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ARAYA V. NEVSUN RESOURCES: REMEDIES FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS COMMITTED BY CANADIAN MINING COMPANIES ABROAD

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Article abstract

In November 2017, the British Columbia Court of Appeal (BCCA) published its decision in the case *Araya v. Nevsun Resources*, dismissing the appeal filed by Nevsun, and allowing the lawsuit to move forward to the merits stage of the procedure. This decision was ground-breaking since the plaintiffs were suing Nevsun Resources, a Canadian mining company, for its alleged complicity in the use of forced labor, slavery, torture, inhuman or degrading treatment, and crimes against humanity at the Bisha Mine in Eritrea, a mine belonging to Nevsun. In its decision, the BCCA rejected the three main arguments put forward by Nevsun to get the case dismissed: (1) the *forum non conveniens* doctrine; (2) the *Act of State* doctrine and (3) the lack of private law cause of action against corporations for the violations of customary international law principles. In this context, this article offers an analysis of the most significant cases brought before Canadian Courts in regard to Canadian mining companies' corporate social responsibility. It also relies on two influential cases from the U.S. Supreme Court: *Kiobel v. Royal Dutch Petroleum* and *Jesner v. Arab Bank.* Finally, it looks at the common challenges faced by foreign victims when they seek to bring lawsuits against transnational corporations and it briefly suggests that common law courts should adopt a new duty of care to address businesses' corporate liability for violations of human rights.

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ARAYA V. NEVSUN RESOURCES: REMEDIES FOR VICTIMS OF HUMAN RIGHTS VIOLATIONS COMMITTED BY CANADIAN MINING COMPANIES ABROAD

Jolane T. Lauzon[*]

In November 2017, the British Columbia Court of Appeal (BCCA) published its decision in the case *Araya v. Nevsun Resources*, dismissing the appeal filed by Nevsun, and allowing the lawsuit to move forward to the merits stage of the procedure. This decision was ground-breaking since the plaintiffs were suing Nevsun Resources, a Canadian mining company, for its alleged complicity in the use of forced labor, slavery, torture, inhuman or degrading treatment, and crimes against humanity at the Bisha Mine in Eritrea, a mine belonging to Nevsun. In its decision, the BCCA rejected the three main arguments put forward by Nevsun to get the case dismissed: (1) the *forum non conveniens* doctrine; (2) the *Act of State* doctrine and (3) the lack of private law cause of action against corporations for the violations of customary international law principles. In this context, this article offers an analysis of the most significant cases brought before Canadian Courts in regard to Canadian mining companies' corporate social responsibility. It also relies on two influential cases from the U.S. Supreme Court: *Kiobel v. Royal Dutch Petroleum* and *Jesner v. Arab Bank.* Finally, it looks at the common challenges faced by foreign victims when they seek to bring lawsuits against transnational corporations and it briefly suggests that common law courts should adopt a new duty of care to address businesses' corporate liability for violations of human rights.

En novembre 2017, la Cour d'appel de la Colombie-Britannique (CACB) a rendu sa décision dans l'affaire *Araya c. Nevsun* dans laquelle elle a rejeté l'appel de Nevsun et a permis que l'affaire soit entendue sur le fond. Cette décision fut considérée révolutionnaire puisque les demandeurs poursuivent Nevsun Resources pour des violations du droit international coutumier, soit le recours au travail forcé, à l'esclavage, à la torture, à des traitements inhumains et dégradants et à des crimes contre l'humanité contre les employés de la mine Bisha, située en Érythrée, et qui appartient à Nevsun. Dans sa décision, la CACB a rejeté les trois arguments proposés par Nevsun dans sa motion en rejet, soit : (1) l'argument basé sur la doctrine *forum non conveniens*; (2) l'argument basé sur la doctrine de l'*Acte de gouvernement* et (3) l'argument voulant qu'une compagnie ne puisse être tenue responsable pour la violation de principes de droit international coutumier. Dans ce contexte, le présent article offre une analyse des plus importantes décisions canadiennes rendues concernant la responsabilité sociale des entreprises. Deux décisions influentes, rendues par la Cour suprême des États-Unis, soit *Kiobel c. Royal Dutch Petroleum* et *Jesner c. Arab Bank*, seront également étudiées. Finalement, cet article présente un résumé des principaux défis rencontrés par les victimes de compagnies multinationales dans leur recherche de justice et suggère que les cours de *common law* adoptent une nouvelle obligation de diligence pour assurer la responsabilité sociale des entreprises lorsqu'elles commettent des violations de droits humains.

En noviembre de 2017, la Corte de Apelación de la Columbia Británica (BCCA por sus siglas en inglés), emitió una sentencia sobre el caso *Araya vs. Nevsun Resources*, en la cual rechaza la apelación presentada por Nevsun y permite que el juicio continuara su curso y llegara a la etapa de fondo. Se trata de una decisión pionera y paradigmática, la cual deriva de una demanda en contra de Nevsun Resources, una compañía minera canadiense, por su supuesta complicidad en el uso de trabajo forzado, esclavitud, tortura, tratos crueles e inhumanos, así como crímenes de lesa humanidad en la mina Bisha la cual es propiedad de Nevsun y se encuentra localizada en Eritrea. La BCCA rechazó los tres principales argumentos a través de los cuales Nevsun pretendía que el caso fuese desestimado: (1) la doctrina de *forum non conveniens*; (2) la doctrina de los *Actos de Estado* y; (3) la falta de acción en derecho privado en contra de corporaciones por violaciones de principios que emanan del derecho internacional consuetudinario. En este contexto, el presente artículo lleva a cabo un análisis de los casos más relevantes de responsabilidad social empresarial de compañías

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mineras canadienses que han sido discutidos en las cortes de Canadá. De igual forma, el presente texto se basa en dos casos influyentes de la Suprema Corte de los Estados Unidos: *Kiobel vs. Royal Dutch Petroleum* así como *Jesner vs. Arab Bank*, y finalmente analiza los desafíos comunes a los que se enfrentan las víctimas de violaciones de derechos humanos cuando buscan demandar a empresas transnacionales y sugiere brevemente que los tribunales del *common law* deben adoptar la noción de obligación de diligencia debida (*duty of care*), a través del cual las empresas tienen una obligación legal de llevar a cabo un estándar de diligencia razonable al realizar cualquier acto que de manera previsible pueda violar derechos humanos, esto a fin de garantizar la responsabilidad empresarial por violaciones de los derechos humanos.

In November 2017, the decision *Araya v. Nevsun Resources*[1] from the British Columbia Court of Appeal (BCCA) made the legal world headlines: for the first time, victims of forced labor were suing a Canadian mining company for acts committed abroad. Even more surprising, the BCCA upheld the British Columbia Supreme Court's decision rejecting the multiple motions to dismiss filed by Nevsun Resources. The case was assured to move forward to the merits until, predictably, the defendant filed an application for leave to appeal to the Supreme Court of Canada in January 2018. On June 14, 2018, the Supreme Court granted the application for leave to appeal. The tentative hearing date was set in January 2019.

This case is the fifth case where foreign plaintiffs' claims against Canadian mining companies have survived the motion to dismiss stage of the proceedings before a Canadian court. In light of the numerous allegations of human rights violations perpetrated by extractive industries incorporated in Canada, this number is disappointing.[2] In this context, the *Nevsun* decision, with its novel and imaginative arguments, is seen as an opportunity for Canadian courts to engage on corporate social responsibility (CSR). It is also considered as an occasion for Canadian courts to answer novel legal questions, such as corporate liability for violations of customary international law (CIL) or the scope and applicability of the *Act of State* doctrine. Finally, if the plaintiffs were to be successful at the merits stage, it would be the first time that a Canadian corporation is found responsible for holding employees in forced labor outside Canada. Such a ruling would send a strong message to the extractive industries not only in Canada, but around the world. It would also bring hope to the victims of illegal practices perpetrated by Canadian mining companies scattered across Latin America and Africa.

With the BCCA's *Nevsun* decision as its focal point, this article will seek to demonstrate the challenges faced by victims of transnational corporations in their search for justice. It will first provide an overview of the violations committed by Canadian extractive companies abroad, as decried by the international community, international NGOs and the United Nations. This will lead to a summary of the facts as alleged by the plaintiffs and Human Right Watch (HRW) in the *Nevsun* case and to an overview of Canada's international obligations in regard to the elimination of forced labor and CSR.

Second, the two first successful cases (which regroup four distinct lawsuits) brought by foreign plaintiffs against Canadian mining companies will be summarized, as they opened the door to the *Nevsun* decision. Third, the three main arguments brought by Nevsun Resources to dismiss the plaintiffs' lawsuit will be analyzed. The BCCA's reasoning about the *forum non conveniens* motion, the *Act of State* doctrine and the corporate liability for CIL breaches will be explained. Fourth, this paper will explore the need to ensure liability for corporations' violations of human

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1 *Araya v Nevsun Resources Ltd*, 2017 BCCA 401 Newbury JA [*Nevsun*].

