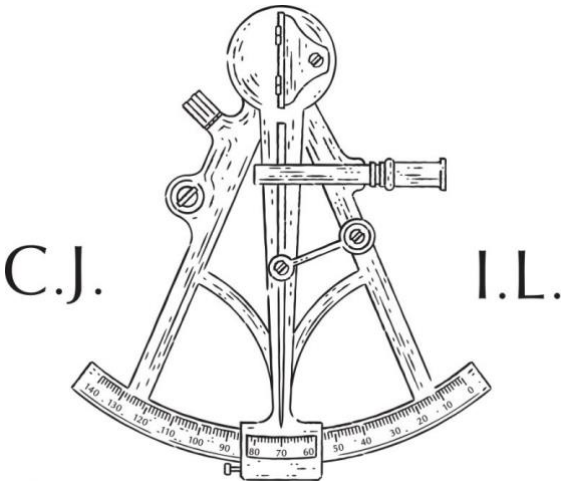

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"THIS IS NOT A BLUFF": THE NEED TO REQUEST A NEW ICJ ADVISORY OPINION ON THE THREAT OR USE OF NUCLEAR WEAPONS

*Mia Bonardi**

"When the territorial integrity of our country is threatened, to protect Russia and our people, we will without reservation, use all the means at our disposal. This is not a bluff."
– Russian President Vladimir Putin, September 22, 2022

"Whoever tries to interfere with us, and even more so to create threats to our country, to our people, should know that Russia's response will be immediate and will lead you to such consequences as you have never experienced in your history."
– Russian President Vladimir Putin, February 24, 2022

ABSTRACT

Since the International Court of Justice ("ICJ") issued its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* over twenty-five years ago, the 2017 Treaty on the Prohibition of Nuclear Weapons ("TPNW") entered into force, more Nuclear-Weapons-Free-Zones ("NWFZ") have been established, and the prohibition of the threat or use of nuclear weapons under any circumstances has evolved. Although nonbinding on future proceedings, a new ICJ advisory opinion should be requested by authorized organs, specialized agencies, or related organizations, to keep abreast of the current law and to pursue their efforts to achieve a world without nuclear weapons.

A new advisory opinion on the legality of the threat or use of nuclear weapons is pertinent to Russia's full-scale invasion of Ukraine on February 24, 2022. Directly before the invasion, Russian President Vladimir Putin released a speech targeted at anyone who would interfere in his war and threatened "consequences as you have never experienced in your history." The international community viewed President Putin's statements as a threat to use nuclear weapons. In a later, nationally televised speech on September 21, 2022, President Putin told the Russian people, "[w]hen the territorial integrity of our country is threatened, to protect Russia and our people, we will without reservation, use all the means at our disposal. This is not a bluff." President Putin directly referenced the *non liquet* the ICJ left open in its 1996 Opinion.

The U.N. must not stand by waiting for threats of use to transition to actual use until it acts: "This is not a bluff." As of the 1996 Opinion, international law valued state security over human security. These outmoded values are being perpetuated by the Russian Federation as it continues its invasion of Ukraine. As such, a new advisory opinion on the legality of the threat or use of nuclear weapons should be requested by authorized organs, specialized agencies, or related organizations to help them stay abreast of the current law and pursue their efforts to achieve a world without nuclear weapons.

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TABLE OF CONTENTS

I. INTRODUCTION

Considering the 2017 Treaty on the Prohibition of Nuclear Weapons ("TPNW") and additionally declared Nuclear-Weapons-Free-Zones ("NWFZ"), material facts have changed since the International Court of Justice ("ICJ") issued its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* over twenty-five years ago.[1] Although nonbinding on future proceedings, a new ICJ advisory opinion should be requested by authorized organs, specialized agencies, or related organizations, to be proactive and to keep abreast of the current law on the evolving and standout issue of the legality of the threat or use of nuclear weapons.[2]

In its 1996 Opinion, the ICJ found that "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law."[3] However, as Judge Rosalyn Higgins argued in dissent, "the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts."[4] A *non liquet* is a situation where the law is unclear on a matter.[5] Since the judges could not "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake," a *non liquet* exits.[6] In other words, the judges did not say that the threat or use of nuclear weapons would be legal in "an extreme circumstance of self-defence," but instead that they could not exclude the possibility that it could be legal.[7]

A new advisory opinion on the legality of the threat or use of nuclear weapons is pertinent to Russia's full-scale invasion of Ukraine on February 24, 2022.[8] Directly before

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* Suffolk University Law School, J.D., International Law Concentration, 2022. The author would like to thank Dr. Daniel Rietiker for supervising the research and writing of this article and the staff of the *Connecticut Journal of International Law* for their editorial assistance.

[1] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8) [hereinafter General Assembly Advisory Opinion]; Treaty on the Prohibition of Nuclear Weapons, *opened for signature* Sept. 20, 2017, (entered into force Jan. 22, 2021) [hereinafter TPNW].

[2] *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/advisory-jurisdiction (last visited Oct. 28, 2021). While this article argues for a new advisory opinion on the legality of the threat or use of nuclear weapons, other topics could also be beneficial. For example, an update from the ICJ on the status of state compliance with the disarmament obligation it provided in its 1996 Opinion would inform the authorized organs, specialized agencies, and related organizations, work toward a world without nuclear weapons.

[3] General Assembly Advisory Opinion, *supra* note 1, at ¶ 105.

[4] Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Higgins, 1996 I.C.J. 583, ¶ 2 (July 8).

[5] NON LIQUET Definition & Legal Meaning, THE LAW DICTIONARY, https://thelawdictionary.org/non-liquet/ (explaining how "In the Roman courts, when any of the judges, after the hearing of a cause, were not satisfied that the case was made clear enough for them to pronounce a verdict, they were privileged to signify this opinion by casting a ballot inscribed with the letters 'N. L.,' the abbreviated form of the phrase 'non liquet.'").

[6] General Assembly Advisory Opinion, *supra* note 1, at ¶ 105.

[7] *Id.*

[8] *Timeline: The events leading up to Russia's invasion of Ukraine*, REUTERS (Mar. 1, 2022, 4:03 AM EST), https://www.reuters.com/world/europe/events-leading-up-russias-invasion-ukraine-2022-02-28/; John Psaropoulos, *Timeline: Week one of Russia's invasion of Ukraine*, ALJAZEERA (Mar. 2, 2022), https://www.aljazeera.com/amp/news/2022/3/2/timeline-week-one-of-russia-invasion-of-ukraine.

the invasion, Russian President Vladimir Putin released a speech targeted at anyone who would interfere in his war and threatened "consequences as you have never experienced in your history."[9] The international community viewed President Putin's statements as a threat to use nuclear weapons.[10] Later, in a nationally televised speech on September 21, 2022, President Putin told the Russian people, "When the territorial integrity of our country is threatened, to protect Russia and our people, we will without reservation, use all the means at our disposal. This is not a bluff."[11] President Putin and his aides continue to directly reference the *non liquet* the ICJ left open in its 1996 Opinion.[12]

Article 38(1) of the Statute of the ICJ enumerates the sources of law the ICJ will apply and, relevantly, it includes (1) treaties, (2) customary international law, and (3) general principles of law.[13] This article addresses the development of each source in the past twenty-five years regarding the legality of the threat or use of nuclear weapons and calls for a new ICJ advisory opinion to be requested by authorized organs, specialized agencies, or related organizations.

II. TREATIES

A new advisory opinion on the legality of the threat or use of nuclear weapons is necessary because there has been a material change to the facts the ICJ considered over twenty-five years ago. In its 1996 Opinion, the ICJ explained that "[t]he pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments . . . . The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction."[14] The ICJ held 11-3 that in 1996 there existed no "comprehensive and universal prohibition of the threat or use of nuclear weapons" in conventional international law.[15] However, this has since changed.

The TPNW entered into force on January 22, 2021, and comprehensively prohibits States Parties from participating in any nuclear weapons activities.[16] The Preamble of the TPNW states, in part, that the States Parties agreed to it, "*[c]onsidering* that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of international humanitarian law."[17] In addition to numerous nuclear weapon prohibitions, TPNW Article 1 states, "1. Each State

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[9] Jordan Sekulow, *Putin To the U.S. and NATO: "Consequences That You Have Never Experienced in Your History."* ACLJ (Feb. 24, 2022), https://aclj.org/foreign-policy/putin-to-the-us-and-nato-consequences-that-you-have-never-experienced-in-your-history.

[10] Roger Cohen, *Beyond Ukraine, the Target Is What Putin Calls America's 'Empire of Lies'*, THE NEW YORK TIMES (Feb. 24, 2022), https://www.nytimes.com/2022/02/24/world/europe/us-putin-nuclear-war-nato.html.

[11] *'This Is Not a Bluff': Putin Threatens Nuclear Response in Ukraine War*, THE WALL STREET JOURNAL (Sept. 21, 2020, 5:40 AM) https://tinyurl.com/2p83fhxm.

[12] Luke McGee & Claire Calzonetti, *Putin spokesman refuses to rule out use of nuclear weapons if Russia faced an 'existential threat'*, CNN (Mar. 22, 2022, 5:51 PM EDT), https://www.cnn.com/2022/03/22/europe/amanpour-peskov-interview-ukraine-intl/index.html.

[13] Statute of the International Court of Justice art. 38, ¶ 1.

[14] General Assembly Advisory Opinion, *supra* note 1, at ¶ 57.

[15] *Id.* at ¶ 63.

[16] TPNW, *supra* note 1.

[17] *Id.*

Party undertakes never *under any circumstances* to: . . . (d) *Use or threaten to use nuclear weapons or other nuclear explosive devices*."[18] The language "never under any circumstances" closes the *non liquet* that the 1996 Opinion left unresolved.[19] As of December 2022, the TPNW has ninety-one Signatory States, and sixty-eight States Parties.[20] Thus, unlike at the time of the 1996 Opinion, there is now an international treaty prohibiting the threat or use of nuclear weapons.[21]

Additionally, the Comprehensive Nuclear Test Ban Treaty ("CTBT") opened for signature in September 1996 after the ICJ Opinion in July of that same year.[22] The CTBT prohibits all nuclear weapons tests and other nuclear explosions.[23] The CTBT, however, has not entered into force since it requires certain states to sign and ratify it.[24] Thus, the "[nuclear weapons States ("NWS")] (except North Korea) abide by a de facto test moratorium despite lack of entry into force of the [CTBT]."[25]

Since the 1996 Opinion, several NWFZs have entered into force, including:

1. African Nuclear-Weapon-Free-Zone Treaty ("Pelindaba Treaty")[26]
2. Central Asia Nuclear-Weapon-Free-Zone ("CANWFZ")[27]
3. Southeast Asian Nuclear-Weapon-Free-Zone Treaty ("Bangkok Treaty")[28]

While each of these treaty regimes has distinct obligations, some are specifically relevant to the 1996 Opinion. First, Article 5 of the Pelindaba Treaty requires States Party "(a) Not to test any nuclear explosive device[, and] (b) To prohibit in its territory the testing of any nuclear explosive device."[29] The incorporation of an enumerated prohibition on testing

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[18] *Id.* (emphasis added).

[19] General Assembly Advisory Opinion, *supra* note 1, at ¶ 105.

[20] *Status of the Treaty*, OFFICE FOR DISARMAMENT AFFAIRS (as of Sept. 28, 2021), https://treaties.unoda.org/t/tpnw.

[21] State Parties to the TPNW are now also upholding their disarmament obligation. *See supra* note 2; TPNW, *supra* note 1.

[22] G.A. Res. 50/245, Comprehensive Nuclear-Test-Ban Treaty, *opened for signature* Sept. 24, 1996, U.N. Doc. A/50/1027 [hereinafter CTBT].

[23] *Id.*

[24] *Get The Facts CTBT*, NTI (September 2019), https://media.nti.org/documents/ctbt_fact_sheet.pdf (explaining that Egypt, Iran, Israel, China, and the United States have signed but not ratified the CTBT and North Korea, India, and Pakistan have not signed or ratified the CTBT.).

[25] *Id.* However, the CTBT does not have a disarmament obligation. *See supra* note 2.

[26] African Nuclear-Weapon-Free Zone Treaty, *opened for signature* Apr. 12, 1996, 35 I.L.M. 698. (entered into force July 15, 2009) [hereinafter Pelindaba Treaty]. At present there are 42 States Parties to the Pelindaba Treaty. *Pelindaba Treaty*, NTI, https://www.nti.org/learn/treaties-and-regimes/african-nuclear-weapon-free-zone-anwfz-treaty-pelindaba-treaty/ (Sept. 23, 2020).

[27] Treaty on a Nuclear-Weapon-Free Zone in Central Asia, *opened for signature* Sept. 8, 2006, 2970 U.N.T.S. (entered into force Mar. 21, 2009) [hereinafter CANWFZ]. At present there are 5 States Parties to the CANWFZ. *CANWFZ*, NTI, https://www.nti.org/learn/treaties-and-regimes/central-asia-nuclear-weapon-free-zone-canwz/ (Sept. 17, 2020).

[28] Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, *opened for signature* Dec. 15, 1995, 1981 U.N.T.S. 129 (entered into force Mar. 27, 1997) [hereinafter Bangkok Treaty]. At present there are 10 States Parties to the Bangkok Treaty. *Bangkok Treaty*, NTI, https://www.nti.org/learn/treaties-and-regimes/southeast-asian-nuclear-weapon-free-zone-seanwfz-treaty-bangkok-treaty/ (Oct. 30, 2020).

[29] Pelindaba Treaty, *supra* note 26.

nuclear weapons into these NWFZs is important in the absence of the entry into force of the CTBT.[30]

Second, Article 2 of the CANWFZ specifically requires any State Party "(d) Not to allow in its territory: (i) The production, acquisition, stationing, storage or *use, of any nuclear weapon or other nuclear explosive device*."[31] Further, Article 5 provides, "[e]ach Party undertakes, in accordance with the CTBT: (a) Not to carry out any nuclear weapon test explosion or any other nuclear explosion; (b) To prohibit and prevent any such nuclear explosion at any place under its jurisdiction or control."[32] Article 1 of Protocol 1 to the CANWFZ echoes the CTBT, stating that "[e]ach Party to this Protocol undertakes *not to use or threaten to use a nuclear weapon or other nuclear explosive device* against any Party to the Treaty."[33]

Third, Article 3 of the Bangkok Treaty specifically prohibits States Parties "anywhere inside or outside the Zone" or "to allow, in its territory, any other State to" "(c) *test or use nuclear weapons*."[34] While the ICJ noted the signing of the Bangkok and Pelindaba Treaties in its 1996 Opinion, neither had yet entered into force.[35] The ICJ said at the time that it did not "view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such."[36] Despite this conclusion, with the entry into force of the TPNW and more NWFZs since the 1996 Opinion, a new advisory opinion is necessary to determine the current state of international law on the legality of the threat or use of nuclear weapons.

Distinct from a NWFZ is the single-state Nuclear-Weapon-Free Status of Mongolia.[37] Article 4 of the law on Mongolia's status states, in part: "4.1 An individual, legal person or any foreign State shall be prohibited on the territory of Mongolia from committing, initiating or participating in the following acts or activities relating to nuclear weapons: 4.1.3 *test or use nuclear weapons*."[38] However, Article 9 of the same law allows for the "[a]mendment and termination of the Law" and states: "9.1 If the vital interests of Mongolia are affected, the present Law may be amended or terminated."[39] This language attempts to use the *non liquet* that the 1996 Opinion left unresolved. However, Mongolia ratified the TPNW on March 10, 2022.[40] Thus, for Mongolia the threat or use of nuclear weapons is prohibited under any circumstances.[41]

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[30] CTBT, *supra* note 22.
[31] CANWFZ, *supra* note 27 (emphasis added).
[32] *Id.*
[33] *Id.* (emphasis added).
[34] Bangkok Treaty, *supra* note 28 (emphasis added).
[35] General Assembly Advisory Opinion, *supra* note 1, at ¶ 63.
[36] *Id.*
[37] *Nuclear-Weapon-Free Status of Mongolia*, NTI, (Sept. 25, 2020), https://www.nti.org/education-center/treaties-and-regimes/nuclear-weapon-free-status-mongolia/.
[38] Law of Mongolia on Its Nuclear-Weapon-Free Status, https://www.nti.org/wp-content/uploads/2021/09/law_of_mongolia.pdf (last visited Oct. 28, 2021).
[39] *Id.*
[40] *Mongolia*, ICAN, https://www.icanw.org/mongolia (last visited Dec. 20, 2022).
[41] TPNW, *supra* note 1.

