme Court of Canada has left open the possibility that trial courts may equally decline to do so, thereby denying plaintiffs an opportunity to obtain legal remedies for breach of the adopted norms of customary international law. That being said, the language of the majority decision in *Nevsun* is strong enough to leave no room for doubt that the Court is favourably disposed to providing legal remedies for breach of the adopted norms of customary international law. As the majority observed, "[s]ince these claims are based on norms that already form part of our common law, it is not 'plain and obvious' to me that our domestic common law cannot recognize a direct

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[151] See *ibid* at paras 104-114.

[152] *Ibid* at para 104.

[153] *Vedanta Resources PLC and another v Lungowe and others,* [2019] UKSC 20.

remedy for their breach."[154] Whether such legal remedies should be provided through the direct-liability approach, or through the creation of a new nominate tort, or under existing tort categories, is the question addressed in the next section of the article.

V. LEGAL PREDICATE FOR THE LIABILITY OF PARENT CORPORATIONS

As noted above, *Nevsun* paves the way for the imposition of liability on Canadian parent corporations for the wrongful actions of their subsidiaries. Following the *Nevsun* decision, Canadian courts could do any of the following: (i) adopt the direct-liability approach based on the adopted norms of customary international law; or (ii) create a new civil claim or nominate tort; or (iii) subsume claims alleging breach of the adopted customary international law under existing tort categories, such as negligence and unlawful confinement. This section of the article analyzes the potential scope of these platforms for parent-corporation liability in Canada. In the author's view, what the Supreme Court of Canada referred to in *Nevsun* as the "direct approach" may in fact be implemented through the creation of a new civil claim or new nominate tort. Hence, the 'direct approach' and a new nominate tort are conflated and discussed together.

A. Direct Liability Based on the Adopted Norms of Customary International Law

The *Nevsun* case was remitted to the BCSC for trial on the merits, but the parties settled out of court prior to the trial.[155] The out-of-court settlement denied the BCSC of the opportunity to make significant jurisprudential decisions, including (1) whether the specific norms of customary international law relied on by the plaintiffs [that is, prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity] are of a strictly inter-state character; and (2) if these norms are of a strictly inter-state character, whether the common law should

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[154] *Nevsun, supra* note 24 at para 128.

[155] See Niall McGee, "Canadian Miner Nevsun Resources Settles with African Workers over Case Alleging Human-rights Abuses" (28 October 2020), online: *The Globe and Mail* <https://www.theglobeandmail.com/business/article-canadian-miner-nevsun-resources-settles-with-african-workers-over-case/> [https://perma.cc/M7VM-VUB9].

evolve so as to extend the scope of these norms to bind corporations.[156] In effect, if this case had gone to trial, the BCSC would have had to determine whether the adopted customary-international-law norms have a private character, which could form the basis for holding parent corporations liable for breach of the norms. In this section of the article, I argue that the norms of customary international law relied on by the plaintiffs in *Nevsun* do not make a distinction between state and non-state violators and that the norms apply irrespective of the status of the violator.

Under extant international law, the prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity are profound and absolute in the sense that they permit of no derogation. These prohibitions are equally universal in the sense that they are not confined to state actors, and they apply equally to non-state actors. Heinous acts such as war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions "are widely recognized to be prohibited by international law to private as well as state actors."[157] These norms of customary international law encompass both inter-state and private characters. The private character of these norms can be gleaned from the decisions of international tribunals such as the Nuremberg Tribunals which held that norms of customary international law apply to legal persons as well as individuals.[158] Given the all-encompassing (inter-state and private) character of these norms of customary international law, both state and non-state actors (including corporations) can be held liable for the violation of these norms. As authors such as Beth Stephens have argued, norms of customary international law (particularly peremptory norms or *jus cogens* relating to human rights) are binding on corporations and other non-state actors.[159] Likewise, Jordan J. Paust argues that because "private corporations, like private individuals, are bound by domestic laws" and because "private corporations and entities are bound by international laws applicable to individuals," corporations and other non-state actors are liable for violations

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[156] *Nevsun, supra* note 24 at para 113.

[157] Carlos M. Vazquez, "Direct vs. Indirect Obligations of Corporations under International Law" (2005) 43 Columbia Journal of Transnational Law 927 at 943.

[158] *Stephens*, *supra* note 129 at 76.