2 For an overview of allegations regarding human rights violations perpetrated by Canadian mining companies abroad (in Latin America): Justice and Corporate Accountability Project, *The Canada Brand: Violence and Canadian Mining Companies in Latin America*, 1 December 2017, online: Osgoode Hall Law School https://ssrn.com/abstract=2886584 [Justice and Corporate Accountability Project].

rights. In this context, it will look at the common challenges faced by foreign victims when they seek to bring lawsuits against transnational corporations. Since most of these lawsuits have been brought before American courts, the fourth section will provide an overview of the US Supreme Court decision in *Kiobel v. Royal Dutch Petroleum* and the very recent decision in *Jesner v. Arab Bank*. Finally, it will briefly suggest that common law courts should adopt a new duty of care to address businesses' corporate liability for violations of human rights, such as forced labor.

I. Canadian extractive companies abroad

A. Canadian extractive companies and human rights violations

In 2015, in the concluding observations of the 6th periodic report of Canada, the Human Rights Committee wrote it was "concerned about allegations of human rights abuses by Canadian companies operating abroad, in particular mining corporations, and about the inaccessibility to remedies by victims of such violations."[3] One year later, it was the turn of the Committee on the Elimination of Discrimination Against Women (CEDAW) to denounce the violations committed by Canadian companies abroad, and above all, the lack of resources for the victims to seek justice and reparations: "The Committee is concerned that victims of alleged actions by transnational corporations registered in Canada, whose activities negatively impact the rights of persons outside Canada, do not have adequate access to justice."[4] The same year, the Committee on Economic, Social and Culture Rights (CESR) stressed the need for Canadian corporations working abroad to recognize the paramountcy of Canada's human rights obligations as protected by the *International Covenant on Economic, Social and Cultural Rights*.[5] It further recommended that Canada "introduce effective mechanisms to investigate complaints filed against those corporations, and adopt the legislative measures necessary to facilitate access to justice before domestic courts by victims of the conduct of those corporations."[6]

For the past 20 years, Canada has become a preferred location for multinational corporations doing business in the field of mining exploration and extraction.[7] In fact, 75% of these companies worldwide have established their headquarters in Canada, with 60% of these corporations being publicly-traded on

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3 *Concluding observations on the sixth periodic report of Canada*, UNHRC, 114th Sess, UN Doc CCPR/C/CAN/CO/6 (2015) 1 at 2, online: Refworld <http://www.refworld.org/docid/5645a16f4.html>.

4 *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UNCERD, UN Doc CERD/C/CAN/CO/21-23 (2017) 1 at 6, online: OHCHR docstore <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhstz6Kqb8xvweVxiwIinyzEnrSQTaImuyoLPtH1p%2B%2FBoA9aSpHnHOaSTR3D%2BGaG21xFo2B95JnqHNgalSwJoOiSGBGOUk6xxJIGD9T1UIJq2pb%2BLbXWwAtxJ%2FiP6NJCzvYQ%3D%3D>.

5 *International Covenant on Economic Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [*ICESCR*].

6 *Concluding observations on the sixth periodic report of Canada*, UNCESCR, 57th Sess, UN Doc E/C.12/CAN/CO/6 (2016) 1 at 4.

7 Pierre Beaucage, "D'autres Plans Sud : Les compagnies minières canadiennes au Mexique et la résistance populaire" (2015) 39:1 Possibles 40 at 40.

the Toronto Stock Exchange.[8] The explosion of global opportunities in extractive industries during this period has led these corporations to invest massively in Latin America and Africa,[9] where the resources are abundant and the legislation favourable to corporations. For example, already in 2005, "Canadian mining companies owned over 1300 mineral properties in Latin America […], which accounted for over 37 percent of the total exploration budget in this region."[10]

With the massive profits this industry creates, Canada is slow in recognizing that these corporations are also violating human rights. Fortunately, these criticisms are getting harder to silence, as victims are seeking justice,[11] civil society is documenting abuses, foreign countries are denouncing Canada's leniency[12] and the UN is adding its voice to these concerns.

In 2015, the Osgoode Hall Law School (York University) published an enlightening report documenting violent incidents associated with Canadian mining companies in Latin America from 2000 to 2015. Its findings are alarming, as it reported incidents implicating 28 different Canadian companies involved in: 44 deaths, 30 of which were classified as "targeted"; 403 injuries, 363 of which occurred in during protests and confrontations; 709 cases of "criminalization", including legal complaints, arrests, detentions and charges; and a widespread geographical distribution of documented violence: deaths occurred in 11 countries, injuries were suffered in 13 countries, and criminalization occurred in 12 countries.[13]

The report added that only a small fraction of these incidents had been reported by the companies involved and that when they were reported, blanket terms were often used to undermine their importance,[14] Furthermore, the authors believed that these numbers represented only "the tip of the iceberg".[15] Although this report only focused on Latin America, other similar incidents are taking place in African mines,[16] where the same companies may be involved and where the regulatory frames are not more stringent than the ones in place in Latin America.

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8 *Ibid*.

9 *Ibid*; Agrès Gruda & Isabelle Hachey, "Mines canadiennes à l'étranger : or, sang et feuille d'érable" *La Presse*, (20 October 2012); Bonnie Campbell, ed, *Mining in Africa: Regulation and Development* (Ottawa: Centre de recherches sur le développement international, 2009).

10 Julia Sagebien et al, "The corporate social responsibility of Canadian mining companies in Latin America: A systems perspective" (2008) 14:3 Can Foreign Pol'Y J 103; Moreover, "The region (Latin America) is the single most important destination for Canadian mining capital, surpassing by a wide margin Africa, the industry's second choice." In Karyn Keenan, "Canadian Mining: Still Unaccountable" (2010) 43:3 NACLA Report on the Americas 29 at 30.

11 The next section will offer a survey of the cases brought before the Canadian Courts.

12 For instance, Norway has removed its investments in the Canadian company Barrick Gold, following an investigation conducted in Papua New Guinea revealing troubling environmental risks. See Thierry Santime, "Le 'paradis minier canadien'" (15 June 2017), online: Caium <https://medium.com/caium/le-paradis-minier-canadien-10633b3bb378>.

13 Justice and Corporate Accountability Project, *supra* note 2 at 6.

14 *Ibid*.

15 *Ibid* at 5.

16 Luca Brown, "What's Yours is Mined: Confronting the Abuses of the Canadian Mining Industry" *McGill Left Review* (12 November 2017), online: McGill left review <http://mcgillleftreview.com/article/whats-yours-mined-confronting-abuses-canadian-mining-industry>.

B. The Bisha mine in Eritrea

In 2013, Human Rights Watch (HRW) revealed to the world the involvement of the Canadian company Nevsun in human rights violations perpetrated at the Bisha mine in Eritrea.[17] Nevsun, a publicly-held British Columbia corporation, engaged in a commercial-venture with the government of Eritrea to build and exploit a mine of copper, gold and zinc. This venture, which allocated 60% of the shares to Nevsun and 40% to Eritrea, was the first operating modern mine in the country. Its construction started in 2008 and the mine began its operations in 2011.[18]

It is no coincidence that Nevsun was the first extractive company to invest in Eritrea. It is one of the poorest country in the world "and ranks 177th out of 187 countries in the 2011 Human Development Index."[19] According to the Commission of Inquiry on Human Rights in Eritrea (COI), created through a U.N. Human Rights Council Resolution in 2014,[20] there are "reasonable grounds to believe that crimes against humanity, namely enslavement, imprisonment, enforced disappearance, torture, other inhumane acts, persecution, rape and murder, have been committed in Eritrea since 1991."[21] HRW, for its part, qualified Eritrea of "pariah state."[22] Another troubling characteristic of Eritrea is its indefinite military conscription program, which it justifies by the ongoing threat represented by its neighbour, Ethiopia. According to the COI:

> What distinguishes the military/national service programme in Eritrea from those in other States is (a) its open-ended and arbitrary duration, which routinely exceeds the 18 months provided for in a decree issued in 1995, frequently by more than a decade; (b) the use of conscripts as forced labour in a wide range of economic activities, including private enterprises; and (c) the rape and torture perpetrated in military camps, and other conditions that are often inhumane.[23]

In this context, one might wonder what has convinced Nevsun to invest in an unstable and dictatorial country like Eritrea. Of course, the natural resources were important and untouched, but the risks of losing the control of the project or to be forced to impose unacceptable work conditions seemed extremely high.

According to HRW and to the lawsuit filed in British Columbia by three former employees of the Bisha mine, Nevsun ought to know about the human rights violations perpetrated at the mine. In the *Notice of Civil Claim* (*NOCC*) filed in November 2014, "the plaintiffs allege that Nevsun was complicit in the use of forced labor, slavery, torture, inhuman or degrading treatment, and crimes against humanity at

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17 Human Rights Watch, *Hear No Evil: Forced Labor and Corporate Responsibility in Eritrea's Mining Sector*, 15 January 2013, online: Refworld <https://www.refworld.org/docid/50f950a22.html>.

18 *Ibid* at 1.

19 *Ibid*.

20 *Situation of human rights in Eritrea*, HRC Res 26/24, UNHRC, 26th Sess, Supp No 4, UN Doc A/HRC/26/L.6, (2014) 1.

21 *Report of the Commission of Inquiry on Human Rights in Eritrea*, UNHRC, 32nd Sess, Supp No 4, UN Doc A/HRC/32/47 (2016) at 1.