Further, in a general comment on Article 6 of the International Covenant on Civil and Political Rights ("ICCPR"), on the right to life, the U.N. Human Rights Committee ("UNHRC") explained:

> The threat or use of weapons of mass destruction, in particular nuclear weapons, which are indiscriminate in effect and are of a nature to cause destruction of human life on a catastrophic scale is incompatible with respect for the right to life and may amount to a crime under international law.[42]

Notably, of the eight confirmed NWS, seven have ratified the ICCPR, and one has signed it.[43] The ICJ noted in its 1996 Opinion:

> [W]hether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[44]

While the ICJ found that the threat or use of nuclear weapons would "generally be contrary" to the rules of international humanitarian law ("IHL"), the UNHRC goes further providing that the threat or use would be "incompatible" with the right to life.[45] This is just another example of a development in the law on which a new advisory opinion could provide clarity.

The great number of treaties, NWFZs, protocols, and more, regarding the legality of the threat or use of nuclear weapons evidence the real and present danger and concern their threat or use poses to human security. Thus, a new advisory opinion would take the TPNW, new NWFZs, and an additional twenty-five years of the evolving law on the use or threat of use of nuclear weapons into account.

III. CUSTOMARY INTERNATIONAL LAW

While treaties only bind States Parties, a "quasi-universal" treaty could develop into customary international law and bind non-signatory States.[46] Customary international law is

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[42] Hum. Rts. Comm., CCPR General Comment No. 36: Art. 6 (Right to Life), ¶ 66, U.N. Doc. CCPR/C/GC/36 (2018).

[43] The U.S., Russia, U.K., India, Pakistan, North Korea, and France have ratified the ICCPR. Israel, a presumed NWS, has also ratified the ICCPR. China has signed the ICCPR. *Status of Ratification*, OHCHR, https://indicators.ohchr.org (last visited Oct. 28, 2021).

[44] General Assembly Advisory Opinion, *supra* note 1, at ¶ 25.

[45] *Id.* at ¶ 105.

[46] Daniel Rietiker, *New Hope for Nuclear Disarmament or "Much Ado About Nothing?": Legal Assessment of the New "Treaty on the Prohibition of Nuclear Weapons" and the Joint Statement by the USA, UK, and France Following its Adoption*, 59 HARV. INT'L L.J. 22 (2017), https://harvardilj.org/2017/12/new-hope-for-nuclear-disarmament-or-much-ado-about-nothing-legal-assessment-of-the-new-treaty-on-the-prohibition-of-nuclear-weapons-and-the-joint-statement-by-the/; Int'l L. Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 65, Conclusion 11 (2018) [hereinafter 2018 Int'l Law Comm'n Rep.].

"a general practice accepted as law."[47] A binding customary international law is established by showing (1) state practice and (2) *opinio juris*.[48] State practice is defined as state conduct, which includes inaction.[49] *Opinio juris* means "that the practice in question must be undertaken with a sense of legal right or obligation."[50] In its 1996 Opinion, the ICJ explained that (1) a number of States adhered to a "policy of deterrence" rather than a "practice of non-utilization" since 1945 and therefore did not find the requisite state practice.[51] The ICJ also could not find (2) the requisite *opinio juris*, explaining that "the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*."[52] The ICJ held 11-3 that in 1996 there existed no "comprehensive and universal prohibition of the threat or use of nuclear weapons" in customary international law.[53]

In the *North Sea Continental Shelf Cases* the ICJ explained that "[s]tates whose interests are specially affected" must participate in the practice to create a rule of customary international law.[54] Dr. Daniel Rietiker, author of *Humanization of Arms Control*, argues that:

> [I]t would be too easy to argue that the particularly interested States are necessarily the States possessing nuclear weapons. On the contrary . . . States not possessing nuclear weapons have a particular interest in creating the rule because their populations have been facing the risk and threat of nuclear weapons for decades to date.[55]

It follows that the state practice and *opinio juris* emerging from the TPNW could develop into customary international law and bind non-signatory States.

However, the ICJ's recognition that States adhered to a "policy of deterrence" rather than a "practice of non-utilization" acknowledges the persistent objector rule.[56] Under the persistent objector rule, "[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection."[57] As such, while a "quasi-universal"

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[47] Statute of the International Court of Justice, art. 38, ¶ 1.

[48] Continental Shelf (Libyan Arab Jarnahiriya/Malta), Judgment, 1985 I.C.J. Rep. 13, 29-30, ¶ 27 (June 3) (explaining "It is of course axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States, even though multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."); 2018 Int'l Law Comm'n Rep., *supra* note 45, at 65, at Conclusion 2.

[49] 2018 Int'l Law Comm'n Rep., *supra* note 46, at 65, at Conclusions 5 & 6.

[50] *Id.* at Conclusion 9.

[51] General Assembly Advisory Opinion, *supra* note 1.

[52] *Id.*

[53] *Id.*

[54] North Sea Continental Shelf Cases (Ger. v. Den.; Ger.v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

[55] Rietiker, *supra* note 45.

[56] General Assembly Advisory Opinion, *supra* note 1.

[57] 2018 Int'l Law Comm'n Rep., *supra* note 46, at 65, at Conclusion 15.

treaty could develop into customary international law and bind non-signatory States, this would not apply to persistent objectors.[58]

For example, the U.S., U.K., and France expressed an effort at persistent objection to the TPNW.[59] On July 7, 2017—the same day the TPNW was adopted—the U.S., U.K., and France issued, in part, the following statement:

> France, the United Kingdom and the United States have not taken part in the negotiation of the treaty on the prohibition of nuclear weapons. We do not intend to sign, ratify or ever become party to it. Therefore, there will be no change in the legal obligations on our countries with respect to nuclear weapons. For example, we would not accept any claim that this treaty reflects or in any way contributes to the development of customary international law.[60]

The NATO States strongly oppose the TPNW.[61] Russia and Pakistan claim they are not bound by the TPNW.[62] Notwithstanding this opposition, as Dr. Rietiker explains, "a persistent objector cannot hinder a customary norm to be established, but only avoid the application of the norm on its behalf."[63] Thus, a customary norm can still develop from the TPNW and bind non-signatory States; it will just not bind persistent objectors. In this case, however, most, if not all, of the States claiming persistent objector status are NWS.[64] As such, a new advisory opinion from the ICJ could inform the status of the development of any customary norms emerging from the TPNW.[65]

IV. JUS COGENS NORMS

While a "quasi-universal" treaty would not bind persistent objectors, there cannot be persistent objectors to *jus cogens* norms. *Jus cogens* norms are general principles of law and

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[58] Rietiker, *supra* note 46; 2018 Int'l Law Comm'n Rep., *supra* note 46, at 65, at Conclusion 11.

[59] Rietiker, *supra* note 46.

[60] *Joint Press Statement from the Permanent Representatives to the United Nations of the United States, United Kingdom, and France Following the Adoption of a Treaty Banning Nuclear Weapons*, UNITED STATES MISSION TO THE UNITED NATIONS (July 7, 2017), https://usun.usmission.gov/joint-press-statement-from-the-permanent-representatives-to-the-united-nations-of-the-united-states-united-kingdom-and-france-following-the-adoption/.

[61] *North Atlantic Council Statement on the Treaty on the Prohibition of Nuclear Weapons*, NATO (Sept. 20, 2017), https://www.nato.int/cps/en/natohq/news_146954.htm. *See also* James Crawford, *International Law and the Problem of Change: A Tale of Two Conventions.*, 49 VICTORIA U. OF WELLINGTON L. REV. 447, 458 (2018) (explaining "Of the 29 North Atlantic Treaty Organization Member States, 28 did not attend; the Netherlands attended but voted against.").

[62] Crawford, *supra* note 61, at 457 (explaining that Russia "has stated that the Treaty will not change the 'reality in the field of strategic stability that mandates us to exercise utmost caution and responsibility with our evaluations of the future of nuclear disarmament'"). *See also* Naveed Siddiqui, *Pakistan not bound by treaty for prohibition of nuclear weapons: FO*, DAWN (Jan. 29, 2021), https://www.dawn.com/news/1604317/pakistan-not-bound-by-treaty-for-prohibition-of-nuclear-weapons-fo.

[63] Rietiker, *supra* note 46.

[64] Crawford, *supra* note 61, at 457-58 (explaining "All of the States that possess nuclear weapons, and all of their strategic military allies, either failed to attend the vote on the TPNW or voted against the Treaty.").

[65] TPNW, *supra* note 1.

are internationally recognized to be both the highest of accepted norms in society and obligatory to follow.[66] *Jus cogens* norms are obligatory and induce obligations *erga omnes*.[67] Such obligations are "owed to the international community as a whole, in which all states have a legal interest."[68] *Jus cogens* norms are preemptory because they are non-derogable.[69] A 2019 International Law Commission report provides a non-exhaustive list of current *jus cogens* norms:

> (a) The prohibition of aggression;
> (b) The prohibition of genocide;
> (c) The prohibition of crimes against humanity;
> (d) The basic rules of international humanitarian law;
> (e) The prohibition of racial discrimination and apartheid;
> (f) The prohibition of slavery;
> (g) The prohibition of torture;
> (h) The right of self-determination.[70]

As shown, the prohibition of aggression (prohibition of threat or use of force[71]), the prohibition of genocide, and the basic rules of IHL (including rules of proportionality of the attack, distinction between combatants and civilians, and the prohibition of causing unnecessary suffering to combatants[72]) are *jus cogens* norms.[73] The 1996 Opinion found unanimously that a threat or use of force with nuclear weapons that violates Article 2, paragraph 4 (prohibition of threat or use of force) of the U.N. Charter and does not meet all the requirements of Article 51 (self-defense), is unlawful, and unanimously that any threat or use of nuclear weapons must comply with IHL.[74] The ICJ further explained that "the

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[66] Vienna Convention on the Law of Treaties art. 53, 64, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[67] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5) (noting that obligations *erga omnes* "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character"). *See also* Int'l L. Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, ¶ 56, Conclusion 17 (2019) [hereinafter 2019 Int'l Law Comm'n Rep.].

[68] 2019 Int'l Law Comm'n Rep., *supra* note 67, at 145, Conclusion 17 (concluding also that, "Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts").

[69] *Id.* at Conclusion 2.

[70] *Id.* at Conclusion 23.

[71] *Id.* at Conclusion 23, Comment 5. *Treaties Conflicting with a Peremptory Norm of General International Law*, art. 37 (1963) Y.B. of the Int'l L. Comm'n 1966 Volume II, U.N. A/CN.4/SER.A/1966/Add.l, art. 50, Comment 1 (explaining the "law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.").

[72] *Id.* at Conclusion 23, Comment 8.

[73] *Id.* at Conclusion 23.

[74] General Assembly Advisory Opinion, *supra* note 1, at ¶ 95.

prohibition of genocide would be pertinent in this case if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such."[75]

While not directly addressed in the 1996 Opinion, the *jus cogens* norms of the prohibition of crimes against humanity and the prohibition of torture are also relevant regarding the legality of the threat or use of nuclear weapons. It is argued that the threat or use of nuclear weapons against human populations could violate both *jus cogens* norms.[76] As such, the prohibition of the threat or use of nuclear weapons is nearly on the short list of *jus cogens* norms. In other words, if the threat or use of nuclear weapons would violate a *jus cogens* norm in any case, the prohibition of the threat or use of nuclear weapons under any circumstances must also be accepted as a *jus cogens* norm.

Since the acceptance and recognition by a majority of, but not all, States is required to identify a *jus cogens* norm, the TPNW may be a sign of this evolving norm.[77] Again, the TPNW prohibits States Parties from the threat or use of nuclear weapons "under any circumstances" and acknowledges in its preamble that the use of nuclear weapons would violate IHL.[78] This language closes the *non liquet* that the 1996 Opinion left unresolved and, with further consensus, could lead to an established *jus cogens* norm.[79]

Notably, *jus cogens* norms are non-derogable.[80] For example, just as States countering a violation of the *jus cogens* norm of genocide cannot commit a counter-genocide, States countering a violation of the *jus cogens* norm of the prohibition of the use of nuclear weapons could not commit a counter-nuclear weapons attack.[81] Since there cannot be persistent objectors to *jus cogens* norms, if the *jus cogens* norm of the prohibition of the use of nuclear weapons evolved, no State could derogate from it. Thus, a new advisory opinion by the ICJ is necessary to reflect the evolving international legal obligation of States not to threaten to use or use nuclear weapons under any circumstances.

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[75] *Id.* at ¶ 26.

[76] *See, e.g.*, HRI, General Cmt. No. 14 (Art. 6), Twenty-third-session, 1984, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) at 188 (stating "6. The production, testing, possession, deployment and use of nuclear weapons should be prohibited and recognized as crimes against humanity."); DANIEL RIETIKER, HUMANIZATION OF ARMS CONTROL, PAVING THE WAY TO A WORLD FREE OF NUCLEAR WEAPONS 195 (2017) (arguing the use of nuclear weapons would amount to torture within the meaning . . . of Article 3 ECHR."); Julia Kapelańska-Pręgowska, *Freedom from Nuclear Weapons? IHRL and IHL Perspective vs The State-Centred Approach*, 14 THE AGE OF HUM. RTS. J., 137, 150 (2020) (explaining "Even if the use of a nuclear weapon did not result in an immediate loss of civilian life, it may be argued that long-term consequences from radiation etc. would be in violation of the prohibition of torture, or inhuman or degrading treatment.").

[77] TPNW, *supra* note 1; 2019 Int'l Law Comm'n Rep., *supra* note 67, at 143, Conclusion 7.

[78] TPNW, *supra* note 1.

[79] 2019 Int'l Law Comm'n Rep., *supra* note 67, at 143, Conclusion 7; General Assembly Advisory Opinion, *supra* note 1, at ¶ 105.

[80] 2019 Int'l Law Comm'n Rep., *supra* note 67, at 142, Conclusion 2.

[81] Int'l L. Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, Ch. IV, Art. 26, Cmt. 4 (explaining in a footnote: "As ICJ noted in its decision in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, "in no case could one breach of the Convention serve as an excuse for another" (Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997, p. 243, at p. 258, para. 35.")).

V. RUSSIAN PRESIDENT VLADIMIR PUTIN'S THREATS TO USE NUCLEAR WEAPONS

On February 24, 2022, Russia launched a full-scale invasion of Ukraine.[82] Directly before the invasion, Russian President Vladimir Putin released a speech targeted at anyone who may interfere:

> Now a few important, very important words for those who may be tempted to intervene in ongoing events from the outside. Whoever tries to interfere with us, and even more so to create threats to our country, to our people, should know that Russia's response will be immediate and will lead you to such consequences as you have never experienced in your history. We are ready for any development of events. All necessary decisions in this regard have been made. I hope that I will be heard.[83]

The international community viewed President Putin's statements as a threat to use nuclear weapons.[84] In an interview with Christiane Amanpour, Putin's spokesperson Dimitri Peskov would not rule out the use of nuclear weapons—specifically citing the *non liquet* the ICJ left open in its 1996 Opinion.[85] On March 14, 2022, U.N. Secretary-General Antonio Guterres said, "[t]he prospect of nuclear conflict, once unthinkable, is now back within the realm of possibility."[86]

In a nationally televised speech on September 21, 2022, President Putin, again referencing the *non liquet,* told the Russian people, "[w]hen the territorial integrity of our country is threatened, to protect Russia and our people, we will without reservation, use all the means at our disposal. This is not a bluff."[87] President Putin's conspicuous threats to use nuclear weapons to protect Russian territory came at a time when it was orchestrating sham referendums in four Russian-occupied, active war zones to acquire more hotly disputed territory.[88]

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[82] *See* sources cited *supra* note 8.