[159] *Ibid* at 70-71. See also Clapham, *supra note* 129 at 58.

of customary norms of international law such as the prohibitions against terrorism and human rights violations.[160]

Thus, domestic "civil liability can reach private actors directly and as private actors participating in a joint venture or complicitous conduct with other actors or as actors colored by a connection with a state, state entity, or other public actor."[161] Domestic civil liability is particularly appropriate in situations where the norms of customary international law alleged to have been breached by non-state actors have been incorporated into the domestic laws of the country in which liability is sought to be imposed on the non-state actors.[162] In sum, norms of customary international law bind Canadian non-state actors, including parent corporations, upon their adoption into Canadian domestic law. As a result, Canadian courts should not only recognize a new civil claim or cause of action based on the adopted norms of customary international law, but provide adequate remedy (in the form of damages) for breach of the norms. Liability for breach of the adopted customary international law norms must capture both direct participation and complicity in the breach. This is because the international-law regimes from which these customary norms are adopted punish both direct participation and complicity in the violation of the norms. As Beth Stephens argues, non-state actors such as individuals and corporations "violate international norms when they are complicit in [human-rights] abuses, as well as when they directly commit abuses."[163]

In the context of the relationship between a parent corporation and its subsidiaries, an essential element of the new civil claim may manifest in the form of a direct obligation on the part of parent corporations to properly and adequately supervise the operations of their subsidiary corporations (within and outside of Canada) so that these subsidiaries do not engage in

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[160] Jordan J. Paust, "Sanctions against Non-State Actors for Violations of International Law" (2002) 8 ILSA Journal of International & Comparative Law 417 at 423-429.

[161] *Ibid* at 429.

[162] Steven M. Schneebaum, "The Enforceability of Customary Norms of Public International Law" (1982) 8 Brooklyn Journal of International Law 289 at 302-3, observing that:

.... there is a right in customary international law, and therefore in the law of the United States, to be free from torture. If there is such a right - as the court emphatically concluded - then there should be no need to continue the search for a private cause of action to enforce it. To be free from torture is a right under United States law. That is enough to enlist the aid of the judiciary in the protection of that right.

[163] *Stephens*, *supra* note 129 at 75.

conduct that violates the adopted norms of customary international law. The parent corporation's supervisory obligation stems not only from its ownership of shares or equity in the subsidiary corporation, but also the following: (i) the exercise of ownership rights, such as appointment of members of the board of directors and management staff of the subsidiary corporation; (ii) the taking of the profits arising from the operations of the subsidiary; (iii) making (or contributing to) investment decisions of the subsidiary; and (iv) enunciating strategic plans on behalf of the subsidiary. In *Nevsun*, the plaintiffs appear to lay the foundation for such supervisory obligations by pleading that Nevsun Resources was responsible for deciding all important matters relating to the operations of its subsidiary in Eritrea, including the employment of contractors and the development, implementation and oversight of its corporate social responsibility policies.[164] In fact, the Chambers judge observed that Nevsun Resources controlled the Bisha Mine Share Company, its Eritrean subsidiary, since it (Nevsun Resources) appointed a majority of the Board of the Bisha Mine Share Company while Nevsun Resources' CEO was also the Chairperson of the Bisha Mine Share Company. The motions judge equally noted that "[t]hrough its majority representation on the board of [the Bisha Company, Nevsun] is involved in all aspects of Bisha operations, including exploration, development, extraction, processing and reclamation."[165]

The direct-liability approach will enable Canadian courts to devise appropriate remedies for breach of the adopted norms of customary international law. As argued below, if the liability of parent corporations is based on existing torts, the remedies available under current tort regimes in Canada may not adequately assuage breaches of the adopted norms of customary international law. Existing tort remedies are inappropriate for breach of the adopted norms of customary international law given the heinous nature of conduct that violates the prohibitions against forced labour; slavery; crimes against humanity; and cruel, inhuman and degrading treatment. The Supreme Court of Canada alluded to this when it observed that:

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[164] See Nicholas Baker, "A Case for Parent-Entity Tort Liability for Wrongful Conduct at Subsidiary Operations" (30 September 2016), <https://www.siskinds.com/case-parent-entity-tort-liability-wrongful-conduct-subsidiary-operations/> [https://perma.cc/A5HU-2KLM].

[165] The Supreme Court of Canada summarized the chambers judge's findings at para 17 of *Nevsun*, *supra* note 24.

> Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" .... The objectives associated with preventing violations of *jus cogens* and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches.[166]

While remedies have yet to be devised for breach of the adopted norms of customary international law in Canada, legal remedies for breach of these norms can be predicated on several factors, including Canada's international obligations to ensure effective remedies for victims of violations of international human rights; the responsibility of states to protect against the violation of human rights by state actors and private persons and entities; the general principle that where there is a right, there must be a remedy for its violation; and the absence of any law or other procedural bar precluding the award of legal remedies for breach of the adopted norms of customary international law.[167] By providing legal remedies for breach of the adopted norms of customary international law, Canadian courts would be upholding Canada's international commitment to respect and promote human rights. Canadian courts would equally be enhancing the United Nations' *Guiding Principles on Business and Human Rights,* which recommend that,

> [a]s part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.[168]

B. Liability based on the Duty of Care

As an alternative to the direct-liability approach, a civil claim against parent corporations may be conceptualized along the lines of the duty of care currently existing under Canadian domestic law. At first blush, this may appear a daunting task, but there are judicial precedents that could guide the court in creating a duty of care for parent corporations. The duty of care is

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[166] *Nevsun, supra* note 24 at para 129.

[167] *Ibid* at para 122.

[168] *United Nations' Guiding Principles on Business and Human Rights*, *supra* note 15, Principle 25 at 27.

firmly established under Canadian common law with the three requisite elements of foreseeability, proximity, and policy considerations.[169] The criteria were first articulated by the House of Lords in *Anns v. Merton London Borough Council*,[170] but the Supreme Court of Canada has modified the criteria by adding policy consideration to the requirements of 'foreseeability' and 'proximity' in *Anns*. The Supreme Court of Canada has held that a duty of care can be imposed where the plaintiff establishes

> (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach; (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and (iii) that there exist no policy reasons to negative or otherwise restrict that duty.[171]

Canadian common law ought to evolve to extend the duty of care to parent corporations in regard to third parties whose rights are infringed by subsidiary corporations. Canadian parent corporations ought to owe a duty of care to third parties where the circumstances fit within the recognized criteria of foreseeability, proximity and absence of policy reasons negating the duty of care. There is judicial precedent for the imposition of a duty of care on Canadian parent corporations. The Ontario Superior Court of Justice held in *Choc v. Hudbay Minerals Inc.*[172] that, in appropriate cases, a parent corporation may owe a duty of care to third parties that are adversely affected by the operations of its subsidiary corporations in developing countries. More specifically, the court held that a parent corporation may owe a duty of care regarding the wrongful actions of its subsidiaries where it is established by evidence

> that the harm complained of is a reasonably foreseeable consequence of the alleged breach; that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and, that there exist no policy reasons to negative or otherwise restrict that duty.[173]

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[169] The duty of care under Canadian common law is based on the House of Lords' decision in A*nns v Merton Borough Council,* [1978] A.C. 728.Although the House of Lords has moved away from *Anns v Merton Borough Council* and reformulated the duty of care in subsequent cases, Canadian courts have retained the standards in *Anns v Merton Bourough Council.*

[170] *Anns v Merton London Borough Council,* [1978] A.C. 728.

[171] *Odhavji Estate v Woodhouse*, 2003 SCC 69, at para 52.

[172] *Choc*, *supra* note 40.

[173] *Ibid* at para 57, citing *Odhavji Estate v Woodhouse*, *supra* note 171.

Choc v. Hudbay Minerals was not decided on the merits, but its significance lies in the fact that it is the first case in Canada to open the door to the possibility of imposing a duty of care on parent corporations regarding the wrongful conduct of their subsidiaries in developing countries.[174]

1. Taking a Leaf from the United Kingdom

Canadian courts may want to look to the courts of the United Kingdom (UK) for guidance in designing a new duty of care for parent corporations. Both the England and Wales Court of Appeal (EWCA) and the UKSC have held that parent corporations owe a duty of care to employees of their subsidiary corporations, as well as third parties who are adversely impacted by the activities of subsidiary corporations, provided the circumstances fit within the established principles of foreseeability, proximity, and fairness or reasonableness of imposition of a duty of care.[175] In the United Kingdom, a duty of care is imposed on parent corporations where the facts and circumstances satisfy the general principles of tort law regarding imposition of a duty of care. As Sales LJ observed in *AAA v. Unilever Plc.*:[176]

> A parent company will only be found to be subject to a duty of care in relation to an activity of its subsidiary if ordinary, general principles of the law of tort regarding the imposition of a duty of care on the part of the parent in favour of a claimant are satisfied in the particular case.[177]

The House of Lords has long established a three-part test for determining whether a duty of care arises, as follows:

> ... in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.[178]

In essence, UK courts require claimants to prove the following: (i) foreseeability of harm or damage; (ii) proximity between the claimant and

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[174] See Nwapi, *supra* note 53.