22 Human Rights Watch, *supra* note 17 at 1.

23 *Report of the Commission of Inquiry*, *supra* note 21 at 7.

the mine."[24] In regard to forced labor, both HRW and the plaintiffs affirm that a local company called Segen Construction was engaged as a contractor at the mine and that "there is evidence that it regularly exploit[ed] conscript workers assigned to it by the Eritrean government."[25] The three plaintiffs affirm that they were hired, or more accurately, forced to work for Segen as military conscripts. HRW believes that Nevsun knew about this practice and turned a blind eye since it was allegedly forced by the Eritrean Government to accept Segen as a subcontractor. The plaintiffs, in turn, are trying to establish that Nevsun was complicit in the perpetration of these human rights violations.[26] This represents a difficult burden of proof for the victims who have, so far, succeeded in defying the three actions filed by Nevsun to dismiss the case on diverse grounds. This will be discussed in more details in the third section of this paper.

C. Canada's international obligations in matters of forced labor and corporate responsibility

Canada has accepted to be bound by many international instruments in matters of forced labor and human trafficking.[27] First and foremost, it is a member of the International Labor Organization (ILO), which means that it has recognized the fundamental rights protected by the *Declaration on Fundamental Principles and Rights*

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24 *Nevsun BCCA, supra* note 1 at para 6.

25 Human Rights Watch, *supra* note 17 at 2.

26 *Nevsun BCCA*, *supra* note 1 at paras 6-7: These are the plaintiffs' arguments: (a) Nevsun aided and abetted the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha mine; and/or (b) Nevsun ordered, solicited, or induced the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha mine; and/or (c) Nevsun, expressly or implicitly, approved of the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha mine; and/or (d) Nevsun acquiesced in the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha Mine; and/or (e) Nevsun failed to prevent or stop the use of forced labour, slavery, torture, cruel, inhuman or degrading treatment, and crimes against humanity at the Bisha mine; and/or (f) Nevsun knowingly and intentionally contributed to the commission of these acts by a group of persons acting with a common purpose in the development of the Bisha mine; and/or (g) Nevsun had effective authority and control over Segen and other subordinates at the Bisha mine and failed to properly exercise control over its subordinates at the Bisha mine, and further: (i) Nevsun either knew or consciously disregarded information which indicated that its subordinates at the Bisha mine were committing or about to commit acts in violation of the foregoing principles of customary international law and *jus cogens*; (ii) these acts were within the effective responsibility and control of Nevsun; and (iii) Nevsun failed to take all necessary and reasonable measures within its power to prevent or repress their commission.

27 According to the ILO *Forced Labour Convention of 1930 (no. 29)*, forced labour is "all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily". Moreover, the ILO adds that "Forced labour refers to situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. Forced labour, contemporary forms of slavery, debt bondage and human trafficking are closely related terms though not identical in a legal sense. Most situations of slavery or human trafficking are however covered by ILO's definition of forced labour." International Labour Organization, *The Meanings of Forced Labour*, 10 March 2014, online: ILO <https://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang--en/index.htm>.

at Work, such as the abolition of forced labor.[28] Canada has also ratified two major conventions on forced labor: the 1930 ILO *Forced Labor Convention*[29] and the 1957 ILO *Abolition of Forced Labor Convention*.[30] Since 2014, it should also follow the *Recommendation on Supplementary Measures for the Effective Suppression of Forced Labour*,[31] which aims to supplement the 1929 *Convention.*[32] This document protects the right to remedies for victims of forced labor, through access to justice, such as administrative, civil and criminal processes,[33] something that the two initial conventions did not protect as clearly. Additionally, Canada has ratified the 1926 *Slavery Convention*,[34] created under the auspices of the League of Nations, and the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*,[35] which was adopted to complement the 1926 *Convention* in order to "intensify national as well as international efforts towards the abolition of slavery, the slave trade and institutions and practices similar to slavery."[36] Finally, Canada has ratified general documents, such as the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, which both prohibits slavery and forced labor.[37]

Of a more precise scope, Canada has ratified the UN *Convention Against Transnational Organized Crime*[38] and its *Protocol to Prevent, Suppress and Punish*

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28 Gilles Trudeau, "Droit international et droit du travail québécois, deux grandes solitudes" in ed, *Développements récents en droit du travail* (Cowansville: Yvon Blais Editions Inc., 2001) at 145.

29 *Convention concerning Forced or Compulsory Labour*, 28 June 1930, ILO C029 (entered into force 1 March 1932).

30 *Abolition of Forced Labour Convention*, 25 June 1957, ILO C105 (entered into force 17 January 1959).

31 International Labour Organization, *Recommendation on supplementary measures for the effective suppression of forced labour*, 103rd Sess, Supp No 203, (2014).

32 *Convention relative to the Treatment of Prisoners of War*, 27 July 1929, online: ICRC <https://www.legal-tools.org/doc/1d2cfc/pdf/>.

33 International Labour Organization, *supplementary measures*, *supra* note 31: Members should take measures to ensure that all victims of forced or compulsory labour have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages, including by: (a) ensuring, in accordance with national laws, regulations and practice, that all victims, either by themselves or through representatives, have effective access to courts, tribunals and other resolution mechanisms, to pursue remedies, such as compensation and damages; (b) providing that victims can pursue compensation and damages from perpetrators, including unpaid wages and statutory contributions for social security benefits; (c) ensuring access to appropriate existing compensation schemes; (d) providing information and advice regarding victims' legal rights and the services available, in a language that they can understand, as well as access to legal assistance, preferably free of charge; and (e) providing that all victims of forced or compulsory labour that occurred in the member State, both nationals and non-nationals, can pursue appropriate administrative, civil and criminal remedies in that State, irrespective of their presence or legal status in the State, under simplified procedural requirements, when appropriate.

34 *Slavery Convention*, 25 September 1926, 212 UNTS 17 (entered into force 7 July 1955) [*1926 Convention*].

35 *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, 266 UNTS 3 (entered into force 30 April 1957).

36 *Ibid*.

37 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 8 (entered into force 23 March 1976) [*ICCPR*]; *International Covenant on Economic, Social and Cultural Rights*, *supra* note 5, at arts 6-7.

38 *United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209 (entered into force 29 September 2003) [*Palermo Convention*].

Trafficking in Persons Especially Women and Children.[39] This protocol defines human trafficking as:

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, *forced labour or services, slavery or practices similar to slavery*, servitude or the removal of organs.[40] [our emphasis]

This protocol, which places the victims at the center of the human rights response,[41] requires the state to criminalize human trafficking[42] and to provide assistance and protection to the victims.[43] Finally, this protocol is supplemented by the non-binding *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, developed by the Office of the High Commissioner for Human Rights (OHCHR). These principles cover a wide range of issues and insist on criminalization, punishment and redress and recommend, for instance, that states "ensure that trafficked persons are given access to effective and appropriate legal remedies."[44]

If international instruments condemning forced labor are numerous, the same cannot be said about corporate responsibility as there is still to this date no international convention on the matter. The only comprehensive framework developed so far is the *Guiding Principles on Business and Human Rights* (Guiding Principles),[45] as developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie. These principles, which are non-binding, have been endorsed by the UN Human Rights Council. This framework is based on three pillars: (1) "the state duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulations and adjudications"[46]; (2) the corporate responsibility to respect human rights, enterprises acting with due diligence; (3) the need for states to

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39 *Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) [*Palermo Protocol*].

40 *Ibid* at art 3a).

41 Anne T. Gallagher, "The Right to an Effective Remedy for Victims of Trafficking in Persons: A Survey of International Law and Policy: Paper Submitted for the Expert Consultation Convened by the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, Ms. Joy Ngozi Ezeilo on: 'The right to an effective remedy trafficked persons'" (23 November 2010), online: Peace Palace Library <https://www.peacepalacelibrary.nl/ebooks/files/357113616.pdf>.

42 *Palermo Protocol*, *supra* note 39 at art 5.

43 *Ibid* at art 6.

44 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Un Doc E/2002/68/Add.1, 2002 at 2. See recommendation 17, which is also complemented by the Basic principles on the right to an effective remedy for victims of trafficking in persons, as developed by the Special Rapporteur on trafficking in persons and the OHCHR in 2014.

45 OHCHR, *Guiding Principles on Business and Human* Rights, Un Doc HR/PUB/11/04, 2011.

46 *Ibid* at para 6.

provide greater access to effective remedies to victims.[47] These principles seek to ensure the transnational businesses' compliance with international human rights standards through due diligence and accurate analysis of the risks involved in their activities.[48] As stated by the first and third pillar, states also have an important role to play, through the exercise of an adequate oversight over businesses and through the creation of effective mechanisms to address business-related human rights abuses and the need for remedies (judicial, administrative and legislative) for victims.[49]

In Canada, the application of these Guiding Principles represents a real challenge for the government, which has in the past showed little to no willingness to address the violations perpetrated by mining companies abroad. For instance, a private member's bill (*Bill C-300*) was introduced in 2009 at the House of Commons. The aim of the bill was to "create accountability mechanisms for government, political and financial support to extractive companies whose overseas operations are associated with conflict, environmental degradation or human rights abuses."[50] The *Bill* was defeated by a narrow margin.