[83] Sekulow, *supra* note 9. *See also If you try to stop us, "you'll face consequences that you have never faced in your history"*, SKYNEWS (Feb. 24, 2022, 13:37 UK), https://news.sky.com/video/if-you-try-to-stop-us-youll-face-consequences-that-you-have-never-faced-in-your-history-12550243; Cohen, *supra* note 10; Dr. Patricia Lewis, *How likely is the use of nuclear weapons by Russia?*, Chatham House (Mar. 1, 2022), https://www.chathamhouse.org/2022/03/how-likely-use-nuclear-weapons-russia.

[84] Cohen, *supra* note 10.

[85] Christiane Amanpour (@amanpour), TWITTER (Mar. 22, 2022, 3:04 PM), https://twitter.com/amanpour/status/1506346172977491978?s=20&t=gBzKF1_6xCweU1IP5_4lcA. *See* McGee and Calzonetti *supra* note 12.

[86] Humeyra Pamuk, *U.N. chief: prospect of nuclear conflict back 'within realm of possibility' over Ukraine*, REUTERS (Mar. 14, 2022, 1:04 PM EDT), https://www.reuters.com/world/un-chief-says-prospect-nuclear-conflict-back-within-realm-possibility-over-2022-03-14/; Max Fisher, *As Russia Digs In, What's the Risk of Nuclear War? 'It's Not Zero.'*, THE NEW YORK TIMES (Mar. 16, 2022, Updated Mar. 22, 2022), https://www.nytimes.com/2022/03/16/world/europe/ukraine-russia-nuclear-war.amp.html?referringSource=articleShare&referringSource=articleShare.

[87] *'This Is Not a Bluff': Putin Threatens Nuclear Response in Ukraine War*, THE WALL STREET JOURNAL (Sept. 21, 2020, 5:40 AM) https://tinyurl.com/2p83fhxm.

[88] Jason Beaubien, et al., Occupied regions of Ukraine vote to join Russia in staged referendums, NPR (Sept. 27, 2022, 6:00 PM ET) https://www.npr.org/2022/09/27/1125322026/russia-ukraine-referendums.

Can the Russian Federation exercise its own manufactured threat to its sovereignty as an excuse for threatening to use or actually using nuclear weapons? Does a legal excuse for threatening to use or using nuclear weapons under any circumstances exist? To answer questions such as this, and to finally clarify the *non liquet*, a new advisory opinion on the legality of the threat or use of nuclear weapons is needed imminently.

VI. REQUESTING A NEW ADVISORY OPINION

The ICJ's advisory jurisdiction is available to five U.N. organs, fifteen specialized agencies and one related organization.[89] While the General Assembly or the Security Council can request an advisory opinion "on any legal question," other organs and specialized agencies can only request an opinion "on legal questions arising within the scope of their activities."[90] Also, while the ICJ explains that "each organ must, in the first place at least, determine its own jurisdiction," the ICJ ultimately determines whether the opinion requested relates to a question which arises within such agency's "scope of activities."[91] The ICJ also explains that "[i]n order to delineate the field of activity or the area of competence of an international organization, one must refer to the relevant rules of the organization and, in the first place, to its constitution."[92] Thus, a question posed to the ICJ regarding the legality of the threat or use of nuclear weapons would differ depending on the requesting agency's mandate and must be carefully crafted to survive rigorous review.

It is important to recall that a second ICJ Advisory Opinion was requested on the *Legality of The Use by A State of Nuclear Weapons In Armed Conflict* by the World Health Organization ("WHO"), but the ICJ decided by an 11-3 vote that it could not give the Opinion because the question posed was not within the WHO's "scope of activities."[93] The WHO asked the ICJ to give an Opinion on the following question: "In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?"[94] The ICJ said the WHO was authorized "to deal with the effects on health of the use of nuclear weapons, or of any other hazardous activity, and to take preventive measures aimed at protecting the health of populations in the event of such weapons being used or such activities engaged in."[95] However, the ICJ explained that the WHO's question related "*not to the effects* of the use of nuclear weapons on health, but to the *legality* of the use of such weapons *in view of their health and environmental effects*."[96] The ICJ stated further "[w]hether nuclear weapons are used legally or illegally, their effects on health would

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[89] *Advisory Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/en/advisory-jurisdiction (last visited Oct. 28, 2021).

[90] U.N. Charter art. 96.

[91] Legality of the Use by A State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, ¶ 29 (July 8) [hereinafter WHO Advisory Opinion]; MAHASEN MOHAMMAD ALJAGHOUB, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT OF JUSTICE 1946 – 2005 52 (Springer Science & Business Media 2007).

[92] WHO Advisory Opinion, *supra* note 91, at ¶ 19.

[93] *Id.* at ¶¶ 31 & 32.

[94] *Id.* at ¶ 1.

[95] *Id.* at ¶ 21.

[96] *Id.*

be the same."[97] However, this distinction and conclusion are artificial and the WHO should request a new advisory opinion on this issue with a rephrased question.

While ICJ advisory opinions are nonbinding, they allow organs, specialized agencies, and related organizations, to be proactive and put States on notice of current law.[98] As such, nothing could be more prudent than a request for an updated advisory opinion on the legality of the threat or use of nuclear weapons by certain organs and as it relates to the work of specialized agencies and related organizations.

VII. CONCLUSION

Any argument by NWS that the threat or use of nuclear weapons does not and would not shock the conscience of humankind falls far too short of basic considerations for human dignity. Unfortunately, as of the 1996 Opinion, international law valued state security over human security. These outmoded values are being perpetuated by the Russian Federation as it continues its invasion of Ukraine.[99] The U.N. must not stand by waiting for threats of use to transition to actual use until it acts: "This is not a bluff."[100]

A new advisory opinion should be requested by authorized organs, specialized agencies, or related organizations, to pursue the status of the evolving law on the legality of the threat or use of nuclear weapons. Since the ICJ issued its 1996 Opinion over twenty-five years ago, the 2017 TPNW entered into force, more NWFZs have been established, and the prohibition of the threat or use of nuclear weapons under any circumstances has evolved. A new advisory opinion on the legality of the threat or use of nuclear weapons would help authorized organs, specialized agencies, or related organizations, stay abreast of the current law and pursue their efforts to achieve a world without nuclear weapons.

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[97] *Id.* at ¶ 22.
[98] *Advisory Jurisdiction*, *supra* note 89.
[99] *See supra* Part V.
[100] *See supra* note 11.


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VICTORS' JUSTICE? MITIGATION OR FAÇADE OF THE CONVICT & JAIL MISSION OF INTERNATIONAL CRIMINAL TRIBUNALS

*Stanisław Krawiecki**

ABSTRACT

This piece challenges the sentencing practice of international criminal tribunals. It argues that the sentencing phases of their proceedings reveal a victors' justice permeating international criminal justice – a victors' justice which utilizes tribunals to not to judge but primarily to punish and convict losers. Specifically, this article uses the example of mitigating circumstances, which do not actually mitigate sentences: either because the tribunals reject their mitigating value, or because the way they commute the resulting sentences does little to actually mitigate the punishment imposed. I highlight cases of defendants whose personal circumstances before and during the atrocities committed might warrant some mercy at the sentencing stage – mercy often denied. The article begins with a seminal case of the Special Court for Sierra Leone, arguing it used mitigation as a façade behind which victors' justice and drive to convict are hidden; and juxtaposes the approaches of ICTR, ICTY, ICC. Therefore, I ask: Why is mitigation so often an empty statement? More attention needs to be paid to the sentencing stage to identify variables at work and see if recent positive decisions will with time prevail over the questionable, thereby fostering consistent fairness in international justice.

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TABLE OF CONTENTS

I. INTRODUCTION

International criminal law ('ICL'), as the branch of public international law concerned with prosecution of individual defendants, started as a project in Nuremberg and Tokyo. The former leaders of allied Germany and Japan were prosecuted, tried, and overwhelmingly convicted for their acts in starting and participating in WWII. What the leaders had done was unimaginable and was an insult to the concept of humanity. Since then, the trials have drawn considerable criticism because they were performed based on laws retroactively applied to the defendants' actions only after their acts were committed. For that reason, the trials are sometimes deemed victors' justice: trying the losers (of the war) under the laws dictated by the winners—substantive victors' justice.[1] That concern, however, was secondary, because it was clear that what they did anyway violated any conception of customary law. What was perhaps more problematic was that they were tried *by* the winners. Procedurally, the United States and the Allies set up and financed the tribunals and dictated their goals, rules, and organization.[2] However deserving the defendants were of punishment, the procedure that was followed was clearly dictated by the victors.

Victors' justice and the law are concepts in tension with each other: The term 'victors' justice' suggests a certain bias within the law or its practice—outcomes dictated by one side.[3] This paper uses the term 'victors' justice' in the same pejorative way in critically reading the practice of ICL from the 1990s to the present. It asks whether contemporary ICL has escaped the victors' justice framework of Tokyo and Nuremberg. It still tries and convicts individuals responsible for horrible atrocities. Yes, it does increasingly rest on foundations (*vide* Rome Statute) agreed upon *ex ante*—before the trials and before the acts tried are being committed. But in doing that, the procedure still seems to be pursuing the goals of the winners, and of convicting and punishing the losers, often prioritizing them over equitable application of the law as well as other legitimate goals of criminal law as a whole: such as rehabilitation, transition, or victims' justice.[4] This article scrutinizes sentencing in international criminal tribunals to attempt to assess whether the goal pursued at the sentencing stage goes beyond punishment to satisfy the victors. After discussing the prosecution of Issa Sesay by the Special Court for Sierra Leone, the paper first concentrates on the International Criminal Tribunal for Rwanda ('ICTR') and the International Criminal Tribunal for the Former Yugoslavia ('ICTY'). It chooses the two biggest temporary international criminal tribunals

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[1] *See, e.g.,* DANILO ZOLO, VICTORS' JUSTICE: FROM NUREMBERG TO BAGHDAD (M. W. Weir trans., Verso 2009) (2020); RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (1971).

[2] WILLIAM SCHABAS, *Victors Justice? Selecting Targets for Prosecution*, *in* UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS (William Schabas ed., 2012). There is also a third concern: selectivity of targets for prosecution, which, if applied to the tribunals analyzed in this paper, could expand the idea that once selected for prosecution, an international criminal defendant is simply destined to be convicted and harshly sentenced. *Id*.

[3] *Id.*

[4] *See, e.g.*, ROBERT CRYER, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 35-41 (4th ed. 2019).

because their jurisprudence and lessons were heavily drawn on when creating the International Criminal Court ('ICC'). The ICC, which is the subject of the last section, is analyzed to briefly inquire whether anything appears to have been changed or systematized through its establishment or jurisprudence.

More specifically, this paper focuses on mitigation in international criminal sentencing, which can illuminate values actually pursued by tribunals.[5] The argument is that mitigating circumstances are often ignored by courts when sentencing international criminal defendants, either: (1) by deeming certain circumstances not enough warrant mitigating the punishment; or (2) by accepting a factor, but then handing down a sentence which in practice is not actually mitigated.[6] It appears that the legitimacy for the victors of the tribunals as a purely *punishment* mechanism[7] disguised as a court of justice might drive a lot of their sentencing practice.

II. SPECIAL COURT FOR SIERRA LEONE (*SESAY*)

The big question underlying this paper—is International Criminal Law a kind of victors' justice—has been bothering me for some time. It is based on my perception of the international criminal tribunals, the coverage (celebrating indictments, celebrating guilty verdicts[8]), and my understanding of public opinion. Law students and young professionals think prosecuting at the ICC is the holy job. But I started to narrow it down to a particular sub-topic within international criminal jurisprudence after learning more about the practice of the Special Court of Sierra Leone.

One of the Special Court's most significant exercises of authority was the prosecution of Issa Sesay. Sesay was the last leader of the Revolutionary United Front (RUF) and served as leader when RUF signed the peace agreement in 2002. He was indicted by the Special Court for Sierra Leone in 2003. He was convicted on thirteen counts, including extermination, murder, and sexual slavery, in March 2009, with the sentence handed down only a month later.[9]

Sesay himself had been forcibly recruited into RUF as a teenager (nineteen years old), and as effectively the last person in control of RUF, he was the one to finalize the peace agreement. Those two facts were argued by the defense as mitigating circumstances during

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[5] *See, e.g.*, Alan Tieger, *Remorse and Mitigation in the International Criminal Tribunal for the Former Yugoslavia*, 16 LEIDEN J. INT'L L. 777, 786 (2003).

[6] The only empirical study analyzing whether mitigation actually reduces sentences focuses on the ICTY and finds that '[g]iven all other factors, a sentence is on average reduced by 0.6 years (7 months) for each mitigating factor'. Barbora. Holá et al., *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT'L L. 79, 94 (2009).

[7] Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12IND. INT'L & COMP. L. REV. 53, 60 & 74 (2001).

[8] *See, e.g.*, *ICC delivers first ever verdict in Thomas Lubanga trial*, BBC (Mar. 14, 2012), https://www.bbc.com/news/world-africa-17356339.

[9] Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Judgment, IX.1 (Special Court for Sierra Leone Oct. 26, 2009).

the sentencing stage[10]—where Sesay was facing a real possibility of life imprisonment.[11] The court first found that while committing all the offenses Sesay was convicted for, his conduct reached the highest level of gravity.[12] Hence, mitigating circumstances were key if he were to avoid a life sentence.

Indeed, several mitigating circumstances were considered, in theory pursuant to the court's general approach: That each circumstance must only be proven by a balance of probabilities, and they do not need to be related to the offenses committed.[13] However, the court's holdings on the circumstances were far from being as permissive as that standard would suggest. The sentence was mitigated in theory but was substantially the same in practice.

First, the court did not consider Sesay's own forced recruitment into RUF at age of nineteen as mitigating, arguing that he could have easily chosen another path (than the one that led him to leadership) once already in RUF.[14] While not wrong on the existence of that *possibility*, the court's holding seems flawed. First, mitigating circumstances are supposed to be established based on a balance of probabilities. Is it more likely than not that someone forced to join an armed group as a young person would have their values disturbed, feel pressure to showcase their ability within the only community they see, and be scared that lack of commitment to its cause would result in punishment? Is it more likely than not that a child soldier does not see another option but rising through the ranks? If the answer is yes, then it should be taken into consideration, even if it cannot mitigate *much* of what Sesay did. After all, if the mitigating effect of forced recruitment at nineteen is completely rejected, the implication is that someone forcibly recruited at nineteen has the same chance to make their own choices as someone who voluntarily joins, let alone co-founds, a terrorist organization.

Second, the court might have forgotten that its own standard does not require a mitigating circumstance to be related to an offense.[15] It is possible that the court considered Sesay's own forced recruitment to potentially mitigate mainly him leading child recruitment later on, in addition to his actions as a leader. But anyone recruited to RUF at nineteen is simply less likely to properly distinguish right or wrong, either in their mind or in their actions—and thus is probably less deserving of *full* punishment when considering any crime.

Furthermore, the Court also declined to find that Sesay helped civilians, highlighting it may have happened at times but was irregular and generally not a driver of Sesay's actions—though the court's discussion was far from exhaustive.[16]

However, the court did find that Sesay's facilitation of the peace process was established, on balance, and warranted some mitigation.[17] The main thrust of this paper is related as much to the court finding a mitigating circumstance as to rejecting all the previous

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[10] Prosecutor v. Sesay et al., Case No. SCSL-04-15-T Sentencing Judgment, 2.2. (Special Court for Sierra Leone Apr. 8, 2009) [hereinafter 'Sesay Sentencing Judgment'].

[11] Statute of the Special Court for Sierra Leone, art. 19, Aug. 14, 2000.

[12] *Sesay,* Sentencing Judgment, ¶ ¶ 212, 215, 218.

[13] *Id.* ¶ 28.

[14] *Id.* ¶ 220

[15] *Id.* ¶ 28.

[16] *Id.* ¶ 226.

[17] *Id.* ¶ 228.

ones. As a result of finding a peace facilitation to be mitigating, the court did not sentence Sesay to life despite finding that his conduct was of the highest level of gravity.

Thus, likely, the finding of a mitigating circumstance resulted in a conviction lower than life. Sesay was convicted to various prison sentences, served concurrently, amounting to a total of fifty-two years.[18] Now, is this really a *mitigated* sentence? Sesay was born in 1970, indicted in 2003, and convicted in 2009. Counting his sentence from 2003, fifty-two years in prison mean imprisonment until the age of eighty-five. That is effectively *imprisonment for life*.