[175] See *Chandler v Cape PLC*, [2012] EWCA Civ. 525; *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.

[176] *AAA v Unilever Plc*, [2018] EWCA Civ 1532 at para 36.

[177] *Ibid.*

[178] *Caparo Industries Plc v Dickman & Others* [1990] 2 A.C. 605 at 617-618.

the defendant; and (iii) fairness or reasonableness of the imposition of a duty of care on the defendant. Thus, in *Chandler v. Cape PLC*,[179] the EWCA held that in situations where the policy of a parent corporation "on subsidiaries was that there were certain matters in respect of which they were subject to parent company direction", the parent company owes a direct duty of care to the employees of its subsidiary company in relation to those matters.[180] The EWCA elaborated in *Chandler* thus:

> ... in appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.[181]

The parent-subsidiary relationship does not, in and of itself, create a duty of care. Rather, whether a parent corporation owes this duty of care depends on the degree to which the parent corporation exercises supervision and control over its subsidiaries. Where there is evidence that the parent corporation subjects its subsidiaries to its rules and policies, the duty of care can be imposed on the parent company, provided the requirements of foreseeability, proximity, and fairness are satisfied.

The UKSC has expressly affirmed such duty of care in the more recent case of *Vedanta Resources PLC and another v. Lungowe and others*.[182] In this case, the plaintiffs (who are Zambian citizens) alleged that a mine owned and operated by Vedanta Resources' subsidiary in Zambia caused the contamination of several waterways in their community, including the Kafue river, which is the primary source of clean water for drinking and other domestic purposes. They alleged that Vedanta Resources was negligent in supervising its subsidiary, thus adversely impacting their health, economic and social well-being. Ruling on a motion to strike the action based on the doctrine of *forum non conveniens*, the UKSC held that, in appropriate cases, a

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[179] *Chandler v Cape PLC*, [2012] EWCA Civ. 525.

[180] *Ibid* at paras 73, 78-79.

[181] *Ibid* at para 80.

[182] *Vedanta Resources PLC and another v Lungowe and others*, [2019] UKSC 20.

parent corporation owes a duty of care to third parties (such as host communities in developing countries) that are adversely impacted by the operations of its subsidiary corporation.[183] It held that a parent corporation's duty of care "depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary."[184] The UKSC articulated other instances where a parent corporation may owe a duty of care to third parties thus:

> Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken.[185]

In sum, in the UK, a duty of care could arise from the policy documents adopted by a parent corporation or, in the absence of such policy documents, a parent corporation's conduct in holding itself out as exercising a degree of supervision and control over its subsidiaries that is sufficient to support the duty of care.

Although the exercise of control or supervision by a parent corporation over its subsidiary is a significant plank of the parent corporation's duty of care, "[i]t would be wrong, however, to approach the issue of whether a duty of care is owed by reference to any generalised assumption or presumption" regarding control.[186] Thus, a parent corporation can bear the duty of care regardless of the exercise of control over its subsidiaries.[187] In effect, the absence of factual evidence that the parent corporation actually exercised such control over the subsidiary is not necessarily fatal to the duty of care. The duty of care would arise if the parent corporation "holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it

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[183] *Ibid* at para 52.

[184] *Ibid* at para 49.

[185] *Ibid* at para 53.

[186] *Okpabi and Others v Royal Dutch Shell Plc and another* [2021] UKSC 3 at para 150.

[187] *Ibid* at para 148.

does not in fact do so."[188] The UKSC reiterated this point in the more recent case of *Okpabi v. Royal Dutch Shell Plc*[189] when it stated:

> In considering that question, control is just a starting point. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent.[190]

The parent corporation's duty of care as articulated by the UKSC could potentially ensure proper supervision of the operations of subsidiary corporations operating in foreign developing countries.