For the time being, two mechanisms coexist to promote mining companies' respect of human rights in Canada, which is referred to as "corporate social responsibility" (CSR).[51] As the Government of Canada explains,

> a variety of terms are used when talking about companies and their responsibility to society, such as corporate social responsibility, responsible business conduct, business and human rights, sustainability, and more. A number of these terms are used interchangeably such as corporate social responsibility and responsible business conduct.[52]

The Government of Canada has adopted the expression CSR, which it describes as "the voluntary activities undertaken by a company, over and above legal requirements, to operate in an economically, socially and environmentally sustainable manner."[53] Furthermore, the Government also recognizes that the *Guiding Principles on Business and Human Rights* are a useful tool to evaluate a company's efforts in regard to CSR.[54]

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47 *Ibid*.

48 *Ibid,* see, among others, principles 11, 12, 13, 17, 18.

49 *Ibid,* see, among others, principles 5, 7, 25, 26.

50 Karyn Keenan, "Commentary: Desperately seeking sanction: Canadian extractive companies and their public partners" (2013) 34:1 Can J of Dev Stud 111.

51 "CSR aims to ensure that companies conduct their business in a way that is ethical. This means taking account of their social, economic and environmental impact, and consideration of human rights. It can involve a range of activities such as: Working in partnership with local communities; Socially responsible investment (SRI); Developing relationships with employees and customers and Environmental protection and sustainability." See: The University of Edinburgh, "What is Social Corporate Responsibility" (3 July 2017), online: University of Edinburgh <https://www.ed.ac.uk/careers/your-future/options/occupations/csr/what-is-csr>.

52 Global Affairs Canada, "Responsible Business Conduct Abroad" (26 November 2018), online: Government of Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng&_ga=2.154968507.2008610196.1525191961-56319408.1524962053>.

53 *Ibid*.

54 *Ibid*.

The first mechanism which exists to promote CSR is the Office of the Extractive Sector Corporate Social Responsibility Counsellor, which was created in 2009. It advises and reviews extractive companies "on the implementation of CSR performance standards and guidelines."[55] It is composed of three employees appointed by the Government of Canada and it reports directly to the Minister of International Trade.[56] Second, Canada has established a seven-member Committee chaired by Global Affairs Canada to become the National Contact Point (NCP) for the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises. The mandate of the NCP is to promote awareness of the *Guidelines* developed by the OECD, "as they relate to the social, economic and environmental impacts of enterprises' activities on the societies in which they work."[57]

In January 2018, however, the federal government announced the creation of a new office, the Canadian Ombudsman for Responsible Enterprises (CORE) to replace the Office of the Extractive CSR Counsellor, which was seen by many as a "toothless"[58] position. The CORE will be able to investigate Canadian companies in regard to allegations of human rights abuses committed abroad. The Ombudsman will be independent and will have the power to launch his/her own investigation and all his/her findings will be reported publicly.[59] As the CORE has not yet been established, we will have to wait to see how effective and proactive it is.

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55 Global Affairs Canada, "Office of the Extractive Sector Corporate Social Responsibility (CSR) Counsellor" (26 June 2018), online: Government of Canada <http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx?lang=eng>.

56 Global Affairs Canada, "CSR Counsellor: About Us" (24 April 2018), online: Government of Canada <http://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?lang=eng>.

57 Global Affairs Canada, "Canada's National Contact Point for the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises" (4 October 2018), online: Government of Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/index.aspx?lang=eng>.

58 Justin Ling, "Corporate Social Responsibility and Canadian Extractive Industries Abroad" (10 December 2010), online: SCRIBD <https://fr.scribd.com/document/50419357/Corporate-Social-Responsibility-and-Canadian-Extractive-Industries-Abroad>; see at 5: "According to MiningWatch, a Canadian NGO that investigates alleged abuses and lobbies the government, listed their perceived shortcomings of the new office. The CSR Counsellor may not create new performance guidelines. The CSR Counsellor may only "review" the activities of extractive companies with the explicit consent of the company in question. The CSR Counsellor has no ability to recommend any form of sanction for companies found to be out of compliance with the voluntary guidelines. The CSR Counsellor does not represent a mechanism by which Canadians can hold the Canadian government to account by conditioning government taxpayer funded political and financial support for extractive companies on their compliance with best environmental practices and with international human rights standards. The CSR Counsellor has been given the mandate to investigate complaints brought against NGOs by industry."; see also Marco Chown Oved, "Ottawa Creates Office to Investigate Human Rights Abuses Linked to Canadian Companies Abroad" *The Star* (17 January 2018), online: The Star <www.thestar.com/news/canada/2018/01/17/ottawa-creates-office-to-investigate-human-rights-abuses-linked-to-canadian-companies-abroad.html>.

59 *Ibid*.

II. Foreign victims suing canadian companies in Canada: The first two successful cases

As has been explained previously, Canada is struggling with serious allegations targeting extractive companies incorporated on its soil. The international community and the United Nations are decrying Canada's inaction while victims are fighting to seek justice. However, since many of these violations have taken place in countries where the justice system might not be trustworthy, the victims are facing a major problem: where can they bring their claims? In the past few years, victims have decided to push their cases forwards before Canadian courts, instead of facing their home country's weak rule of law and failed judicial system. This is the case of the three victims from the Bisha Mine, who have filed their *NOCC* before the British Columbia Supreme Court in 2014, rather than before an Eritrean Court. Before them, victims from Guatemala had done the same in two different cases (regrouping four lawsuits), which have brought a new hope for corporate social responsibility advocates in Canada and abroad.

A. Tahoe resources

In June 2014, seven Guatemalan individuals filed a lawsuit against Tahoe Resources, a Canadian extractive company, owner of the Escobal mine in San Rafael de Las Flores in Guatemala. The plaintiffs, villagers living very close to the mine, allege that they were peacefully protesting against the mine because of concerns about its harmful impact on the environment and the lack of consultation with the community, when the security personnel of the mine opened fire on them, to eliminate the resistance movement. The order would have been given by the Guatemala Security Manager of Tahoe Resources. This man has been charged by the Guatemalan authorities after the violent events, but Tahoe Resources has not suffered the consequences of its employee's acts.[60]

In this context, the plaintiffs decided to sue Tahoe Resources in Canada to obtain damages for their injuries. They argue that the company was negligent and had authorized the behaviour of its Security Manager. In November 2015, the British Columbia Supreme Court stayed the case, agreeing with Tahoe's argument that Canada did not represent the right forum for the plaintiffs' claim (*forum non conveniens* doctrine).[61] According to the BCSC, "having considered the case law, the evidence, including the expert evidence, and the submissions, I conclude the comparative convenience and expense for the parties and their witnesses favours Guatemala as the appropriate forum."[62] Fortunately, the plaintiffs appealed the first instance decision to the BCCA, where it was overturned in January 2017. According to the BCCA, the first judge

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60 *Garcia v Tahoe Resources Inc*, 2015 BCSC 2045 at paras 1-26, Gerow JA [*Garcia*].

61 *Ibid* at para 34; According to the Court, the defendant [Tahoe] had to establish that an alternate forum is clearly more appropriate and should be preferred.

62 *Ibid* at para 73.

> plac[ed] insufficient weight on the risk that the appellants will not receive a fair trial in Guatemala […] [as they might] encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala aligns with the political interests of the Guatemalan state.[63]

Finally, the Supreme Court of Canada refused to hear the appeal of Tahoe Resources. The case is thus back before the BCSC for the proceedings on the merits.

B. *Choc, Caal and Chub v Hudbay Minerals*

The second case of interest reunites three different lawsuits filed against the same Canadian mining company: Hudbay Minerals. In each of their lawsuits, the victims allege that the company is responsible for the killing of a community leader,[64] for shooting a young man who became paralyzed[65] and for gang-raping eleven women during the forceful expulsion from their house.[66] All the victims are members of the indigenous Mayan Q'eqchi' population from El Estor in Guatemala and affirm that the alleged incidents took place between 2007 and 2009 on their ancestral lands, by Hudbay Minerals' Fenix mine.[67] They further add that all these acts were committed by the security personnel working at the Fenix mine, hired by Hudbay's subsidiaries in Guatemala. The defendant, Hudbay Minerals, filed a motion to strike all three civil claims, mainly arguing that there was no reasonable cause of action in any of them[68] since there was no duty of care owed to impose an absolute supervisory liability on parent and grandparent companies. Hudbay further argued that the plaintiffs were attempting to pierce the corporate veil.

The Superior Court of Ontario (ONSC) first found that the plaintiffs' arguments in regard to the corporate veil were not patently ridiculous and that some exceptions accepted by the jurisprudence could eventually lead to lifting Hudbay's corporate veil.[69] The plaintiffs then argued that Hudbay was negligent in failing to prevent the harm committed by the security personnel of the Fenix mine. They admitted that there was no established duty of care for such a tort and that they would have to establish a novel one. Following the test established in the seminal British case *Anns v. Merton* and subsequently adopted by the Supreme Court of Canada in *Kamloops v. Nielson*,[70] the plaintiffs were able to convince the Court that their claims could support a reasonable cause of action in negligence.[71] The three cases were thus allowed to move forward by the ONSC.

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63 *Garcia v Tahoe Resources Inc*, 2017 BCCA 39, at para 130, Groberman J [*Garcia BBCA*].

64 *Choc v Hudbay Minerals Inc*, 2013 ONSC 1414 116 OR (3d) 647 Brown J [*Choc*]**;** Angelica Choc, individually and as personal representative of the estate of Adolfo Ich Chamàn, deceased, Plaintiffs.

65 *Ibid*; German Chub Choc, Plaintiff.