Was this not just a theoretical reduction in sentence, handed down to preserve a semblance of justice for everyone — while satisfying the hunger of those seeking retribution by effectively keeping Sesay in prison until a probable end of his life? And, who was seeking that retribution? West? The court pretending and punishing in full at the same time, without mitigation in practice, might be explained by Sesay being the highest RUF official ever indicted, tried, convicted, and sentenced. So, he might have been punished as a proxy for the entire RUF.[19] Some may argue that is desired: to deter to the fullest anyone who might ever have any decision-making power. In addition, some may argue that someone must be punished for RUF's conduct to the maximum extent available to bring justice to the victims. Still, I argue that is not the aim of law and 'international justice.' Unless, of course, it is *victors' justice*.

The following sections identify this pattern, or at least similar results within inconsistent decisions, by analyzing the approach to and use of mitigating circumstances in chosen cases of three international criminal tribunals. For law to be equal and fair, its application should be uniform. This also applies to the sentencing stage, where consistent sentences and consistency of the analysis should be a priority. However, factors potentially reducing a sentence — '*mitigating circumstances*'— are often defined in broad terms and left for the discretion of trial judges. For example, Article 23 of the ICTY Statute states only that 'individual circumstances' should be taken into account by the Trial Chamber in imposing sentences.[20] ICTY's Rule of Procedure and Evidence (ICTR's rule 101 is almost identical) goes only half a step further, calling on the Trial Chamber to take into account "any mitigating circumstances including substantial cooperation with the Prosecutor by the convicted person before or after conviction."[21] Thus, many potential mitigating circumstances are not enumerated, leaving the decisions on whether a factor is mitigating to the judges. Moreover, the rules do not even provide guidance for those discretionary decisions — for example, the goals to be served by finding mitigating circumstances are not defined. Hence, it is perhaps not surprising, as the analysis below shows, that factors are

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[18] *Id.*, Disposition.

[19] War Don Don (Racing Horse Productions 2010) (*see,* e.g., statements of the defense counsel Wayne Jordash).

[20] Statute of the International Criminal Tribunal for the former Yugoslavia art. 23(1), *in* Report of the Secretary-General Pursuantto Paragraph 2 of Security Council Resolution 808, UN Doc. S/25704 (1993). The ICTR Statute is almost identical. *See* Statute of the International Tribunal for Rwanda, art 23, *in* S.C. Res. 955, U.N. SCOR, 49th Year, Res. And Dec., at 15, UN Doc. SINF150 (1994).

[21] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, U.N. Doc. IT/32/Rev.7 Rule 101, March 14, 1994, as amended. Rule 101 of the Rwanda Tribunal is almost identical. *See* Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, U.N. Doc. ITR/3/REV.1 Rule 101, June 29, 1995, as amended.

accepted and rejected without regards to whether they: (1) mitigate the need for retribution by speaking to a defendant's culpability; or (2) that speak to a defendant's rehabilitable character.[22] The following sections concentrate on highlighting precisely those shortcomings, through selected cases at the ICTR, ICTY, and ICC. The ICTY and ICTR were hybrid tribunals established with similar ideas, which contributed to the evolution of international criminal and informed the crafting of the ICC. Despite the limited scope, the inter-tribunal dialogue helps paint both a static and a dynamic picture of the use of mitigating circumstances in ICL.

III. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

At the ICTR, trial judges enjoyed considerable discretion in deciding sentences for convicts; they also usually did so as part of the same proceeding as the case in chief.[23] Separate sentencing proceedings are, for the most part, a post-ICTR development.[24] Moreover, the ICTR Statute does not rank the various crimes falling under its jurisdiction and thereby the sentences for each of them.[25] Hence, in theory, the same sentences — up to life imprisonment — are applicable for each crime. Indeed, life imprisonment is the starting point for many of the analyses, especially of non-guilty-plea convictions.[26] Thus, mitigating (as well as aggravating) factors are implicitly set up to play a crucial role in a system where individualization of punishment and adjudged gravity of a given defendant's conduct governs.[27] However, or perhaps therefore, there is a lot of inconsistency in individualization of sentences and application of mitigating factors: whether they are accepted, whether they really mitigate, and potentially why.

First, the *Kambanda* case best illustrates the challenges faced by defendants attempting to assert mitigating circumstances. It portrays the two main tensions which this paper attempts to highlight — Kambanda's sentence is not ultimately mitigated, but it is unclear whether because mitigating factors are substantively not enough to be mitigating factors in this case, or because in practice their mitigating effect is not sufficient in the eyes of the judges. Kambanda was the Prime Minister and held various high-level official positions during the 1994 Genocide. He was convicted of crimes against humanity (murder, extermination) and genocide.[28] The only mitigating circumstances the tribunal considered were Kambanda's guilty plea and cooperation with prosecution. However, the gravity of his offenses, which were extreme due to Kambanda's position of power, negate the mitigating

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[22] Jean Galbraith, *The Good Deeds of International Criminal Defendants*, 25 LEIDEN J. INT'L L. 799, 800 (2012).

[23] Keller, *supra* note 7, at 66.

[24] *Id.*

[25] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgement and Sentence, ¶ 449 (Int'l Crim. Trib. for Rwanda Dec. 6, 1999) [hereinafter 'Rutaganda'].

[26] *Id.* ¶ 448.

[27] *Id.* ¶ 450.

[28] Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, ¶ 40 (Int'l Crim. Trib. for Rwanda Sep. 4, 1998) [hereinafter 'Kambanda'].

factors in the judges' eyes.[29] Hence, Kambanda received the highest sentence possible: life imprisonment.[30]

A few potential issues arise out of this decision. First, it is not fully clear whether the plea and cooperation were mitigating factors. Second, if that is a correct reading, was that appropriate? Although I would argue that in principle, we should indeed be concerned more with mitigating factors relating to culpability of the defendant. Keller highlights the judicial economy benefits of cooperation and guilty plea as well as the real effect a plea can have on other perpetrators or witnesses coming forward.[31] Not mitigating Kambanda's sentence, then, might have missed a chance and discouraged others from coming forward. Keller, though, implicitly agrees with Treiber that harsh punishment is preferred, especially towards the most high-ranking officials involved in the atrocities. Specifically, since Rwandan domestic courts have capital punishment, but the ICTR cannot impose it, going below life imprisonment would go too far below the 'preferred' sentence for the worst criminals — the argument goes.[32] However, Keller's reasoning that the life sentence had to be imposed to preserve legitimacy of ICTR in Rwanda has two problems — especially if it was indeed the rationale guiding the trial judges in this case. First, mitigating factors should always mitigate the same, regardless of tribunal politics, if international adjudication is to be fair to all defendants. Second, a blank assertion by a white male Western lawyer and professor that a life sentence is the most 'legitimate' punishment begs the question: is this law or is this victors' justice? Whose 'needs for justice' are satisfied by ignoring mitigating factors (or downplaying them) for harsh punishment? The Rwandan people,[33] and if so, does Mr. Keller really know this? Or the West's?

The ICTR demonstrated further incongruence, or at least unexplained logic, in the two issues permeating *Kambanda*: are mitigating factors respected and is there actual mitigation?

First, 'good deeds'[34] are the actions of defendants to help victims or otherwise alleviate the effects of atrocities. But they were treated inconsistently by the ICTR. In *Serushago* and *Serugendo*, the defendants' actions to help victims were recognized as mitigating factors and appeared to decrease their ultimate sentences. In *Serushago*, the defendant was convicted of genocide and crime against humanity (murder). Apart from a guilty plea, his assistance to individual victims as well as politicized upbringing were accepted as mitigating factors.[35] Politicization, though not elaborated upon, is one of the external pressure factors, which might be said to reduce culpability — a defendant, politicized in his early years, had a lower chance to form a proper moral backbone. Assistance to individual victims is notable in light of the following comparison. Though certainly limited and not offsetting the harm to other

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[29] *Id.* ¶ 62.

[30] *Id.* Verdict.

[31] Keller, *supra* note 7, at 59.

[32] Keller, *supra* note 7, at 60.

[33] A similar question on whose conceptions of justice should prevail, local or western, though on an opposite theme—no capital punishment at the ICTR while it existed in domestic Rwandan courts—was posed by Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13(3) EUR. J. INT'L L. 561, 583 (2002).

[34] 'good deeds' is a term used by Galbraith, *supra* note 22.

[35] Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, ¶¶ 36-42 (Int'l Crim. Trib. for Rwanda Feb. 5, 1999) [hereinafter 'Serushago].

victims caused by the defendant, it contributed to the tribunal imposing only a fifteen-year sentence.[36]

Mitigation in *Serugendo* was even more powerful. The tribunal underlined the inherently aggravating nature of a genocide and crimes against humanity conviction but providing assistance to *just one* victim was accepted as a mitigating factor.[37] When combined with a guilty plea and remorse, it resulted in a sentence at the bottom of the prosecution-recommended range (though not below it): six years.[38]

However, the *Munyakazi* and *Muvunyi* decisions provide a stark contrast. Helping several Tutsis was not enough to even be considered by the ICTR as a mitigating factor for Munyakazi. The tribunal in that case reasoned that his help was 'selective'[39] — be to prevent mitigation. Perhaps the best, unstated, explanation would be motivation-based: that when help is not disinterested, it will not mitigate — Munyakazi appeared to only help those to whom he had family ties.[40] But it still does not explain why helping several people is worse than helping just one, as Serguendo did. It also does not explain why the tribunal mixes liability and sentencing: any help, especially fairly widespread, should be taken into account in some way at the sentencing stage, where the defendant's guilt is no longer in question. The trial chamber in *Muvunyi* followed *Munyakazi*'s[41] The comparison of the above four cases demonstrates inconsistency and potentially unequal treatment of international criminal defendants through discretionary denial of mitigation.

However, even if helping victims or external pressure is accepted as a mitigating factor— does it really mitigate the final sentence? We will never know for certain because the judgments do not quantify the effect of mitigating factors on their starting-point sentence idea.[42] Nevertheless, because we know that the ICTR underlined life imprisonment as a starting point in several cases, and in others prosecution recommendations are highlighted, we can hypothesize.

In *Serushago* it seemed like all the mitigating factors (plea, cooperation, assistance to individual victims, politicized upbringing) impacted the sentence.[43] Despite convictions for genocide and crimes against humanity, the tribunal seemingly saw rehabilitative potential through the factors and therefore opted for fifteen years of imprisonment.

Nevertheless, several other cases resemble Sesay and a mitigation on paper with full punishment maintained in practice. First, in *Rutaganda*, the defendant was sentenced to life imprisonment for genocide and crimes against humanity of extermination and murder.[44] That

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[36] *Id.* ¶ 39 & Verdict.

[37] Prosecutor v. Serugendo, Case No. ICTR-2005-84-I, Judgement and Sentence, ¶¶ 68-69 (Int'l Crim. Trib. for Rwanda Jun. 12, 2006).

[38] *Id.* ¶ 79 & Disposition.

[39] Prosecutor v. Munyakazi, Case No. ICTR-97-36A-T, Judgement, ¶ 520 (Int'l Crim. Trib. for Rwanda Jul. 5, 2010).

[40] Galbraith, *supra* note 22, at 803.

[41] Prosecutor v. Muvunyi, Case No. ICTR-00-55A-T, Judgement, ¶¶147, 150–51 (Int'l Crim. Trib. for Rwanda Feb. 11, 2010).

[42] For an attempt at an empirical quantitative analysis, *see* Hola, *supra* note 6 (only discussing the ICTY).

[43] Serushago, ¶¶ 36-42.

[44] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, Verdict (Int'l Crim. Trib. for Rwanda Dec. 6, 1999).

was despite mitigating circumstances including assistance to two Tutsi families (as well as deteriorating health condition).[45]

Moreover, the case of *Ntawukililyayo* demonstrates the fact that the ICTR, like SCSL, might not have understood — nor wanted to understand — the purpose of mitigation at the sentencing stage. The defendant was found guilty of genocide based on ordering and aiding and abetting, with his conduct found to have been of an extreme gravity, and the prosecution requested a life sentence.[46] However, the defendant had worked as a teacher before the genocide. The tribunal found that through his work he had been contributing to the *easing* of ethnic tensions and that his involvement in the genocide was partly due to external pressures on his person.[47] His help to non-related Tutsis was also accepted as a mitigating factor.[48] As a result — or rather *nevertheless* — the tribunal imposed twenty-five years instead of life imprisonment. This sentence, though, appears to be lacking in practical mitigation. Being condemned to twenty-five years in prison at sixty-eight years old is effectively a life sentence anyway. Like in *Sesay*, the result appears to be satisfying the hunger of the victors to keep the 'devil' in prison until the end of his years, while painting a semblance of humanity and mercy by the victors.

IV. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

A similar two-level tension between mitigation and punishment can be observed in the ICTY jurisprudence. First, the ICTY took a way-too-narrow approach to whether an individual circumstance can qualify as a mitigating factor. In *Kunarac,* defendant Zoran Vukovic was convicted of rape.[49] For sentencing purposes, the defense introduced evidence of Vukovic having helped other Bosnian victims escape the killings. However, the tribunal held those acts could not count as mitigating circumstances because they were not related to the offense at hand.[50] That is a very harsh approach to mitigation. Rape is an atrocious crime — that should not be understated. But if we are ever going to mitigate someone's sentence, it should serve to encourage acts that reduce the overall effects of the broad atrocity. Of course, Mr. Vukovic did not save others from rape: he participated in it. If a goal of punishment is deterrence, then another goal should encourage socially beneficial conduct even by criminals who had already committed their crimes. Moreover, the overall rehabilitative potential of a defendant is underestimated if only factors relating to the offense convicted for are considered.

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[45] *Id.* ¶¶ 153-55.

[46] Prosecutor v. Ntawukulilyayo, Case No. ICTR-05-82-T, Judgment and Sentence, ¶468 (Int'l Crim. Trib. for Rwanda Aug. 3, 2010).

[47] *Id.* ¶ 474.

[48] *Id.* ¶ 475.

[49] Prosecutor v. Kunarac et al., Case No. IT-96-23 & IT-96-23/1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jun. 12, 2002).

[50] *Id.* ¶ 408. For a different approach, more systematic and more permissive, *see* Prosecutor v. Krajišnik, Case No. IT-00-39-T, Judgement, ¶ 1162 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006). There, the ICTY accepted selective assistance that saves lives or alleviates suffering of victims can be a mitigating factor—limited, however, if the defendant was in position of power to prevent the acts in the first place. *Id.* That still appears to mix sentencing with responsibility—and at least illustrates the deep inconsistency and unequal treatment of defendants.

However, the ICTY also showed examples of actual mitigation in practice. In *Erdemovic*, the defendant was found to have several mitigating circumstances working in his favor: showing remorse, admitting to crimes, as well as operating under duress (external pressure). Thus, he was deemed ripe for reform/rehabilitation, and only sentenced to five years in prison.[51] Nevertheless, this judgment was heavily criticized by some practitioners and scholars for not reflecting the gravity of offenses.[52] That would suggest aspirations by certain segments of the Western legal sphere to usurp the role of determining what punishments are sufficient for certain offenses, even by criminals who have shown considerable remorse and limited the harm done to victims by the atrocities in which the defendants participated.

V. INTERNATIONAL CRIMINAL COURT: CHANGE?

Has the ICC improved the approach to punishment and the use of mitigation circumstances? Some progress has been made—at least in terms of uniformity—but, unfortunately, less progress has been made in terms of sentencing still operating as a tool of victors' justice.

The establishment of the ICC was hailed as a milestone in international criminal law.[53] Now, temporary regional criminal tribunals, established only *in response* to atrocities, could become an exception in favor of a regular, *ex ante* world-wide jurisdiction — to which countries could agree *before* their citizens would become subject to its jurisdiction and judgments.

However, that did create a problem: Not everyone would agree to cede criminal, coercive powers, from national courts to such a tribunal in a general and preemptive sense.[54] For example, neither Azerbaijan nor Armenia ratified ICC's jurisdiction, so despite a long-standing, ethnically-loaded conflicts — just as the conflicts that contributed to the rise of ICTR and ICTY — their leaders are likely not subject to ICC's jurisdiction for acts during that conflict. This, in turn, limits the global deterrence power of international criminal law and leaves individuals such as Azerbaijani president Aliyev virtually untouchable. Moreover, a collateral consequence was that of who agreed to be judged at the ICC. To date, the court has exclusively convicted Africans.[55] Though that appears to be changing with the 2021 opening of an investigation on the Situation in the State of Palestine,[56] the first twenty-odd

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[51] Prosecutor v. Erdemovi, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶16 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

[52] *See, e.g.*, Keller, *supra* note 7, at 63.