2. Obstacles to Corporate Liability under existing Duty of Care Regimes

Although a duty of care could conceivably be imposed on parent corporations in Canada, the problem is that parent corporations could evade the duty of care through risk-mitigation strategies. They could avoid adopting policies regarding control or supervision of their subsidiaries, or avoid holding themselves out as exercising such control or supervision. The complex ownership structure of MNCs could enable parent corporations to evade the duty of care, particularly where the parent corporation is separated from the subsidiary by multiple layers of intermediary owners. Parent corporations sometimes establish subsidiary corporations based on a pyramidal scheme involving multiple intermediaries and holding corporations. In some instances, several layers of intermediaries are deliberately created between the parent corporation and its subsidiary corporations, thus obscuring the degree to which the parent corporation supervises and controls the subsidiaries. The United Nations Conference on Trade and Development has reported, for example, that some MNCs and their subsidiaries have as many as 7 hierarchical levels in their ownership structure consisting of numerous affiliates and intermediaries spread across the globe.[191] This is particularly so in the mining and oil-and-gas industries

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[188] *Vedanta Resources PLC and another v Lungowe and others*, *supra* note 182 at para 53.

[189] *Okpabi and Others*, *supra* note 186.

[190] *Ibid* at para 147.

[191] UNCTAD, *World Investment Report 2016 - Investor Nationality: Policy Challenges* (Geneva:

where the ownership of many companies is 'layered' and linked to offshore affiliates.[192] For example, Sierra Leone Hard Rock (SL) Limited, a mining company, operates "through three separate offshore holding companies (two registered in Guernsey and one in Bermuda) with a primary owner registered in Bermuda, owned in turn by three separate holding companies (two of which were registered in London and one in China)."[193]

In addition to risk-mitigation measures which could attenuate the parent corporation's duty of care, the extant common law tort regimes, including the duty of care, may not adequately capture and compensate violations of the adopted norms of customary international law because the prohibitions under the adopted customary international law norms are more profound than the common law duty of care and other torts. While the prohibitions under the adopted customary international law norms are absolute and permit of no derogation, the common law duty of care is relative to the circumstances, and it involves the element of foreseeability. Moreover, the harm or injury resulting from breach of the adopted customary international law norms are profound and more severe than the harm arising from tortious conduct. Thus, available remedies for breach of the duty of care may not assuage violations of the adopted customary international law norms. The Supreme Court of Canada may have had this in mind when it noted that:

> While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity. The profound harm resulting from their violation is sufficiently distinct in nature from those of existing torts that, as the workers say, "[i]n the same way that torture is something more than battery, slavery is more than an amalgam of unlawful confinement, assault and unjust enrichment". Accepting this premise, which seems to be difficult to refute conceptually, reliance on existing domestic torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm" ....[194]

United Nations, 2016) at xiii.

[192] "Equity in Extractives: Stewarding Africa's Natural Resources for All" (2013) at 60-61, online (pdf): Africa Progress Panel <https://static1.squarespace.com/static/5728c7b18259b5e0087689a6/t/57ab29519de4bb90f53f9fff/1470835029000/2013_African+Progress+Panel+APR_Equity_in_Extractives_25062013_ENG_HR.pdf> [https://perma.cc/SS53-8YE3].

[193] *Ibid* at 61.

[194] *Nevsun, supra* note 24 at para 126.

VI. Conclusion

The Supreme Court of Canada's decision in *Nevsun* is epoch-making in terms of the liability of Canadian parent corporations for the wrongful conduct of subsidiary corporations in developing countries. For far too long, Western countries have enabled the irresponsible behaviour of MNCs in developing countries by shielding these corporations from liability even in the face of egregious breaches of human rights. However, through its decision in *Nevsun*, the Supreme Court of Canada has taken a bold incremental step in the long quest for corporate accountability. *Nevsun* signifies that the day may not be far when parent corporations are held liable in Canada for violation of the norms of customary international law. *Nevsun* does the following. It: (i) incorporates the norms of customary international law into Canadian domestic law; (ii) creates a legal platform for imposing direct liability on corporate entities for breach of the adopted customary international law; and (iii) in the alternative, paves the way for the recognition of a new nominate tort regarding the liability of parent corporations for the wrongful actions of subsidiaries in developing countries. In this sense, the Supreme Court of Canada blazes a trail, which could serve as a template for corporate liability in other countries. More significantly, the Supreme Court of Canada has sent a strong and unequivocal message to investors that, henceforth, the mantra in the Canadian business arena should be 'investors beware'! Canadian investors, particularly parent corporations, should be cautious and alert to the dangers of inadequate or improper supervision of the operations of subsidiary corporations in developing countries.