66 *Ibid*; Margarita Caal Caal, Rosa Elbira Coc Ich, Olivia Asig Xol, Amalia Cac Tiul, Lucia Caal Chun, Luisa Caal Chun, Carmelina Caal Ical, Irma Yolanda Choc Cac, Elvira Choc Chub, Elena Choc Quib and Irma Yolanda Choc Quib.

67 *Ibid* at paras 11, 13.

68 *Ibid* at para 14.

69 *Ibid* at paras 48-49.

70 *Ibid* at para 56.

71 *Ibid* at para 75.

No decisions on the merits have been rendered against either Tahoe Resources or Hudbay Minerals yet. However, these are the first cases brought against mining companies by foreign plaintiffs to proceed to the merits stage. If it is too early to celebrate, it cannot be denied that these cases represent a step in the right direction in the battle against corporate impunity, as they may result in victims finally having access to a reliable forum to seek legal remedies.

III. The Nevsun case

While Tahoe Resources argued the *forum non conveniens* doctrine in its motion to strike and Hudbay Minerals mostly focused on the absence of a duty of care, Nevsun Resources raised three arguments to get the case stayed and/or dismissed by the BCCA.

First, it argued that British Columbia represented the wrong forum because the locus of the asserted wrongs was Eritrea. Second, it contended that ruling on Nevsun's alleged wrongs would amount to judging Eritrea's conduct, which it says is prohibited by the *Act of State* doctrine. Finally, it claimed that CIL principles could not create a private law cause of action against corporations under Canadian law. According to Nevsun, CIL simply does not apply to corporations. Both the BCSC and the BCCA concluded that Nevsun had failed to prove that the plaintiffs' claims were bound to fail and chose a cautious approach in letting the case move forward. This review will analyze the reasoning of the BCCA for every motion filed by Nevsun.

A. *Forum non conveniens*

In debating the motion on the *forum non conveniens* doctrine, the Court reminded that "the onus was on Nevsun to establish that it would be fairer and more efficient to depart from"[72] a trial in British Columbia, where Nevsun is incorporated and which also represents the choice of the plaintiffs as the most appropriate forum. The Court then recognized that in the present case, it had to balance "the expense, inconvenience and practical difficulties of mounting a trial in British Columbia" with the "prospects of no trial at all, or a trial in an Eritrean court"[73] subject to the Eritrean military control. Referring to a very recent decision from the United Kingdom Supreme Court (UKSC) where it had to rule on the complicity of some UK officials in various torts (such as torture) committed by foreign states overseas,[74] the BCCA agreed that "the cost, inconvenience and expense that would be involved 'must be looked at in the light of the grave allegations that [the plaintiffs'] claims comprehend'".[75] The Court concluded that the British Columbia courts definitely represented a more appropriate forum than any court in Eritrea.

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72 *Nevsun BCCA*, *supra* note 1 at para 119.
73 *Ibid* at para 118.
74 *Belhaj and another v Straw and others*, 2017 UKSC 3 (UK) at para 1, Neuberger [*Belhaj*].
75 *Ibid* at para 159; Nevsun BCCA, supra note 1 at para 119.

B. *Act of State* doctrine

In its second motion, Nevsun argued that the Court should apply the *Act of State* doctrine to dismiss the suit brought by the former mine workers. This represented a novel argument, as no Canadian court had ever applied it in a decision.[76] In this context, the Court of Appeal decided to rely mostly on British cases, as "the principle, or doctrine, of act of state has been evolving in England over many decades from a series of diverse judicial decisions concerned with the justiciability of the acts of sovereign nations."[77]

Before defining the scope of the doctrine, the Court first had to determine the nature of the doctrine: was it a rule of subject-matter competence as argued by Nevsun[78] or was it a "doctrine of judicial prudence or deference"[79] as sustained by the plaintiffs? The Court, adopting a prudent approach, recognized that when a party raises the *Act of State* doctrine, courts should determine whether it applies, "as opposed to whether it might possibly apply."[80] The Court further added that a determination on the application of the doctrine was necessary to avoid the absurdity of a tribunal ruling on the merits only to realize later that the *Act of State* doctrine removed its competence to adjudicate the claim altogether. The Court, however, avoided "determining whether the doctrine as now understood is truly jurisdictional […] or something less hard-edged."[81]

To define the scope of the *Act of State* doctrine, the Court then had to refer to the jurisprudence of the English courts. It first had to distinguish between the act of state – defined as a subject matter immunity – and the ratione materiae immunity. In Pinochet (no. 3), the Appellate Committee of the House of Lords had differentiated the two concepts by explaining that the

> state immunity is a creature of international law and operates as a plea in bar to the jurisdiction of the national court, whereas the act of state doctrine is a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts of a foreign state.[82]

The recent *Belhaj v. Straw*[83] case also provided insightful information about the application of the *Act of State* doctrine. According to the United Kingdom Supreme Court, this doctrine prevents a national court from exercising its jurisdiction when it would amount to adjudicating upon the lawfulness of a foreign state's act, even if the foreign state or its officials are not the direct defendants of the case.[84] Still in *Belhaj*, it was added that even when the *Act of State* doctrine is applicable, this immunity would not apply when the State was involved in torture, since this is a behaviour prohibited

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76 *Ibid* at para 123.
77 *Ibid* at para 130.
78 *Ibid* at para 124.
79 *Ibid* at para 128.
80 *Ibid* at para 129.
81 *Ibid*.
82 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 3)*, 2000 All ER 97 at para 269, 1 AC 147 Wilkinson [*Bow*]; *Nevsun*, supra note 1 at para 134.
83 *Belhaj*, *supra* note 83 at para 118.
84 *Ibid*; *Nevsun*, *supra* note 1 at para 143.

by international law.[85] This was titled the "Public Policy Exception" by the UKSC.

After determining the scope of the doctrine, the Court analyzed the many arguments raised by Nevsun and concluded that it was not applicable for multiple reasons. First, the BCCA found that the plaintiffs' claim did not seek to challenge the validity of Eritrea's conscription program, but to obtain a compensation for the harm suffered while they were working forcefully at the Bisha mine.[86] The Court added that to obtain that compensation, the victims would not have to analyze the lawfulness of Eritrea's behaviour. Rather, they would have to show that these acts were in contravention of international law and that Nevsun was complicit in their perpetration.[87]

Furthermore, the Court determined that even if the *Act of State* doctrine could apply to the present case, the Public Policy Exception would prevent it from being successfully applied. Indeed, the "nature of the grave wrongs asserted is such that they could not be justified by legislation or official policy."[88] According to the BCCA, acts involving torture, forced labor and slavery prevent a state from requesting the immunity given by the *Act of State* doctrine since they are all "contrary to both peremptory norms of international law and a fundamental value of domestic law."[89]

Finally, the BCCA added to its analysis that the Kirkpatrick exception would equally be applicable in the present case. This exception, established by the Supreme Court of the United States (USSC)[90], refers to the fact that the *Act of State* doctrine "only arise[s] when a court must decide – that is, when the outcome of the case turns upon – the effect of official action by a foreign sovereign. When that question is not the case, neither is the act of state doctrine."[91] Since in their claims against Nevsun the plaintiffs only stated that Nevsun aided and abetted, or condoned or was complicit with Eritrea in keeping them in forced labor, the Court would not have to rule on the acts of Eritrea *per se.*[92] As the Court writes, "the issue in this litigation is not whether [the alleged acts] are valid, but whether they occurred."[93] The Court thus rejected Nevsun's motion based on the *Act of State* doctrine.

C. Customary International Law and Canada

When came the time to analyze the plaintiffs' claims for damages for breaches of CIL such as torture and forced labor, the Court admitted it was a difficult and novel question it would only be able to address in a superficial manner, inviting the Supreme Court to provide some guidance on the matter. Nevsun argued that these claims went

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85 *Ibid* at para 266; *Nevsun*, *supra* note 1 at para 153.
86 *Nevsun BCCA*, *supra* note 1 at para 166.
87 *Ibid* at para 167.
88 *Ibid* at para 169.
89 *Ibid*; *Belhaj*, *supra* note 83 at para 266.
90 *Kirkpatrick & Co v Environmental Tectonics Corporation*, 1990 493 US SC 400 Scalia J [*Kirkpatrick*].
91 *Ibid* at para 151.
92 *Ibid* at para 172.
93 *Ibid*.