[53] *See, e.g.,* statement by Ban Ki-moon, then Secretary-General of UN, in 2008: "The creation of the ICC is unquestionably one of the major achievements of international law during the past century." (Jul. 17, 2008), https://news.un.org/en/story/2008/07/266572-international-criminal-court-legal-milestone-ban-says-anniversary.

[54] *See* The State Parties to the Rome Statute, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

[55] Claire Klobucista, *The Role of the International Criminal* Court, COUNCIL ON FOREIGN RELATIONS (Mar. 28, 2022), https://www.cfr.org/backgrounder/role-international-criminal-court ("The ICC has indicted more than forty individuals, all from African countries").

[56] Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine (Mar. 3, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine.

years of the functioning of the ICC suggest that on a higher level, the issues of West-imposed idea of justice might not have disappeared.

Nevertheless, the ICC did emerge with several substantial alterations and with an understanding that previous tribunals might have been imperfect — especially procedurally and regarding treatment of defendants.[57] Thus, the ICC was an attempt to start a new, more forgiving, rehabilitative, or perhaps even 'transitional' era, with softer penalties and increased focus on victim's voices as opposed to pure retribution.[58] The procedural shift appears to have had an effect on sentencing, but only to a limited extent — so more debate and work in this area is needed.

First, in theory, the ICC undertook a more lenient approach, recognizing that retribution for the sake of it perhaps should not be the governing principle of international criminal law; and that long non-life sentences are in practice life sentences anyway — at least implicitly. The Rome Statute and rules of the court have made a life sentence applicable only in extraordinary circumstances, based on the extreme gravity of the crimes and the individual circumstances of the convicted person.[59] Otherwise, the available prison sentence is limited to thirty years — thus making the repetition of Sesay less likely.[60]

In practice, some cases appear to show the ICC indeed brought a shift of attitude. For example, in *Katanga*, mitigation appeared to be real. The defendant's sentence was *mitigated*, or reduced, from twenty-two to twenty-five requested by the prosecution[61] to ten to twelve years[62] based on the demobilization of child soldiers despite not establishing the defendant's participation in the peace process.[63] The tangible effect and recency of that decision (2014) provides hope for the future. It provides hope that the ICC project is indeed attempting to depart from a victors' justice model of ICL — at least at the sentencing stage, recognizing that harshest punishment is not always the victim community's priority nor conducive to international justice, whatever that means.

However, a couple other cases suggest that the old sentiment to punish while preserving a semblance of justice is alive. First, in *Bosco Ntaganda*, more recent than *Katanga*, the defendant's 'good deeds' were rejected and not treated as mitigating at all.[64] The rationale was similar to the implied reasons in *Munyakazi*: the defendant's motivations for their actions in helping victims.[65] Ntaganda had been saving the lives of potential victims. However, because he appeared to be using the same saved boys/men as his soldiers, the actions were

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[57] *See, e.g.*, Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10(1) EJIL 144 (1999).

[58] *See, e.g.*, Bridie McAsey, *Victim Participation at the International Criminal Court and Its Impact on Procedural Fairness*, 18 AUSTL. INT'L L. J. 105 (2011).

[59] Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2842, Judgment pursuant to Article 74 of the Statute, ¶ 94 (Mar. 14, 2012).

[60] Rome Statute of the International Criminal Court, art. 77, Jul. 17, 1998, 2187 U.N.T.S. 38544.

[61] Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on Sentence pursuant to article 76 of the Statute, ¶ 141 (May 23, 2014).

[62] *Id.* ¶¶ 146-47.

[63] *Id.* ¶ 115.

[64] Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06 A3, Judgment on the appeal of Mr Bosco Ntaganda against the decision of Trial Chamber VI of 7 November 2019 entitled 'Sentencing judgment,' ¶ 157 (Mar. 30, 2021).

[65] *Id.* ¶ 153.

deemed aimed at commission of further crimes (such as child militarization or simply using the soldiers for crimes) — and thus not mitigating.[66] Although logical on its face, this analysis might again be missing the point of mitigation at the sentencing stage. This occurred after the defendant's guilt had been established; why should motivations be assumed based on some other actions, even if related to the potentially mitigating deeds? Saving lives should mitigate, even if in the end only somewhat, despite any further crimes. Ntaganda had already been convicted for the crimes. Hence, there is no reason to hold them against him for the second time and refuse to recognize some positive activity—even if modest in relation to the criminal conduct.

Second, even when circumstances are recognized as mitigating, they appear to not really mitigate the sentence in practice. Instead, they provide a semblance of procedural justice in a case where the defendant is punished as an example — and perhaps as a proxy. Having been convicted on sixty-one counts, including crimes against humanity, war crimes, child recruitment, Ongwen plead his own forced recruitment by the Lord Resistance Army at age of only nine. It was accepted as a mitigating factor.[67] Logically, since such an event imposes extreme pressure on a yet-unformed mind. However, even before handing down the sentence, the court was already preparing for what was to come, highlighting that most others recruited as children did not rise in ranks as Ongwen did, and that no-one forced Ongwen to commit his crimes once he rose up the ranks.[68] However, (1) that does not mean others did not try to rise in ranks; and (2) no-one actively forced Ongwen at the time, perhaps. Does that mean that being recruited as a child soldier at nine-years-old does not have a lingering effect on one's mind and thus culpability? The ICC handed down a twenty-five-year sentence.[69] That sentence was indeed not the exceptional penalty of life imprisonment; but not much less than the otherwise maximum of thirty years and within the twenty to thirty years bracket requested by the prosecution.[70] Is that unquestionably mitigation? Unless life imprisonment was a real possibility in this case, twenty-five years is virtually the maximum sentence despite powerful mitigating factors.

Thus, this paper has now looped back to *Sesay*. Defendant's individual circumstances were accepted as mitigating, providing a semblance of justice. However, in reality, an almost maximum punishment was handed down — perhaps in pursuit of *victors' justice*. Moreover, similarly to Sesay, a direct and specific explanation might be that Ongwen was on trial and punished as a proxy for the whole LRA, being the highest official captured—with Joseph Kony on the run.[71]

VI. CONCLUSION

Overall, this paper attempts to open a new angle of discussion about the processes of international criminal justice by highlighting issues concerning mitigation in sentencing.

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[66] *Id*.
[67] Prosecutor v. Ongwen, Case No. ICC-02/04-01/15, Sentence, ¶¶ 87-88 (May 6, 2021).
[68] *Id.* ¶¶ 85-86.
[69] *Id.* ¶¶ 387-391.
[70] *Id*.
[71] Julian Hattem, *Joseph Kony is still at large. Here's why the U.S. and Uganda were willing to give up the hunt.* THE WASHINGTON POST (Apr. 22, 2017, 7:00 AM).

International criminal defendants are too often not only tried, but also used at international criminal tribunals. Used, because too often they seem to serve the goals of merciless retribution and political legitimacy of tribunals set up to convict and punish individuals deemed enemies of humanity. That is sometimes accomplished by not accepting legitimately mitigating individual circumstances as mitigating factors for purposes of sentencing. Or, even more interestingly, mitigating factors are accepted as such, but the resulting sentences are mitigated only in theory, not in practice, still imposing close to the maximum available sentence or even what effectively are life sentences. That kind of justice, I argue, is victors' justice: serving the goals not of justice, not of law, but of those who win, capture those defendants, and bring them to the tribunals.

There are, however, positive signs. First, an alternative explanation for some defendants not having their sentences actually mitigated is simple inconsistency. While not acceptable, that would mean that as international criminal sentencing develops, a uniform practice might alleviate some of the flaws highlighted above. With some cases, such as *Erdemovic* or *Serugendo* or *Katanga*, mitigating the sentences, there are examples on which to build.

Thus, the analysis of this very limited paper should continue—to assess how much of victors' justice the sentencing practice really is—and to attempt to find alternative explanations for the differences in the treatment of mitigating factors. Other independent variables, such as position of authority, type of acts convicted for, and type of liability of the defendants, might be able to explain some of them.

Still, whether those explanations will be enough to justify not rethinking the tribunals' approach to sentencing is another question. The tribunals should further recognize that if international criminal law is to be remembered (or survive) as a truly equal, non-neo-colonial project, it might have to start showing mercy where deserved—both in sentencing and in accepting that humans do change. They sometimes succumb to external pressure before they commit atrocities, sometimes change during or after by acting to the benefit of the victim population. If retribution is only one goal of international criminal punishment, and if victims are the ones who should have an input and benefit, then one should ask whether Sesay or Ongwen, who were abducted as children and committed horrific atrocities, are the individuals most deserving of effectively unmitigated punishment. This is not an argument against responsibility for the actors committing some of the worst acts that humanity has seen. It is an argument against punishing them rigidly, instead of fairly judging whether they are deserving of the harshest punishment that is seemingly the main mission of the international tribunals — which the façade of mitigation disguises.


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TO BOLDLY GO WHERE NO COURT HAS GONE BEFORE: CANADA PAVES THE WAY FOR TRANSNATIONAL LITIGATION AGAINST CORPORATIONS FOR HUMAN RIGHTS ABUSES?

*Vincent-Joël Proulx**

ABSTRACT

Some commentators have recently proclaimed the U.S. Alien Tort Claims Act to be dead. In *Nevsun Resources*, the Canadian Supreme Court took a seemingly bold step in providing access to justice to victims of human rights abuses against corporate entities, presumably to partly fill this void. This decision comes at an arguably propitious time, when the corporate social responsibility ("CSR") movement is in full swing, but when the U.S. Supreme Court has precluded suits against corporate wrongdoers for extraterritorial torts and the prospect of universal civil jurisdiction is waning globally. I argue that *Nevsun* constitutes a welcome development, potentially providing more effective and meaningful avenues to remedy overseas human rights violations, though it also presents some challenges. I attempt to situate that decision critically within the CSR landscape and assess what role relevant international law principles play in a post-*Nevsun* universe. Part II explores the prospect of enlarging extant liability schemes in international law to better regulate corporate wrongdoing. It canvasses various substantive issues with a view to propping up corporations as rights- and obligations-bearers in international law and discusses important developments in the business and human rights/CSR agenda. It then moves on to the implications of using investor-state arbitration and domestic legal systems to implement transnational legal corporate responsibility before identifying a broader impetus for developing a general regime of international civil individual responsibility, or at least a regime to govern corporate wrongdoing. Part III investigates the potential transformative impact of *Nevsun*, first by recalling the legal situation in Canada prior to the judgment and then by delving into the judgment. This part concludes by highlighting some of the positive and negative implications of the decision. Part IV briefly addresses some of the challenges going forward in the post-*Nevsun* legal universe, focusing primarily on evidentiary, methodological, and substantive issues. This contribution fits within a broader project in which I attempt to articulate the foundations of a general legal regime governing individual *civil* responsibility in transnational law.

THE
CONNECTICUT JOURNAL
OF
INTERNATIONAL LAW

TABLE OF CONTENTS

I. INTRODUCTION

Corporate social responsibility ("CSR") has been very much in vogue in the last two decades, with many commentators investigating ways to hold business entities accountable for transnational human rights violations.[1] In *Nevsun Resources Ltd. v. Araya*, the Supreme Court of Canada ("SCC") took a seemingly bold step in providing access to justice to victims of human rights abuses against corporate entities.[2] The Court recognized that the claims of three Eritrean workers based on customary international law ("CIL") against a Canadian company—which partly owned a mine where the individuals were allegedly subject to various human rights violations in Eritrea—could be entertained by Canadian courts. However, it did not do so in unequivocal terms, as the main issues arose against the backdrop of an appeal against a declined motion to strike.

While the Court acknowledged the relevance of CIL in framing the workers' claims, it is not clear whether its analysis favors the judicial vindication of their rights under the rubric of CIL, or rather under the banner of common law torts. Either proposition presents its own sets of challenges. What is probable is that the Court's decision fills a considerable gap identified in the rich literature on transnational human rights litigation.[3] It should be a

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[1] *See, e.g.,* CORPORATE SOCIAL RESPONSIBILITY IN DEVELOPING AND EMERGING MARKETS: INSTITUTIONS, ACTORS AND SUSTAINABLE DEVELOPMENT (Onyeka Osuji et al. eds., 2022); Jingchen Zhao & Shuangge Wen, *Corporate Social Accountability*, 58 STAN. J. INT'L L. 63 (2022); THE PALGRAVE HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY (David Crowther & Shahla Seifi eds., 2021); YOUSUF AFTAB & AUDREY MOCLE, BUSINESS AND HUMAN RIGHTS AS LAW: TOWARDS JUSTICIABILITY OF RIGHTS, INVOLVEMENT AND REMEDY (2019); STÉPHANIE BIJLMAKERS, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS AND THE LAW (2019); Fabrizio Marrella, *Protection Internationale des Droits de l'Homme et Activités des Sociétés Transnationales*, 385 RECUEIL DES COURS 33 (2016); RESEARCH HANDBOOK ON CORPORATE SOCIAL RESPONSIBILITY IN CONTEXT (Anders Örtenblad ed., 2016); LA RSE SAISIE PAR LE DROIT: PERSPECTIVES INTERNE ET INTERNATIONALE (Kathia Martin-Chenut & René de Quenaudon eds., 2016); John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005).

[2] Nevsun Res. Ltd. v. Araya, [2020] S.C.R. 5 (Can.).

[3] *See, e.g.,* Menno Kamminga, *Transnational Human Rights Litigation against Multinational Corporations Post-Kiobel*, *in* WHAT'S WRONG WITH INTERNATIONAL LAW? 154, 154–65 (Cedric Ryngaert et al. eds., 2015); SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION (2004); Iman Prihandono, *Barriers to Transnational Human Rights Litigation Against Transnational Corporations (TNCs): The Need for Cooperation Between Home and Host Countries*, 3 J. L. & CONFLICT RESOL. 89 (2011) (highlighting the need for an international regime to address this issue and enhance cooperation between home and host countries to strengthen accountability for human rights violations).

welcome development for progressively minded students of international law and adherents of social justice alike. In fact, this decision finds its place alongside a slew of other SCC cases in which the Court has had to pronounce on problematic foreign laws or practices.

In such instances, Canadian courts have not shied away, through any jurisdictional bar or other means, from addressing the laws or acts of a foreign state when such issue arose "merely incidentally" before them.[4] Moreover, the SCC emphasized that Canadian courts will sometimes be called upon to adjudicate questions of international law in order to determine rights or obligations within the Canadian legal system, as a matter of necessity.[5] For example, the SCC has often been called upon to assess foreign laws and international law, particularly in extradition and deportation cases, steering it towards deference by comity only to the extent that breaches of international law and fundamental human rights had not been committed.[6]

Nevsun comes at a seemingly propitious time when potential judicial avenues to hold corporations legally accountable are shrinking. The U.S. Supreme Court ("SCOTUS") has, for all intents and purposes, precluded access to U.S. courts to sue corporations for violations of international law under the Alien Tort Claims Act ("ATCA"), with its recent *Nestlé* decision being the last nail in the judicial coffin. For its part, the prospect of using universal civil jurisdiction has fallen out of favor at the European Court of Human Rights ("ECtHR") and elsewhere. These developments arguably create a contested space for law and policy on CSR to develop through international civil society and for emboldened domestic courts to address accountability gaps. The SCC likely fell in this latter category with its recent jurisprudence. The *Nevsun* decision arguably places Canada at the vanguard of CSR and could have a "domino effect" in other jurisdictions.[7] After all, Canadian judicial decisions have considerable purchase globally.[8]

Relatedly, this decision could become a key player in shifting the tides of state practice, or at least judicial practice, in the realm of corporate accountability in some quarters. Conversely, it is important not to overstate this decision's potential reach, as states harbor considerable resistance to instituting a judicialized form of transnational civil corporate liability. Not to mention that it is a procedural decision. At best, it gives serious teeth to the proposition that victims of human rights violations must be given an adequate (and effective) remedy, even if through transnational litigation.[9] At worst—while this precedent provides

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[4] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 49 (Can.).; *see infra* notes 236–37 and accompanying text.