"beyond anything that has ever been seen in this country"[94] and that human rights violations prohibited under CIL could not give rise to a private cause of action in Canadian common law. Furthermore, Nevsun sustained that the plaintiffs should have relied on well-established torts, such as assault and false imprisonment.[95]

As the BCCA stressed, Canadian and British Courts have so far always "declined to recognize a private cause of action"[96] for a breach of *jus cogens* such as torture. However, these cases also had to be distinguished from the present one, since they were all brought directly against a state and were dismissed to a large extent because of the application of the state immunity doctrine.[97] The Court started by discussing the Ontario Court of Appeal (OCA) judgment in *Bouzari v. Iran*,[98] as well as the decision of the UK House of Lords in *Jones v. Saudi Arabia*,[99] where the two plaintiffs were suing their home country for torture perpetrated there. If the OCA in *Bouzari* first affirmed that CIL was directly incorporated into the Canadian law, it also ruled that it had to recognize the validity of Iran's immunity from the jurisdiction of foreign domestic courts:

> Both under customary international law and international treaties there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction.[100]

The BCCA then relied on the Supreme Court's decision in *Kazemi*,[101] where it had to determine if Mr. Kazemi could sue Iran for the torture and the killing of his mother in that country. Mr. Kazemi was arguing that Canada, as a state-member to the *Convention against Torture*[102] (*CAT*), had to provide him with civil remedies to sue Iran. According to the majority decision, however, a norm of *jus cogens* like the prohibition of torture does not create an obligation for states to open their courts to victims who are seeking redress for violations committed outside the territory of Canada.[103] The majority also relied heavily on Canada's federal *State Immunity Act*,[104] which does not include an exception to immunity in cases of torture. It further stressed its preference for a prudent approach, since "in cases of international law, it is appropriate for Canadian courts only to follow the 'bulk of the authority' and not change the law drastically based on an emerging idea that is in its conceptual infancy."[105]

The BCCA noted, however, that Justice Abella dissented from the approach taken by the majority in *Kazemi*, first explaining that the State practice was evolving as

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94 *Nevsun BCCA*, *supra* note 1 at para 180.
95 *Ibid* at paras 177-178.
96 *Ibid* at para 182.
97 *Ibid* at para 183.
98 *Bouzari v Iran*, 2004 ONCA 871, 71 OR (3d) 675 Swinton J [*Bouzari*].
99 *Jones v Saudi Arabia*, 2006 UKHL 26 Bingham [*Jones*].
100 *Bouzari*, *supra* note 98 at para 95; *Nevsun BCCA*, *supra* note 1 at para 184.
101 *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, 3 SCR 176 McLachlin J [*Kazemi*].
102 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) [*Convention against Torture*].
103 *Kazemi*, *supra* note 101 at para 157; *Nevsun BCCA*, *supra* note 1 at para 186.
104 *Loi sur l'immunité des États*, LRC 1985, c S-18.
105 *Kazemi*, *supra* note 101 at paras 107-108; *Nevsun BCCA*, *supra* note 1 at para 186.

to the applicability of the immunity *ratione materiae* in matters of allegations of torture. She further emphasized the development of the principle of reparations under public international law and its corollary, the right to a remedy for victims of human rights violations.[106] In this context, Justice Abella concluded that Mr. Kazemi should not be prevented from suing Iran since "torture cannot […] be an official state act for the purposes of immunity *ratione materiae.*"[107]

The BCCA in *Nevsun* concluded that if the *Bouzari, Jones* and *Kazemi* cases were helpful for their analysis of the applicability of CIL and *jus cogens* principles by domestic courts, they did not provide any insight about corporate liability for CIL violations. The BCCA thus had to determine if these precedents could apply - and if yes, how? - to the *Nevsun* case. Unfortunately, the Court did not answer the question, arguing that the debate was becoming "historical" and "philosophical" rather than legal.[108] It concluded, however, that it "did not believe it can be said the plaintiffs' claims are bound to fail", since international and transnational law were in flux, "especially in connection with human rights violations that are not effectively addressed by traditional international mechanisms."[109]

The BCCA decision, even if it leaves many questions unanswered, provides an excellent overview of the difficulties faced by victims of transnational corporations when they seek justice. This decision also shows how domestic courts struggle in reconciling common law (or civil law) and public international law. It equally highlights the lack of tools available to them to address the violations perpetrated by multinational corporations abroad.

IV. Ensuring liability for corporations' Violations of Human Rights

As the few Canadian cases addressing corporate liability illustrate, victims of human rights violations by corporations face a multitude of obstacles in their search for justice. "The availability of legal remedies is regarded as a key aspect of the effective implementation, by a State, of its human rights obligations",[110] but to whom do these obligations extend? How do civil and criminal law remedies apply to corporations for acts committed abroad? Those are questions that remain unanswered despite states' struggle to find solutions that are compliant with their domestic legal system. However, many obstacles are common to diverse legal systems. This section will seek to provide an overview of the most frequent barriers encountered by victims.

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106 *Kazemi*, *supra* note 101; summary of Abella's dissent.
107 *Ibid*.
108 *Nevsun BCCA*, *supra* note 1 at para 195.
109 *Ibid* at para 197.
110 Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunity in International Law* (New-York: Cambridge University Press, 2011) at 116.

A. Challenges to corporate liability before domestic courts

It is interesting to realize that most motions filed by Canadian corporations – Tahoe Resources, Hudbay Minerals, Nevsun Resources-to dismiss the lawsuits brought against them by foreign victims rely on legal concepts that are known obstacles to corporate liability worldwide. Jennifer Zerk has compiled the most frequent barriers in a report commissioned by the OHCHR in 2013.[111] She noted that victims face many practical and financial obstacles: difficult access to legal aid, lack of access to qualified counsel, interference by political entities, corruption, fear of reprisals or intimidation of witnesses, impossibility to obtain the evidence needed, etc. However, if the victims succeed in overcoming these challenges, they will still have to face other challenges in court since the legal obstacles are numerous.

For instance, the complex corporate structure of a transnational corporation can represent a real hardship for the victims.[112] Indeed, most transnational corporations will have a multitude of subsidiaries, which can be incorporated in different countries. They might also use intermediary holding companies and joint ventures. This complicated scheme makes it very difficult for the victims to establish who is responsible for the alleged wrong. As seen in *Hudbay Minerals*, such a corporate structure will lead the corporation to argue the doctrine of separate corporate responsibility, meaning that a parent company cannot be held responsible for the acts of a subsidiary. The victims will then have to prove that the corporate veil has to be pierced, which often becomes a heavy burden.

Another common hindrance is the corporations' reliance on the sovereign immunity or the *Act of State* doctrine.[113] Indeed, transnational corporations are often involved in a joint venture with a foreign country, or, if it is not the case, take advantage of the foreign country's lenient legislation in matters of human rights. In this context, it becomes easy for the corporation to allege that a ruling against the company will amount to a ruling against a foreign country. While the application of these doctrines varies widely from one country to another, many countries have developed strict limitations to their application. This is the case for example in the United States with the *Foreign Sovereign Immunities Act* and in Canada with the *State Immunity Act*. As the BCCA has illustrated in the *Nevsun* case, the jurisprudence developed in common law countries also provides many exceptions to the application of the *Act of State* doctrine.

Additionally, alleged victims have to face arguments about domestic courts' extraterritorial jurisdiction. If "most states appear to consider that they have jurisdiction as of right over cases involving defendants incorporated under their own laws",[114] many

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[111] Jennifer A. Zerk, "Corporate Liability for Gross Human Rights Abuses: Towards a fairer and more effective System of Domestic Law Remedies: A Report Prepared for the Office of the UN High Commissioner for Human Rights" *OHCHR* (2013), at 64, 104, online: OHCHR <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticeLawRemedies.pdf>.

[112] *Ibid* at 44.

[113] *Ibid* at 51.

[114] *Ibid* at 68.

common law countries, such as the United States, Australia and New Zealand, apply the *forum non conveniens* doctrine when they believe that their country does not represent the most appropriate forum for the plaintiffs' claims. In Canada, we have seen that this is a common argument, which has however not been successful in *Tahoe* nor *Nevsun*.

Finally, another recurring problem is the lack of an appropriate private cause of action in domestic law to target human rights violations. According to Zerk, "the only private law redress mechanisms to recognize a cause of action for human rights as such is the US *Alien Tort Statute* [*ATS*]."[115] Of course, this does not mean that alleged victims of human rights cannot articulate their claims using pre-existing causes of action. However, these existing categories of wrongs rarely describe adequately the gravity of the allegations. For instance, in the *Nevsun* case, Nevsun was arguing that the plaintiffs should have framed their claims using the torts of assault and false imprisonment. Yet, these two torts do not express satisfactorily the extreme severity of international human rights violations such as torture and forced labor. If Nevsun were to be found liable for these two torts rather than violations to CIL or *jus cogens* principles, it would clearly lessen the gravity of its acts and possibly minimize the remedies available to the victims.

With the clear redress mechanism provided with the *ATS*, the United States has received the vast majority of the lawsuits filed by victims for human rights violations committed abroad. Since many countries did not have as many opportunities to look into the issue of business and human rights as the United States, the American jurisprudence on the question has been heavily relied on internationally.[116] One of the most discussed case on the liability of foreign companies is the US Supreme Court decision in *Kiobel*, which has been seen by many as narrowing the door for claims brought by foreign plaintiffs.[117] It is thus no surprise that the case was discussed by the parties in *Nevsun*, in their written arguments and in court. Indeed, the BCSC recognized that:

> While I agree with Nevsun that the American jurisprudence may be of limited assistance to the plaintiffs and that there is merit to many of its submissions, I also agree with the plaintiffs that the history of corporate liability under international law "is a complex and layered narrative that spans centuries and

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[115] *Ibid* at 78. Also, the French have just adopted in 2017 the *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, which might offer an interesting remedy to victims of corporations incorporated in France.

[116] For instance, in the *Nevsun* case before the Supreme Court of British Columbia, one of the plaintiffs' main arguments was the following: (f) in any event it cannot be said that the claims advanced have no reasonable chance of success and are bound to fail. The legal principles underpinning them have been accepted by Canadian courts to the extent they have been considered. Further, the soundness of these CIL claims is supported by a significant precedent from *American, British, and international tribunals that remain the law*, given that the subject matter of the claim is CIL, reference to this international precedent is sufficient to establish that the plaintiffs' claims have a reasonable chance of success. [emphasis added] In *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 at para 444 f), Abrioux J [*Nevsun BCSC*].

[117] Edna Chinyele Udobong, "Post-Kiobel: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations" (2016) 11:2 Liberty UL Rev 559 at 603.

draws from many different fields of law, countries, and types of materials."[118]

In this context, it seems important to shortly evaluate the impact of the *Kiobel* decision, as well as the US Supreme Court decision in *Jesner v. Arab Bank*.

B. Kiobel and Jesner

Since the decision of the Second Circuit Court of Appeals in *Filartiga v. Pena Irala* in 1980, the *Alien Tort Statute* (*ATS*) has become the statute *par excellence* to bring claims based on customary international law to American domestic courts. The *ATS*, which provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States",[119] was adopted in 1789 and until the *Filartiga case*, had been mostly forgotten.

In this case, the parents of a Paraguayan national who had been tortured and killed by a Chief Police Officer in Paraguay brought their damage claim for death by torture before a U.S. federal court. Both the parents of the victim and the chief police officer now lived in the United States. On appeal, the U.S. Court of Appeals for the Second Circuit recognized that a government's torture of its own citizen constituted a violation of the law of nations since it violated a universally accepted principle of international law.[120]

Since this seminal case, it has been understood that the *ATS* could now "be used to recover civil damages for particularly serious violations of human rights, even if they occurred in a foreign country."[121] This has led to "the birth of the modern line of ATS cases", as noted by the U.S. Supreme Court in the decision *Sosa v. Alvarez-Machain.*[122] Various successful cases followed, where U.S. courts have found many perpetrators liable for violations of human rights committed abroad, such as torture, crimes against humanity and extrajudicial killings.[123]

The Supreme Court decision in *Kiobel v. Royal Dutch Petroleum Co. (Shell)*,[124] published in 2013, has, however, cast a shadow over the successes of the previous thirty years. In this case, Nigerian citizens alleged "that in the early 1990s, members of the Nigerian military attacked their villages by shooting, killing, beating

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118 *Nevsun BCSC, supra* note 116 at para 471.

119 *Alien Tort Statute*, USC 2006 28, s 1350.

120 Ralph G. Steinhardt, "Kiobel and the Multiple Futures of Corporate Liability for Human Rights Violations" (2013) 28:1 Md J Int'l L 1 at 2.

121 *Ibid* at 3.

122 *Sosa v Alvarez-Machain*, 2004 542 US 692 at paras 724-725, Souter J [*Sosa*].

123 See for ex: *Cabello Barrueto v Fernandez Larios*, 205 F Supp. 2d 1325, 1326-27 (SD Fla 2002); afd per curiam, 402 F3d 1148 (11th Cir 2005); *Chavez v Carranza*, No. 03-2932 M1/P, 2006 WL 2434934 at 1-2 (WD Tenn Aug 15, 2006); aff'd, 559 F3d 486 (6th Cir 2009); *Doe v Constant*, No 04 Civ 10108, slip op at 13 (SDNY Oct 24, 2006); aff'd, 354 F App'x 543 (2d Cir 2009) in Steinhardt, *supra* note 120 at 3.

124 *Kiobel v Royal Dutch Petroleum Co*, 569 U.S. 108 (2013) [*Kiobel,* 2013].

and raping Ogoni residents and destroying and looting property."[125] They further alleged that Royal Dutch Petroleum had "provided transportation to the military forces […] and compensated" the Nigerian soldiers for their work.[126]

In the *Kiobel* case, the U.S. Second Circuit Court of Appeals focused mostly on the possibility for corporations to be sued under the *ATS* for a violation of CIL[127]. In its decision, the Court refused to "recognize corporate liability under the *ATS*, because corporate liability had simply not risen to the level of a specific, universal and obligatory norm encompassed in the law of nations."[128] According to Ralph G. Steinhardt, who was one of the counsel representing the plaintiffs in this case, this was "a weird decision" because there had already been successful cases against corporations brought under the *ATS* before the Second Circuit Court of Appeals, such as in *Abdullahi v. Pfizer* in 2009.[129]

Before the U.S. Supreme Court, however, the focus of the case changed dramatically. Setting aside the corporate liability question, the Court preferred to determine "whether and under what circumstances the *ATS* allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign, other than the US."[130] The Court ruled that the *ATS* had no clear indication of extraterritorial application, which means it had none.[131] It further relied on the "presumption that United States law governs domestically but does not rule the world."[132] In this context, the Court determined that to displace the presumption against extraterritorial application, plaintiffs would now have to show sufficient jurisdictional ties with the United States. Since in the *Kiobel* case, the only connection was the office of an affiliated company of Royal Dutch in New York City, the link was too tenuous to rebut the presumption.[133] Yet, Justice Kennedy seems to have left the door open, noting "that a number of significant questions evolving the *ATS* are left open and that future cases may arise that are not covered […] [by] the holding in *Kiobel*."[134] As many authors have noted, the *Kiobel* decision will undoubtedly curtail many actions for relief under the *ATS*, since it reduced the scope of its jurisdictions.[135]

In this context, the U.S. Supreme Court ruling in *Jesner v. Arab Bank*[136] is extremely relevant. Indeed, the issue of corporate liability lies at the heart of this lawsuit. The plaintiffs in this case are alleged victims of terror attacks in Israel, the West Bank and Gaza. They are both American citizens and non-American citizens.

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125 *Ibid*, Justia Opinion Summary and Annotations, online: Justia <https://supreme.justia.com/cases/federal/us/569/108/>.

126 *Kiobel v. Royal Dutch Petroleum Co*, 2010 621 F3d 111 (US) Jacobs J [*Kiobel*, 2010], as quoted in Stephen R. Layne, "Corporate Responsibility for Human Rights Violations: Redressability Avenues in the United States and Abroad" (2015) 18:2 Gonz J Int'l L 1 at 20.

127 *Ibid*.

128 *Ibid* at paras 148-149.

129 *Abdullahi v Pfizer, Inc,* 562 F3d 163 (2d Cir 2009), as explained in Steinhardt, *supra* note 120 at 6.

130 Steindhart, *supra* note 120 at 6-7; see also Layne, *supra* note 126 at 22.

131 Layne, *supra* note 126 at p 22.

132 *Ibid*.

133 Udobong, *supra* note 117 at 578.

134 *Ibid* at 581.

135 Layne, *supra* note 126 at 24.

136 *Jesner et al v Arab Bank*, 2018 PLC 584 US 16-499 [*Jesner*].

They allege that Arab Bank knowingly funnelled millions of dollars through its New York branch to finance the attacks perpetrated in the region of Israel and to reward the families of the suicide bombers. Because of the different origins of the plaintiffs, two lawsuits were brought to the U.S. courts: for the US citizen, the suit was brought under the *Antiterrorism Act* (*ATA*), while for the non-citizens, it was brought under the *ATS*. Although the American plaintiffs have been successful with their action under the *ATA*, the non-American citizens have seen their claims dismissed both by the first instance judge and the Second Circuit Court of Appeal. The Court of Appeal dismissed the case "on the sole ground that under circuit precedent, *ATS* cannot be brought against corporations."[137] Before the Supreme Court, three main arguments were debated in October 2017: (1) whether CIL permits corporate liability; (2) whether the *ATS* creates a cause of action that should be interpreted as permitting corporate liability and (3) whether the case should be dismissed on another ground.[138]

On April 24, 2018, the U.S. Supreme Court published its decision. It held, by a vote of 5-4, that "foreign corporations may not be sued under the *ATS*."[139] In the majority opinion, Justice Kennedy explained that "the *ATS* was intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations when the absence of such a remedy might provoke foreign nations to hold the United States accountable."[140] He added, however, that the tenuous link between the terrorist attacks and the United States "illustrates the perils of extending the scope of *ATS* liability to foreign multinational corporations like Arab Bank."[141] Moreover, in regard to the possible liability of foreign corporate entities, Justice Kennedy contended that "courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one"[142] and that such a decision should be made by Congress. Justice Kennedy added:

> If, in light of all the concerns that must be weighed before imposing liability on foreign corporations via *ATS* suits, the Court were to hold that it has the discretion to make that determination, then the cautionary language of Sosa would be little more than empty rhetoric.[143]

He thus concluded: "the Court holds that foreign corporations may not be defendants in suits brought under the *ATS*."[144]

Justice Sonia Sotomayor wrote a 34-page dissent, to which Justices Ruth Bader Ginsburg, Stephen Breyer and Elena Kagan agreed: "*Sotomayor castigated her*

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137 William S Dodge, "Corporate Liability for Human Rights Violations: A Preview of Jesner v. Arab Bank, PLC" (29 September 2017), online: Just Security <https://www.justsecurity.org/45480/corporate-liability-human-rights-violations-preview-jesner-v-arab-bank-plc/>.

138 *Ibid*.

139 Amy Howe, "Opinion analysis: Court bars lawsuits against foreign corporations under Alien Tort Statute" (24 April 2018), online: SCCOTUSblog <http://www.scotusblog.com/2018/04/opinion-analysis-court-bars-lawsuits-against-foreign-corporations-under-alien-tort-statute/>.

140 *Jesner, supra* note 136 at para 3.

141 *Ibid*.