[5] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 38 (Can.).; Reference re Secession of Quebec, [1998] 2 S.C.R. 217, para. 23 (Can.).

[6] For a variety of applications of these principles, *see* India v. Badesha, [2017] 2 S.C.R. 127, para. 44 (Can.); R. v. Hape, [2007] 2 S.C.R. 292, para. 52 (Can.); Tolofson v. Jensen, [1994] 3 S.C.R. 1022, 1047 (Can.); Suresh v. Canada, [2002] 1 S.C.R. 3 (Can.); United States v. Burns, [2001] 1 S.C.R. 283, para. 68 (Can.); Canada v. Khadr, [2008] 2 S.C.R. 125, para. 18, 26 (Can.); Canada v. Khadr, [2010] 1 S.C.R. 44, para. 16 (Can.); Canada v. Schmidt, [1987] 1 S.C.R. 500, 522 (Can.); Kindler v. Canada, [1991] 2 S.C.R. 779, 849–50 (Can.).

[7] The expression is borrowed from Guénaël Mettraux, *infra* note 325.

[8] *See, e.g.,* Mark Tushnet, *The Charter's Influence Around the World*, 50 OSGOODE HALL L. J. 527 (2013); Tania Groppi, *A User-Friendly Court*, 36 SUP. CT. L. REV. 337 (2007). *See also* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 85, 96 (Feb. 3) (citing Bouzari v. Islamic Republic of Iran, [2004] 243 D.L.R. 4th, 406).

[9] *See, e.g.,* ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 99 (1994); M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006).

powerful ammunition to human rights advocates—it might fall short in engendering change in domestic and international settings, although it might alter the Canadian legal landscape in terms of access to justice. Any serious study of CSR's legal aspects, therefore, should strike a balance between the unhealthy idealism of the CSR literature and the reality on the ground. Indeed, the ambitions of civil society and academia might not align with those of states and the business community.

I argue that *Nevsun* constitutes a welcome development in striving towards a more egalitarian global legal order and seeking to make remedies for human rights violations more effective. This article also attempts to situate that decision within the CSR landscape—and within international law, more generally—to gauge its impact and relevance to a broader framework of individual civil responsibility in transnational law. In my attempts to develop the foundations of that general regime to regulate the conduct of non-state actors, I contend that more normative, regulatory, and enforcement clarity are required to address corporate wrongdoing.[10] In this light, *Nevsun* likely constitutes a step in the right direction—perhaps even providing a building block to strengthen the foundations of the abovementioned general regime—although this tentative conclusion must be appreciated with caution.

Indeed, the decision's implications are not universally positive, as challenges—both logistical and substantive—lie ahead in heeding its proposals. It also presumably stands in tension with extant CIL principles, although the SCC's outcome could arguably be interpreted as countervailing state practice. Finally, *Nevsun* provides little in the way of direct guidance on the way forward. The Court skirted some of the more challenging issues—for instance not indicating, on grounds of policy, expediency or otherwise, whether the workers' claims could/would be better accommodated through the vehicle of tort law or rather as a set of standalone CIL-based grievances—only obliquely hinting at its preferences.

Recently, a settlement was reached between the Eritrean workers and Nevsun, the terms of which remain confidential.[11] This development ensures that this specific case will not end up in lower courts for adjudication on the merits. However, lower courts will be tasked with doing most of the conceptual and theoretical heavy lifting when a similar case appears on their docket and it is time to potentially devise new extraterritorial torts, based on CIL and/or

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Many human rights instruments recognize the right to a remedy, including: G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, Art. 2(3) (Dec. 16, 1966); G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Art. 6 (Dec. 21, 1965); G.A. Res. 44/25, Convention on the Rights of the Child, Art. 39 (Nov. 20, 1989); G.A. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14(1) (Dec. 10, 1984); and G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec, 16, 2005). *See also* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 117ff (Can.).

[10] In other fields, like law of the sea, private actors' duties and rights are perhaps more clearly defined, although challenges also abound. *See* ARMANDO ROCHA, PRIVATE ACTORS AS PARTICIPANTS IN INTERNATIONAL LAW: A CRITICAL ANALYSIS OF MEMBERSHIP UNDER THE LAW OF THE SEA (2021). *See also generally* Nilüfer Oral, *Jurisdiction and Control over Activities by Non-state Entities on the High Seas*, *in* HIGH SEAS GOVERNANCE: GAPS AND CHALLENGES 9–33 (Robert C. Beckman et al. eds., 2018).

[11] *See Amnesty International Applauds Settlement in Landmark Nevsun Resources Mining Case*, AMNESTY INT'L (Oct. 25, 2020, 9:00 AM), https://hrc-eritrea.org/amnesty-international-applauds-settlement-in-landmark-nevsun-resources-mining-case.

transnational law.[12] Given this case's implications and the legal issues it raised, it is not farfetched to envisage another similar case being appealed up the judicial ladder and ending up before the SCC. Some will ponder whether the Court's reluctance to say more on some key issues was wise, if only for reasons of judicial economy or sound administration of justice.

It is imperative to map out some of the key milestones, features, and drawbacks in the quest to enhance transnational corporate civil responsibility to better understand where *Nevsun* fits within that broader discourse—both methodologically and substantively—and what, exactly, it brings to the table. Part II explores the prospect of enlarging extant liability schemes in international law to better regulate overseas corporate wrongdoing. It briefly canvasses substantive issues related to enabling corporate entities to become bearers of international law rights and obligations before chronicling important developments in the evolution of the business and human rights/CSR agenda. It then considers the implications of using investor-state arbitration and municipal legal systems to implement corporate wrongdoers' international responsibility. It identifies a broader impetus for developing a general regime of individual civil responsibility in transnational law, along with its role and limitations in addressing corporate wrongdoing.

Part III investigates *Nevsun*'s potential transformative impact, first by briefly looking at the legal situation in Canada prior to the judgment, and then by delving into the case. After unfolding the case's facts and procedural background, this article turns to the SCC decision itself, briefly canvassing the Court's analysis on the act of state doctrine before devoting more space to its handling of the Eritrean workers' claims based on CIL. This part concludes by highlighting some positive and negative implications of the decision. Part IV then addresses some central challenges going forward in the post-*Nevsun* legal universe, focusing primarily on evidentiary, methodological, and substantive challenges. Part V concludes.

By way of methodological caveat, the prospect of corporate entities assuming legal obligations under international treaties extends beyond the scope of this study.[13] Given that the SCC focused exclusively on the prospect of holding corporations accountable for violating CIL norms, this article's analysis is accordingly confined mostly to this topic's CIL dimension.

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[12] For a take on *Nevsun* before the lower courts, which advocates incorporating CIL prohibitions into Canadian law, *see* E. Samuel Farkas, *Araya v. Nevsun and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law*, 76 U. TORONTO FAC. L. REV. 130 (2018).

[13] On that issue, *see* MARKOS KARAVIAS, CORPORATE OBLIGATIONS UNDER INTERNATIONAL LAW 17–67 (2013); Eric De Brabandere, *Non-State Actors, State-Centrism and Human Rights Obligations*, 22 LEIDEN J. INT'L L. 191 (2009) (analyzing whether corporations and foreign investors can assume human rights law obligations). As long recognized, certain treaty provisions impose direct obligations upon individuals and non-State actors, the violation of which might trigger civil liability before domestic courts. *See* Hans Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 CAL. L. REV. 530, 537–38 (1943) (analyzing Article II of the International Convention for the Protection of Submarine Telegraph Cables). While the role of investment arbitration in this context will be discussed later, recent investment treaties seldom impose direct international law obligations upon investors. Such instruments rather favor 'hortatory' CSR-aligned language in their preambles—as opposed to binding obligations—and prioritize investor protections over their potential responsibilities. *See, e.g.,* Kristen Boon, *Theorizing Responsibility in the Investor State Dispute Resolution System*, 95 ST. JOHN'S L. REV. 253, 262 (2021); Andrea K. Bjorklund, *Sustainable Development and International Investment Law*, *in* RESEARCH HANDBOOK ON ENVIRONMENT AND INVESTMENT LAW 38, 38 (Kate Miles ed., 2019).

II. ENLARGING EXTANT LIABILITY SCHEMES TO CAPTURE CORPORATE ACTORS

The prospect of holding corporations legally accountable for various international/transnational law transgressions is a well-trodden field, at least theoretically and conceptually. Relevant state practice trails behind scholarly overtures, as fundamental disagreements persist over the scope, content, and very existence of corporate obligations under international law. This part now turns to the theoretical, conceptual, and practical building blocks in the quest to enhance international accountability models for corporate wrongdoing.

A. APPLICABLE INTERNATIONAL LAW AND THE SHRINKING JUDICIAL AVENUE

1. CORPORATIONS AS RIGHTS BEARERS UNDER INTERNATIONAL LAW

An overarching friction pervades this field, namely between international law's need to acknowledge and regulate corporations' increasingly important role, on one hand, and the challenges associated with converting this need into hard law and justiciable claims, on the other. The famous *Barcelona Traction* case epitomized this tension, where the International Court of Justice ("ICJ") underscored "corporate personality [as] a development brought about by new and expanding requirements in the economic field," but also emphasized that "international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing an analogy between its own institutions and those of municipal law."[14] The vexed question whether corporations can bear *direct* obligations under international law was thus initially—and continues to be—exacerbated by the polemic over how and where to draw the boundaries of their international legal responsibility.[15]

Yet, on one view, corporate entities should not be analogized to states, nor to international organizations, thereby not making them "natural" or "artificial subjects of international law as presently defined."[16] Some commentators caution against predicating corporations' potential liability on their would-be "subject-hood" under international law,

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[14] Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, at 33–35 (Feb. 5). *See also* Ahmadou Sadio Diallo (Guinea v. DRC), Judgment, 2010 I.C.J. 639, ¶ 104 (Nov. 30).

[15] *See* Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L. J. 748 (1983); A.A. Fatouros, *Transnational Enterprise in the Law of State Responsibility*, *in* INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 361 (Richard B. Lillich ed., 1983); CHRISTIAN OKEKE, CONTROVERSIAL SUBJECTS OF INTERNATIONAL LAW: AN EXAMINATION OF THE NEW ENTITIES OF INTERNATIONAL LAW AND THEIR TREATY-MAKING CAPACITY 205–16 (1974). On why the international community originally espoused a state-centric approach, *see* JANE E. NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW 352 (2004).

[16] Hans W. Baade, *The Legal Effects of Codes of Conduct for Multinational Enterprises*, *in* LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 8 (Norbert Horn ed., 1980). *See also* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 80 (2006).

rather favoring the label "participants" to elude a series of unintended consequences.[17] Hence, the scope and tenor of the debate surrounding these issues shifted from the question of international legal personality to the precise functions of corporations in specific circumstances.[18] Admittedly, while the prospect of holding corporations *directly* liable under international law might not have gained much traction fifty or sixty years ago,[19] the end of the Cold War brought with it a new focus on corporate wrongdoing—particularly in the human rights and criminal law fields—which affects the enjoyment of fundamental rights.[20] This approach makes good pragmatic sense: subjecting corporations to *direct* international law obligations might palliate inaction by ineffective, complicit, or corrupt governments, thereby offering a more robust deterrent to induce better corporate compliance with fundamental rights.[21]

One classical obstacle to corporations assuming direct international legal obligations resides in international law's state-centric nature, which traditionally posited that only sovereign states could do so.[22] Nevertheless, even over seventy years ago, non-state actors still fell within the ambit of international law's regulatory scope,[23] a practice dating back to between the 17th and 19th centuries when the Dutch and English trading companies operating in East India were endowed with state-like powers and functions.[24] While some argue that parts of international law governing corporate conduct remain in a state of flux, or proceed in a "piecemeal fashion,"[25] there is every indication that corporations can bear obligations, both from theoretical and conceptual standpoints.

According to classical ICJ jurisprudence, a corporate entity would not only need to possess international legal personality to bear rights and obligations, but also have the "capacity to maintain its rights by bringing international claims."[26] Consequently, the issues

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[17] *See* José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 SANTA CLARA J. INT'L L. 1, 8–9 (2011). *See also* HIGGINS, *supra* note 9, at 49–50 (rejecting the "subjects"/"objects" dichotomy advanced by some scholars and promoting the all-encompassing term "participants"); Rosalyn Higgins, *Conceptual Thinking About the Individual in International Law*, 4 BRIT. J. INT'L STUD. 1 (1978).

[18] *See* Vaughan Lowe, *Corporations as International Actors and International Law Makers*, 14 ITALIAN Y.B. INT'L L. 23 (2004). *See also generally* Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35 (2005).

[19] *See* Wolfgang Friedmann, *General Course in Public International Law*, 127 RECUEIL DES COURS 47, 121–24 (1969).

[20] *See* CLAPHAM, *supra* note 16, at 266–70; Sarah Joseph, *Taming the Leviathans: Multinational Enterprises and Human Rights*, 46 NETH. INT'L L. REV. 171, 185–86 (1999).

[21] *See* KARAVIAS, *supra* note 13, at 3; Joseph, *supra* note 20, at 185–86. As regards corporate structure, "[i]f international law obligations were to serve as a credible deterrent, they would have to directly bind each and every corporate entity with a distinct personality, irrespective of its position as parent or subsidiary." KARAVIAS, *supra* note 13, at 3. On challenges in applying international legal concepts to corporations, *see* Louis Henkin, *International Law: Politics, Values and Functions*, 216 RECUEIL DES COURS 9, 199 (1989).

[22] For classical examples of the state-centric approach, *see* LASSA FRANCIS OPPENHEIM, INTERNATIONAL LAW: VOLUME 1 19 (2nd ed. 1912); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

[23] *See* JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: VOLUME 2 339 (1969); Cezary Berezowski, *Les Sujets Non Souverains du Droit International*, 65 RECUEIL DES COURS 1 (1938).

[24] Charles Alexandrowicz, *Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries*, 100 RECUEIL DES COURS 203, 212–13 (1960).

[25] KARAVIAS, *supra* note 13, at 6.

[26] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. Rep. 174, 179 (Apr. 11).

of international law's applicability to corporations and of their international legal personality must be kept analytically distinct.[27] Yet, both questions remain intimately intertwined, as the corporation's status under international law is necessarily predicated on determining the scope of its legal capacity.[28]

The Permanent Court of International Justice's *Jurisdiction of the Courts of Danzig* Advisory Opinion offered a solid launching-point for recognizing corporations as international law rights holders. In that case, the Court had to determine whether an international agreement between Poland and the City of Danzig empowered Danzig railway officials to claim monetary damages against the Polish Railway Administration. First turning to the classical position, the Court observed that "[i]t may be readily admitted that, according to a well established principle of international law, the *Beamtenabkommen*, being an international agreement, cannot, as such, create direct rights and obligations for private individuals."[29] However, the Court added that "it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts."[30]

While the *Jurisdiction of the Courts of Danzig* Advisory Opinion centered on the rights and obligations of individuals, there is strong support for analogizing the Court's holdings to corporations, amongst other non-state entities.[31] Indeed, the debate surrounding the applicability of international legal norms to non-state actors has at times focused more centrally on individuals, particularly because of its implications for rights-based discourse. Yet, there is no credible theoretical differentiation over the application of international legal obligations to individuals, as opposed to corporations.[32] In fact, the case for establishing

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[27] *See* Shabtai Rosenne, *The Perplexities of Modern International Law*, 291 RECUEIL DES COURS 9, 291 (2001).

[28] *See* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION) 75 (1927). In the investment law space, however, some publicists contend that corporate investors should attract the status of international law subjects since investment treaties grant them rights directly enforceable before international tribunals. *See, e.g.,* Patrick Dumberry & Érik Labelle-Eastaugh, *Non-state Actors in International Investment Law: The Legal Personality of Corporations and NGOs in the Context of Investor-State Arbitration*, *in* PARTICIPANTS IN THE INTERNATIONAL LEGAL SYSTEM: MULTIPLE PERSPECTIVES ON NON-STATE ACTORS IN INTERNATIONAL LAW 360, 362–66 (Jean d'Aspremont ed., 2011). *See also generally* Jean d'Aspremont, *Introduction*, *in ibid*, at 2; Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 812–16 (2002).