142 *Ibid* at 26-27.

143 *Ibid* at 27.

144 *Ibid*.

colleagues for absolving "corporations from responsibility under the ATS for conscience-shocking behaviour."[145] [emphasis added] According to her and her colleagues, "history and purpose of the ATS all support the idea that corporations can be sued under the law."[146] She moreover contended that the majority did not have to close the door to all lawsuits filed under the *ATS* against foreign corporate entities the way it did. Rather, the majority could have used other legal tools "to address the foreign-policy concerns voiced by the court."

According to her, with the decision of the majority "the Court ensures that foreign corporations — entities capable of wrongdoing under our domestic law — remain immune from liability for human rights abuses, however egregious they may be."[147] [emphasis added]

The decision in *Jesner* is thus a deception for victims of foreign corporations all across the globe. However, this very tight decision also highlights how complicated it is to find an answer and to provide remedies to victims for abuses committed by foreign corporations.

The overview of the decisions *Nevsun, Kiobel* and *Jesner* emphasized the fact that both in Canada and the United States — and probably in most common law countries — the issues raised by corporate responsibility and civil liability are far from settled. This is partly due to the fact that the courts do not have access to sufficient tools to settle these questions, seen as novel. In this context, it might be time to realize that new tools are necessary, if not through domestic statutes, through a new common law duty of care.

C. A New Duty of Care for Businesses

No common law court has yet developed a new duty of care targeting businesses' international human rights obligations. However, with the multiple obstacles faced by victims of transnational corporations to access legal remedies, "the time is ripe for common law courts to enforce the now widely recognized human rights responsibilities of business enterprises to exercise human rights due diligence."[148] This is what Douglass Cassel argues in a recently published article on the matter.[149] According to him, the recognition of a novel duty of care "of business to exercise due diligence with regard to the potential human rights impacts of business activity" would be the most adequate way for states and businesses to fulfill the remedial goals set in the *Guiding Principles on Business and Human Rights*.[150] Since this is a novel area of law, which is developing slowly, very few authors have had the opportunity to comment

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145 Howe, *supra* note 139.
146 *Ibid*.
147 *Ibid*.
148 Douglass Cassell, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) 1:2 Bus & Hum Rts J 179 at 180.
149 *Ibid*.
150 Cassell, *supra* note 148 at 182.

on this proposition.[151]

Such a duty of care would give the opportunity to the victims to bring a tort action in negligence against transnational businesses, it they can establish that the injuries suffered "were reasonably foreseeable by the exercise of due diligence."[152] Furthermore, this duty of care would enable the victims to overcome the burden represented by the corporate veil doctrine. Indeed, it "would hold parent companies responsible only for their own failures to exercise due diligence with regard to the enterprises over which they have control or effective leverage". Such an approach, rather than allowing parent companies to walk away from their responsibilities in regard to their subsidiaries, would push them to improve their oversight.[153]

Additionally, as Cassel explains, this novel duty of care "would entail no departure from factors widely considered by common law courts in recognizing new duty of care: foreseeability, proximity, fairness, and public policy."[154] Also, proceeding with the establishment of a novel duty of care would avoid the political debates that would without a doubt surround the adoption of a statute on the matter.[155] It thus represents a simpler, more efficient solution to the ongoing abuses carried out in the course of business of transnational corporations all across the planet.

Finally, while decisions are awaited both in Canada and in the United States about corporate liability under international law principles, the adoption of this new duty of care would answer many of the legal arguments raised by the plaintiffs and the defendants. For instance, the British Columbia Court of Appeal had to admit in *Nevsun* that customary international law principles had never been recognized as creating a

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151 In his article published in 2011, Richard Meeran explains that establishing a parent company liability is difficult and that some victims have argued that these parent companies owed them a duty of care for their actions carried abroad. He wrote: "The issue of parent company liability has not however been subject to a final determination in any of these cases, which have either been settled before trial (e.g. *Thor Chemicals v Cape PLC*) or struck out for other reasons (eg *Connelly v Rio Tinto*). Frustrating though this undoubtedly is for academic lawyers and campaigners, it reflects the financial realities and risks to the MNC, the claimants and the claimants' lawyers of not settling. Unless an MNC is confident of a resounding victory and that no significant evidence damaging to its reputation will emerge at trial, the risk of going to trial usually makes little commercial sense. The primary objective of claimants is usually to obtain the maximum amount of compensation as speedily as possible. Claimants' lawyers, whose resources and cash flow can be stretched to the limit by such cases, may also feel under pressure." See Richard Meeran, "Tort Litigations Against Multinationals ('MNCs') for Violation of Human Rights: an Overview of the Position Outside the US" (7 March 2011), online: Business & Human Rights Resource Centre <https://www.business-humanrights.org/en/pdf-tort-litigation-against-multinationals-%E2%80%9Cmncs%E2%80%9D-for-violation-of-human-rights-an-overview-of-the-position-outside-the-us>; Furthermore, in regards to Professor Cassel's argument, I was not able to find anyone who directly commented on his suggestion. At best, his article was referred to by some authors for further reading on the question, see Jonathan Bonnitcha & Robert McCorquodale, "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights" (2017) 28:3 Eur J of Int'l L 899 at 903; Robert McCordquodale et al, "Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises" (2017) 2:2 Business & H R J 195 at 198.

152 *Ibid* at 180.

153 *Ibid* at 182.

154 *Ibid* at 183.

155 As illustrated by the failure of the *Bill C-300* in Canada, corporate social responsibility is a controversial topic and adopting a law on the matter can represent an enormous challenge.

private cause of action in Canada. In the same vein, it also had to acknowledge that corporations had never been held responsible in Canadian common law for breaches of CIL. Furthermore, even if the Court affirmed that the plaintiffs could possibly succeed in piercing Nevsun's corporate veil, the complexity of the arrangement between Nevsun, its subsidiaries in Eritrea and the government's subcontractors illustrate perfectly the need for the adoption of a new duty of care for parent corporations. The doctrine of separate corporate responsibility clearly adds an unnecessary burden to the plaintiff's already challenging journey towards justice.

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The horrible allegations about Canadian mines' involvement in human rights violations across continents was the starting point of this article. For years, the international community, the United Nations and alleged victims have struggled to raise awareness on this issue. Within Canada, offices have been created by the government, a *Bill* has been introduced at the House of Commons but was rejected, the Senate has conducted special hearings on the matter… But what impact has those measures had?

A very recent decision from the British Columbia Court of Appeal brought some hope to this bleak picture. For the first time in Canada, in the decision *Araya v. Nevsun Resources,* plaintiffs are suing a Canadian corporation for breaches of CIL-forced labor, torture, crimes against humanity-committed abroad. The plaintiffs have successfully obtained the dismissal of the motions filed by Nevsun to stay their claim. They have also been able to get Nevsun's motions on the *forum non conveniens* doctrine and the *Act of State* doctrine rejected.

This Canadian case reflects the pressing needs of the victims to access remedies for violations committed by transnational corporations. Until *Nevsun*, only four other lawsuits filed in Canada by alleged victims of mining corporations were able to move forward after the decisions on the motions to dismiss brought by the defendants. Before these cases, all foreign plaintiffs' claims had been defeated by the Canadian mining companies at the motion to dismiss the stage of the procedures.

On the other side of the Canadian border, the American courts are struggling with very similar issues, despite some successes with the claims brought under the *Alien Tort Statutes*. Indeed, the Supreme Court decision in *Kiobel* has narrowed down the scope of the claims that can be brought under the *ATS*, while it avoided clarifying if this statute could lead to corporate liability. Indeed, despite the Court of Appeal's decision in *Kiobel*, the Supreme Court has reformulated the litigated matter towards the extraterritorial applicability of the *ATS*. Now, with the recent decision in *Jesner v. Arab Bank*, which held that "foreign corporations may not be defendants in suits brought under the *ATS*",[156] it is clearer than ever that victims of foreign corporations need new tools to hold these corporations liable for any violations of human rights they might

[156] *Jesner, supra* note 136 at para 3.

commit.

With the wake of transnational corporations and the proliferation of their activities all around the planet, it is high time that governments and courts take the matter of corporate social responsibility (CSR) seriously. The United Nations has taken meaningful steps in developing the Guiding Principles and getting their endorsement by the Human Rights Council in 2011.

In regard to extractive industries, Canada should be at the forefront of the efforts to promote CSR, especially with the disproportionate amount of transnational mining companies incorporated in its soil. The government should equally raise awareness as to the risks involved in doing business in countries where governments are known to be disrespecting human rights. As Nevsun Resources's experience in Eritrea has shown, developing projects in dictatorial and violent countries brings enormous challenges from a human rights perspective. Indeed, as HRW points out, "Nevsun appears to feel that it has no power to confront its own politically-connected contractor about allegations of abuse at its own mine site."[157]

Finally, if there is one thing that is made clear by the numerous Canadian and American decisions on the matter of CSR, it is that victims desperately need to have access to remedies. It is thus time for courts to be creative and to become a vehicle for change. In the *Nevsun* case, why wouldn't the plaintiffs try to argue for the development of a new duty of care? Like states and individuals, corporations have to be held accountable for their acts: impunity should not be an acceptable outcome and the lack of available legal tools should not prevent the courts from innovating on this matter.

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[157] Human Rights Watch, *supra* note 17 at 3.