[29] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17 (Mar. 3); *see also* Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 28 (Sept. 13) (observing that "[r]ights or interests of an individual … are always in a different plane from rights or interests belonging to a State").

[30] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17-18 (Mar. 3). For various interpretations, *see* DIONISIO ANZILOTTI, COURS DE DROIT INTERNATIONAL 407 (1929); LORD MCNAIR, THE LAW OF TREATIES 338 (1961); W.E. Beckett, *Decisions of the Permanent Court of International Justice on Points of Law and Procedure of General Application*, 11 BRIT. Y.B. INT'L L. 1, 4 (1930); Louis-Érasme LeFur, *Le Litige au Sujet de la Compétence des Tribunaux Dantzikois*, 35 REVUE GÉNÉRALE DE DROIT INT'L PUB. 268, 272–73 (1928); HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE PERMANENT COURT OF INTERNATIONAL JUSTICE 51 (1934).

[31] *See, e.g.,* Int'l L. Comm'n, Rep. on the Law of Treaties by J.L. Brierly, U.N. Doc. A/CN.4/23 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 222, 228–29 n.24.

[32] *See, e.g.,* Philip C. Jessup, *Modernization of the Law of International Contractual Agreements*, 41 AM. J. INT'L L. 378, 389 (1947); KARAVIAS, *supra* note 13, at 7. The case for analogizing corporations to individuals in

corporate liability under international law is arguably more compelling. For one thing, the legal fiction and juridical person known as the corporation presents considerably more commonalities with the state and international organizations. While these analogies are not perfect, they should assuage most conceptual challenges associated with binding corporations directly under international law, when compared to individuals.[33] In short, it may be conceptually easier to envisage corporations being rights/obligations bearers under international law than individuals.[34]

This brief survey reveals at least two realities. First, the state of the law on this thorny question has been in flux for some time, although stabilizing initiatives have been attempted recently, as will be seen in the next sub-section. Second, at a minimum, this line of cases suggests that—from both conceptual and theoretical perspectives—corporations can be holders of legal rights and obligations, if only through the mechanism of state consent.[35] However, there is strong indication that non-state actors can also assume obligations independently of the will of states, as subjects of international law, or, at least, fall within the purview of international law's norms, including CIL (perhaps as mere "participants"[36]). One reality mitigating in favor of recognizing that corporations can owe direct obligations under international law—which also implies their liability for violating those obligations—is that they already do, to some extent.[37]

This eventuality had already been recognized some time ago by leading publicists and more recently by contemporary scholars.[38] In the *Reparation* Advisory Opinion, the ICJ similarly subtracted the question of sovereignty from the equation when recognizing that "the subjects of law in any legal system are not necessarily identical in their nature or in the

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domestic law has also been made, particularly in the U.S. *See* KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) (2018).

[33] *See, e.g.,* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 180–82 (2nd ed. 1966); KARAVIAS, *supra* note 13, at 7.

[34] For a fuller discussion, *see* KARAVIAS, *supra* note 13, at 7–10.

[35] *See id*. at 69; Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 115 (2012); Marko Milanović, *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, 9 J. INT'L CRIM. JUST. 25, 39–40 (2011); KATE PARLETT, THE INDIVIDUAL IN THE INTERNATIONAL LEGAL SYSTEM: CONTINUITY AND CHANGE IN INTERNATIONAL LAW 324–25, 361 (2011). *See also* LAUTERPACHT, *supra* note 28, at 175–76; Ian Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435, 440 (1964).

[36] *See, e.g.*, Alvarez, *supra* note 17, at 8–9; HIGGINS, *supra* note 9, at 49–50.

[37] *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 232 (2007) (underscoring how contracts between developing nations and corporations bestow international legal personality upon the latter); Texaco Overseas Petroleum Co. v. Gov't of the Libyan Arab Republic (1977), *reprinted in* [1979] 5 INT'L L. REP. 389 (finding an arbitral clause between Texaco and Libya enforceable). *See also* Jaye Ellis, *The Alien Tort Statute as Transnational Law*, 28 MD. J. INT'L L. 90, 97 (2013). On vindicating CSR objectives through the mechanism of contracts, *see* Laura Valle, *Contract as an Instrument Achieving Sustainability and Corporate Social Responsibility Goals*, 24 INT'L CMTY. L. REV. 100 (2022).

[38] *See* LAUTERPACHT, *supra* note 28, at 79; Charney, *supra* note 15, at 762; OKEKE, *supra* note 15, at 220; Yoram Dinstein, *The Interaction Between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 339 (2006). CIL may also directly regulate other non-state entities' conduct, such as armed opposition groups, as affirmed by the Special Court for Sierra Leone. *See* Prosecutor v. Kallon, Case No. SCSL-04-15-PT-060, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, ¶ 47 (Special Court for Sierra Leone Mar. 13, 2004).

extent of their rights."[39] In *LaGrand*, it more squarely recognized that individuals can hold individually justiciable rights in international law, beyond human rights, a holding which prompted the International Law Commission ("ILC") to extend that reasoning to other non-state entities, in particular, in its work on the responsibility of international organizations.[40]

Earlier, several ILC members had already offered compatible views during the Commission's work on the law of treaties, spearheaded by Special Rapporteur Sir Humphrey Waldock.[41] More directly on point, the ECtHR has recognized that corporations are subject to international law, thereby falling within the ambit of Article 34's protection under the European Convention of Human Rights.[42] That framework protects the right to private property of "legal persons," which includes corporations, not to mention that ECtHR jurisprudence has interpreted that protection as extending beyond the right to property and into the human rights realm.[43]

As discussed below, the SCC sidestepped many of these analytical nuances in its *Nevsun* decision, opting for weaker support when substantiating its holdings. Notably absent from its analysis was any reference to the important work of the UN Secretary-General's Special Representative for Business and Human Rights and the broader international CSR agenda, which is briefly canvassed immediately below. Taking stock of these important initiatives is vital to better understand where and how *Nevsun* fits into transnational efforts to enhance accountability frameworks for corporate wrongdoing.

2. THE BUSINESS AND HUMAN RIGHTS/CORPORATE SOCIAL RESPONSIBILITY AGENDA

a. PAST EFFORTS AND CHALLENGES IN DEVELOPING THE LAW

Against the background of classical arguments for and against recognizing corporations as international law subjects/participants explored above, recent initiatives to bolster the

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[39] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, at 178 (Apr. 11).

[40] LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶¶ 77–78 (June 27); Giorgio Gaja (Special Rapporteur), *First Rep. on Responsibility of International Organizations*, ¶ 17, U.N. Doc. A/CN.4/532 (Mar. 26, 2003). *See also* Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25, 28 (2010); Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 EUR. J. INT'L L. 11, 14 (2010). For a fuller analysis of *LaGrand* and its impact, *see* Vincent-Joël Proulx, *International Civil Individual Responsibility and the Security Council: Building the Foundations of a General Regime*, 40 MICH. J. INT'L L. 215, 234–37 (2019).

[41] *See* Sir Humphrey Waldock (Special Rapporteur), *Third Rep. on the Law of Treaties*, U.N. Doc. A/CN.4/167 (1964), *reprinted in* [1964] 2 Y.B. Int'l L. Comm'n 5, 46. *See also* the positions defended by Verdross, *Summary Records of the 741st Meeting*, [1964] 1 Y.B. Int'l L. Comm'n 112, 114, ¶ 22, U.N. Doc. A/CN.4/167; Yasseen, *id.* at ¶ 26; Castrén, *id.* at ¶ 24; Amado, *id.* at 116, ¶ 38; and De Luna, *id.* at 114, ¶ 40.

[42] Convention for the Protection of Human Rights and Fundamental Freedoms, art. 34, Nov. 4, 1950, 5 E.T.S. 8.

[43] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 1, Mar. 20, 1952, 9 E.T.S. 1. For a full account, *see* MARIUS EMBERLAND, THE HUMAN RIGHTS OF COMPANIES: EXPLORING THE STRUCTURE OF ECHR PROTECTION (2006). For critical takes, *see* Andreas Kulick, *Corporate Human Rights?*, 32 EUR. J. INT'L L. 537 (2021); Turkuler Isiksel, *Corporate Human Rights Claims Under the ECHR*, 17 GEO. J.L. & PUB. POL'Y 979 (2019).

regulatory framework have been met with some resistance. A perennial obstacle to holding corporations liable for human rights abuses under international law—aside from the belief held by some that such entities are not subjects of the discipline and cannot assume direct obligations[44]—resides in the fact that states are unwilling to move in that direction. This resistance has arguably created both normative and enforcement gaps —at best, the content of CIL norms binding corporations directly for human rights transgressions is "nebulous," if not piecemeal or non-existent.[45]

Considerable ambiguity surrounds the content and very existence of primary norms of conduct that would bind corporations directly under international law, coupled with similar uncertainty as to secondary remedial norms that would regulate breaches of those primary obligations. Moreover, this normative vacuum is only cognizable if one accepts that the primary/secondary dichotomy—usually applied within state responsibility and international responsibility frameworks—can be extended to corporations.[46] To the parsimony of affirmative state practice that would recognize corporate actors as obligations bearers, similarly equivocal *opinio juris* should be added. Even if one recognizes that corporations can be bound by international law, it is unclear whether states, or corporations, harbor the requisite belief that such eventuality should materialize.[47]

The recent push for enhanced international corporate liability culminated in 2003, when a sub-commission of the UN Commission on Human Rights promulgated a set of proposed human rights norms binding on corporations, titled "UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights."[48] These norms, their drafters insisted, reflected existing international human rights obligations incumbent upon corporations.[49] However, this approach was met with considerable, and sometimes very vocal, resistance by states, thereby exacerbating ambiguities in the extant legal regime.

While accepting that armed opposition groups and other non-state actors may assume direct international human rights and humanitarian obligations has become more

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[44] *See, e.g.*, Mona Paré & Tate Chong, *Human Rights Violations and Canadian Mining Companies: Exploring Access to Justice in Relation to Children's Rights*, 21 INT'L J. HUM. RTS. 908, 910 (2017); Miriam Cohen, *Doing Business Abroad: A Review of Selected Recent Canadian Case-Studies on Corporate Accountability for Foreign Human Rights Violations*, 24 INT'L J. HUM. RTS. 1499, 1499 (2020).

[45] *See* KARAVIAS, *supra* note 13, at 73 (observing that the voluminous case-law of human rights monitoring bodies illuminates corporations' status under human rights conventions, that the "situation under CIL is somewhat more nebulous," but that "[c]orporations cannot be all too easily excluded from the ambit of human rights law").

[46] On that extension to non-state actors, *see* Proulx, *supra* note 40, at 216–17.

[47] Similarly, the business community harbors resistance to incorporating investor liability mechanisms in investment treaties. *See* Karsten Nowrot, *How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?*, 15 J. WORLD INV. & TRADE 612, 631 (2014). *But see* Jay Butler, *Corporate Commitment to International Law*, 53 N.Y.U. J. INT'L L. & POL. 433, 434 (2021) ("Corporate *opinio juris* describes a company's subscription to a rule of international law, even though the company is not technically bound by that rule."). *See also* Jay Butler, *The Corporate Keepers of International Law*, 114 AM. J. INT'L L. 189 (2020) (exploring how corporations support implementation and enforcement of international law in various sub-fields).

[48] Comm. on Human Rights, Rep. of the Subcomm. on the Promotion and Prot. of Hum. Rights on its Fifty-Fifth Session, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

[49] *See* David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901, 912 (2003). On attempts to develop human rights to bind corporations, *see* KARAVIAS, *supra* note 13, at 73–81.

widespread,[50] a similar extension of potential liability to corporations has been less palatable to many constituencies. Given the considerable reticence about a more rigid accountability scheme for corporate wrongdoing, the UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie, mapped out a new orientation for the CSR project and elected a less legalistic, softer approach to regulating companies doing business abroad.

In 2006, he took issue with the abovementioned "UN Norms" in an interim report presented to the UN Commission on Human Rights, echoing many states' critiques: "[w]hat the Norms have done, in fact, is to take existing State-based human rights instruments and simply assert that many of their provisions now are binding on corporations as well. But that assertion itself has little authoritative basis in international law—hard, soft, or otherwise."[51] Ruggie acknowledged that both emerging practice and expert opinion pointed to potential corporate liability for the gravest human rights abuses, but expressed skepticism "that international law has been transformed to the point where it can be said that the broad array of international human rights attach direct legal obligations to corporations."[52]

With this in mind, the Special Representative articulated a new approach—the "Protect, Respect and Remedy" framework—which became emblematic of his entire work and tenure in that capacity. Ruggie's framework built on three essential principles, namely: "the State duty to protect against human rights abuses by third parties … the corporate responsibility to respect human rights; and the need for more effective access to remedies."[53] This initiative again denoted a softer approach as the framework entailed the state's "duty" instead of "obligation," arguably shifting it away from "traditional" human rights rationale. Additionally, corporations were said to assume a "responsibility to respect human rights," as opposed to unequivocal and binding legal obligations.[54] Under this framework, this "baseline

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[50] *See generally* KATHARINE FORTIN, THE ACCOUNTABILITY OF ARMED GROUPS UNDER HUMAN RIGHTS LAW (2017); Andrew Clapham, *Human Rights Obligations of Non-State Actors in Conflict Situations*, 88 INT'L REV. RED CROSS 491 (2006); Michael Schoiswohl, *De Facto Regimes and Human Rights Obligations—The Twilight Zone of Public International Law?*, 6 AUSTRIAN REV. INT'L & EUR. L. 45 (2003); LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW (2002); Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Agents*, 31 COLUM. HUM. RTS. L. REV. 81 (1999); Asbjørn Eide et al., *Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards*, 89 AM. J. INT'L L. 215 (1995). Conversely, the obligation and ability of armed opposition groups to provide reparations remain controversial. *See* Olivia Herman, *Beyond the State of Play: Establishing a Duty of Non-State Armed Groups to Provide Reparations*, 102 INT'L REV. RED CROSS 1033 (2020); Luke Moffett, *Violence and Repair: The Practice and Challenges of Non-State Armed Groups Engaging in Reparations*, 102 INT'L REV. RED CROSS 1057, 1085 (2020). *But see Special Collection – Reparations Beyond the State*, 14 J. HUM. RTS. PRACTICE 379–501 (2022) (including various contributions on the prospect of armed opposition groups redressing past violations of international law).

[51] John Ruggie (Special Representative of the U.N. Secretary-General), *Promotion and Protection of Human Rights*, ¶ 69, U.N. Doc. E/CN.4/2006/97 (Feb. 22, 2006).

[52] *Id.* ¶¶ 60, 64. *See also* KARAVIAS, *supra* note 13, at 81.

[53] John Ruggie (Special Representative of the U.N. Secretary-General), *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 9, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter *Protect, Respect and Remedy*]. On the framework's consonance with international human rights law, *see* Robert McCorquodale, *Corporate Social Responsibility and International Human Rights Law*, 87 J. BUS. ETHICS 385 (2009).

[54] *See* KARAVIAS, *supra* note 13, at 82. This shift was important to move this new framework away from "traditional" human rights doctrine, which posits that states' duty to protect human rights "evokes conceptions of horizontality and essentially mirrors the international obligations of States to uphold human rights in the relationships between individuals." *Id.*

responsibility of companies" comes into play "in addition to compliance with national laws."[55] Furthermore, this version of corporate responsibility, whose contents are "defined by social expectations," operates independently of the duties binding states.[56]

Unsurprisingly, different corporate constituencies voiced misgivings over the perceived paucity of normative content of the "corporate responsibility to respect," prompting some to call for greater clarity. The Special Representative offered some clarifications in a later report. He first observed that the use of the term "responsibility" over "duty" signaled that extant international human rights law does not generally obligate corporations to respect human rights, although some domestic legal systems may offer some degree of protection.[57] He emphasized that the corporate responsibility to respect constitutes a "well established and institutionalized social norm."[58] In short, this social norm encompasses the whole gamut of internationally recognized rights given that corporations, through their actions, can have a considerable impact, both positive and negative, on all of these rights.[59]

The foremost point of contention resided in the way in which corporations were expected to fulfil their responsibility to respect internationally recognized rights. In response, Ruggie opined that corporations are expected to engage in "human rights due diligence," which operates on four key practices: (i) "a statement of policy articulating the company's commitment to respect human rights;" (ii) "periodic assessment of actual and potential human rights impacts of company activities and relationships;" (iii) "integrating these commitments and assessments into internal control and oversight systems;" and (iv) "tracking and reporting performance."[60]

These efforts culminated into, and informed, a final document titled "Guiding Principles on Business and Human Rights" ("Guiding Principles"), which the Special Representative submitted to the Human Rights Council when he completed his mandate in 2011.[61] In Resolution 17/4, the Human Rights Council endorsed the Guiding Principles.[62] Tellingly, in that document the Special Representative recalled that its "normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template."[63] Equally important was Ruggie's remark that the Guiding Principles "are not intended as a tool kit, simply to be taken off the shelf

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[55] *Protect, Respect and Remedy*, *supra* note 53, ¶ 54.

[56] *Id.* ¶¶ 54–55. *See also* KARAVIAS, *supra* note 13, at 82.

[57] Special Representative of the U.N. Secretary-General, *Business and Human Rights: Further Steps Toward the Operationalization of the "Protect, Respect and Remedy" Framework*, ¶ 55, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) [hereinafter *Business and Human Rights: Further Steps*].

[58] John Ruggie (Special Representative of the U.N. Secretary-General), *Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework*, ¶ 48, U.N. Doc. A/HRC/11/13 (Apr. 22, 2009).

[59] *Business and Human Rights: Further Steps*, *supra* note 57, ¶ 59.

[60] *Id.* ¶ 83. On follow-up and oversight mechanisms to monitor corporations' international human rights records, *see* Emmanuelle Mazuyer, *Les Mécanismes de Suivi de la Responsabilité Sociale des Entreprises à la Lumière de la Doctrine Internationaliste*, *in* REGARDS CROISÉS SUR LA SOFT LAW EN DROIT INTERNE, EUROPÉEN ET INTERNATIONAL 299–315 (Pascale Deumier & Jean-Marc Sorel eds., 2018).

[61] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter *Guiding Principles*].

[62] Human Rights Council Res. 17/4, U.N. Doc. A/HRC/17/4 (July 6, 2011).

[63] *Guiding Principles*, *supra* note 61, ¶ 14.

and plugged in … [w]hen it comes to means for implementation, therefore, one size does not fill all."[64]

Ruggie seemingly opted for a more measured and grounded position, as opposed to promoting a more robust liability scheme to govern corporations.[65] Given the considerable resistance noted above, this approach was likely inevitable and the only outcome that could garner as much support as possible, although reactions and responses to the Guiding Principles have been as varied as they have been voluminous.[66] What was clear was that Ruggie eluded concepts endemic to the international human rights regime from the project's inception. This choice was largely prompted by the notion that corporations should not be analogized to states in their functions or human rights duties. Therefore, a wholesale and uncritical transplantation of international human rights norms to the business realm would have proven counterproductive.[67]

Ruggie emphasized in several reports that international human rights law does not directly address corporations. Consequently, the "corporate responsibility to respect human rights" was not designed to generate hard positive law, nor to extend international law obligations to businesses.[68] However, this conclusion is a far cry from creating a "law-free zone" or from absolving corporations from any wrongdoing. Rather, the "corporate responsibility to respect" was erected upon existing corporate obligations to comply with the national laws of the states in which corporations carry out their activities,[69] some of which mirror international human rights commitments.

We are left with a resulting document couched in hortatory language in its relevant portions—relying centrally on the idea of "responsibility of business enterprises to respect human rights"—as opposed to resting on mandatory, legal language.[70] In fairness, however, the Guiding Principles and their commentary lay down serious exhortations, hinting at least at an attempt to institute a robust self-reporting and self-compliance system. They include: (i) inviting states to envisage the implementation of domestic corporate civil liability

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[64] *Id.* ¶ 15.

[65] *See also* Proulx, *supra* note 40, at 236 n.85.

[66] On the Guiding Principles and their implications, *see* JOHN GERARD RUGGIE, JUST BUSINESS: MULTINATIONAL CORPORATIONS AND HUMAN RIGHTS (2013); Susan Ariel Aaronson & Ian Higham, *"Re-Righting Business": John Ruggie and the Struggle to Develop International Human Rights Standards for Transnational Firms*, 35 HUM. RTS. Q. 333 (2013); Jonathan Bonnitcha & Robert McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, 28 EUR. J. INT'L L. 899 (2017); Carola Glinski, *The Ruggie Framework, Business Human Rights Self-Regulation and Tort Law: Increasing Standards Through Mutual Impact and Learning*, 35 NORDIC J. HUM. RTS. 15 (2017); Carlos López, *The "Ruggie Process": From Legal Obligations to Corporate Social Responsibility?*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 58 (Surya Deva & David Bilchitz eds., 2013); John Gerard Ruggie, *Protect, Respect, and Remedy: The UN Framework for Business and Human Rights*, *in* INTERNATIONAL HUMAN RIGHTS LAW: SIX DECADES AFTER THE UDHR AND BEYOND 519 (Mashood Baderin & Manisuli Ssenyonjo eds., 2010); John Gerard Ruggie & John F. Sherman, III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, 28 EUR. J. INT'L L. 921 (2017); THE UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: FOUNDATIONS AND IMPLEMENTATION (Radu Mares ed., 2012).

[67] *See also* KARAVIAS, *supra* note 13, at 83.

[68] *Id.*

[69] *Id.*

[70] *See* U.N. OHCHR, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 13–26 U.N. Doc. HR/PUB/11/04 (June 16, 2011) [hereinafter GUIDING PRINCIPLES] (especially Principle 23).

mechanisms for human rights violations (in addition to administrative and criminal schemes);[71] (ii) acknowledging that the questions of *legal* responsibility and its enforcement "remain defined largely by national law provisions in relevant jurisdictions," some of which envisage civil actions to remedy corporate complicity in human rights violations;[72] and (iii) encouraging corporations to consider the risk of being held accountable for such violations "as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims."[73] The Guiding Principles also emphasize that "corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses" and, in various sections, spell out the "human rights due diligence" that business enterprises should carry out.[74]

It is telling that efforts underpinning the Guiding Principles did not translate into an attempt to create new—or reflect existing—CIL obligations binding on corporations. This conclusion likely corresponded to the state of CIL at the material time, as no general practice, "let alone a uniform" one, could be invoked to justify a different approach; if anything, states' "verbal" practice in response to Ruggie's initiative evidenced strong resistance to binding corporations directly under human rights law, a proposal which would essentially require reversing the state-centric nature of international human rights law.[75] Recent work by eminent publicists similarly suggests that "no international processes exist that require private persons or businesses to protect human rights" and that "corporate liability for human rights violations" is not "yet recognised under [CIL]."[76]

While they foreshadowed an appetite for greater corporate accountability and cleared a pathway forward, the Guiding Principles nonetheless left some constituencies dissatisfied. For instance, they seek to regulate many of the host-states' obligations and responsibilities whereas, in reality, corporations' home-states might be better situated to intervene in cases of human rights abuses (for example when an internal conflict prevents the host-state from providing effective human rights protections/remedies).[77] Relatedly, some commentators consider the home-state's role in regulating its corporate nationals' overseas activities to be vital in addressing "governance gaps" caused by what they perceive to be an inadequate international legal CSR framework.[78]

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[71] *Id.* at 10.

[72] *Id.* at 14, 19.

[73] *Id.* at 25–26.

[74] *Id.* at 15–26. On various due diligence considerations in this context, *see* Robert McCorquodale, *Human Rights Due Diligence Instruments: Evaluating the Current Legislative Landscape*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS 121–42 (Axel Marx et al. eds., 2022).

[75] KARAVIAS, *supra* note 13, at 83 (also considering "the presumption against change in the law" and observing that "arguing for corporate obligations under customary international human rights law equals arguing for revisiting the state-centred foundations of international human rights").

[76] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 630 (9th ed. 2019).

[77] *See* Cohen, *supra* note 44, at 1503 (citing U.N. OHCHR, FREQUENTLY ASKED QUESTIONS ABOUT THE GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS, at 23, U.N. Doc. HR/PUB/14/3, U.N. Sales No. E.14.XIV.6 (2014)). *See generally* Sara L. Seck, *Conceptualizing the Home State Duty to Protect Human Rights*, *in* CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL, LEGAL AND MANAGEMENT PERSPECTIVES 25, 25–51 (Karin Buhmann et al. eds., 2011).

[78] *See, e.g.*, PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS, AND THE HOME STATE ADVANTAGE (2014). A related critique is that the Guiding Principles fail to consider harm sustained by women in overseas extractive operations, resulting in the perpetuation of neo-liberal

More importantly, the Guiding Principles are not legally binding but rather voluntary and, as explored above, it remains unclear to what extent corporations have international law obligations, not to mention the scope and content of those undertakings.[79] In addition to this "soft law" scheme, other similarly framed international documents were adopted and now form part and parcel of the global business and human rights framework. Particularly noteworthy are the 2011 "OECD Guidelines for Multinational Enterprises"[80] and the International Labour Organization's 2017 "Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy."[81] Moreover, the ILC recently adopted the Draft Principles on the Protection of the Environment in Relation to Armed Conflicts, together with commentaries, which seek to ensure that states obligate corporations to exercise due diligence and subject them to liability for damaging the environment and/or human health in armed conflict or post-conflict situations.[82] More ambitiously, efforts were deployed under the aegis of the now-defunct UN Centre on Transnational Corporations to develop a legally binding code of conduct for multinational corporations, which ultimately failed.[83]

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and patriarchal structures that oppress women. *See* Penelope Simons & Melisa Handl, *Relations of Ruling: A Feminist Critique of the* United Nations Guiding Principles on Business and Human Rights *and Violence against Women in the Context of Resource Extraction*, 31 CAN. J. WOMEN & L. 113, 114 (2019).

[79] *See* Cohen, *supra* note 44, at 1503. The dissatisfaction with the Guiding Principles has also carried over to the digital sphere. *See* Stefania Di Stefano, *The Facebook Oversight Board and the UN Guiding Principles on Business and Human Rights: A Missed Opportunity for Alignment?*, *in* HUMAN RIGHTS RESPONSIBILITIES IN THE DIGITAL AGE: STATES, COMPANIES AND INDIVIDUALS 93–116 (Jonathan Andrew & Frédéric Bernard eds., 2021). For a broader critique of CSR's shortcomings, absent more extensive and effective government regulation, *see* DAVID VOGEL, THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY (rev. ed., 2006).

[80] *See* Org. for Econ. Coop. and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2011), https://www.oecd.org/daf/inv/mne/48004323.pdf.

[81] *See* Int'l Lab. Org. [ILO], *Tripartite Declaration of Principles concerning Multinational Enterprises* (5th ed. 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

[82] On the ILC's provisional adoption after the second reading, *see* Int'l L. Comm'n, Protection of the Environment in Relation to Armed Conflicts: Texts and Titles of the Draft Preamble and the Draft Principles Adopted by the Drafting Committee on Second Reading, U.N. Doc. A/CN.4/L.968, at 3 (May 20, 2022) (Draft Principles 10–11). For the final adoption, *see* Int'l L. Comm'n., Draft Principles on Protection of the Environment in Relation to Armed Conflicts, with Commentaries, U.N. Doc. A/77/10 (2021), *to be reprinted in* [2022] 2(2) Y.B. Int'l L. Comm'n _, *available at* https://legal.un.org/ilc/texts/instruments/english/commentaries/8_7_2022.pdf. The UN General Assembly also took note of the Principles. *See* G.A. Res. 77/104, ¶ 4 (Dec. 19, 2022).

[83] *See* DOREEN LUSTIG, VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION 1886-1981, 209–11, 217–18 (2020); Karl P. Sauvant, *Lessons from the negotiations of the United Nations Code of Conduct on Transnational Corporations and related instruments*, *in* ALTERNATIVE VISIONS OF THE INTERNATIONAL LAW ON FOREIGN INVESTMENT: ESSAYS IN HONOUR OF MUTHUCUMARASWAMY SORNARAJAH 186–93 (Ching Leng Lim ed., 2016); UNITED NATIONS CENTRE ON TRANSNATIONAL CORPORATIONS: CORPORATE CONDUCT AND THE PUBLIC INTEREST (Khalil Hamdani & Lorraine Ruffin eds., 2015); Karl P. Sauvant, *The Negotiations of the United Nations Code of Conduct on Transnational Corporations: Experience and Lessons Learned*, 16 J. WORLD INV. & TRADE 11 (2015). On lessons learned and their relevance to developing a legally binding instrument—explored below in section II.B.—*see* Khalil Hamdani & Lorraine Ruffing, *Lessons from the UN Centre on Transnational Corporations for the Current Treaty Initiative*, *in* BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS: CONTEXT AND CONTOURS 27–47 (Surya Deva & David Bilchitz eds., 2017).

b. MOVING AWAY FROM "SOFT LAW" THROUGH THE CONCEPT OF LEGAL PERSONALITY

This background foreshadows the role of "soft law" and self-reporting mechanisms in tackling corporate wrongdoing. This is the dominion of the Guiding Principles, which begs the question whether such softer standards are ill-equipped to effectively govern and regulate the overseas activities of corporations.[84] In some sectors, including in the corporate universe, private actors obviate the need for regulation by self-regulating, for example by adopting corporate codes of conduct or relying on "soft law" regimes.[85]

Understandably, the prospect of corporations eluding official state authority by self-regulating, including through corporate codes of conduct, raises eyebrows in some quarters. For example, some proponents of the Third World Approaches to International Law ("TWAILs") scholarly canon harbor a skeptical stance, equating corporate codes of conduct with an escape clause through which "the internal legal order [is] … used to, among other things, present a picture of law and human rights observance when the contrary is true."[86] After all, states have long used corporations to achieve various ends—not all laudable and many historically concerned with imperialistic expansion—including during international law's formative periods.[87] Professor Anghie, a thought leader of the TWAILs canon, goes further by arguing that "international law was developed to defend, not the rights of a state, but the rights of a corporation."[88]

While these concerns are legitimate, as corporate subterfuges and illusory compliance remain central to CSR's reality and narrative, the global CSR agenda has only advanced thus far through soft law and voluntary compliance mechanisms. Another case in point is the

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[84] *See, e.g.*, Catherine Kessedjian, *Le Droit Tendre (Soft Law) Est-il Apte à Encadrer la Responsabilité des Entreprises pour leurs Violations des Droits de l'Homme?*, *in* RÉCIPROCITÉ ET UNIVERSALITÉ 1323–36 (Emmanuel Decaux ed., 2017).

[85] On corporate codes of conduct, *see* INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 216–34 (Jeffrey Dunoff et al. eds., 2nd ed. 2006); Sean D. Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005); David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004). On "soft law" mechanisms, *see* Christian Tomuschat, *Private Individuals*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 317, 327–28 (James Crawford et al. eds., 2010). Seeking support from "soft law" mechanisms can be challenging when the underlying norms are perceived as imprecise or non-binding. *See generally* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 422 (2000); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT'L L. 581 (2005).

[86] B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3, 13 (2006). For broader critiques of the international legal system, *see* B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES (2nd ed. 2017); ANGHIE, *supra* note 37.

[87] Although not directly on point, *consider* Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as "the Good Despot": The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES IN L. 125 (2014); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L. J. 1, 33 (1999).

[88] Antony Anghie, *Asia in the History and Theory of International Law*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ASIA AND THE PACIFIC 68, 75 (Simon Chesterman et al. eds., 2019) (adding that this development occurred "at a time when the issue of legal personality and the relationship amongst empires, states, corporations, and individuals was still being theorized and far from clear") (also citing Koen Stapelbroek, *Trade, Chartered Companies, and Mercantile Associations*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 338–58 (Bardo Fassbender et al. eds., 2012)). Some suggest that international law assisted in shaping and limiting corporate responsibility's scope in various ways. *See* LUSTIG, *supra* note 83.

Montreux Document, which was predicated on a shared understanding that private military and security companies would self-regulate.[89] Another, arguably softer, potential avenue to enhance corporate respect for human rights, beyond investor activism, is to rely on specific tools embedded within corporate law—such as shareholder proposals—which some commentators reconcile with TWAILs discourse.[90]

Similar mantras animate much of the CSR movement which paved the way for these initiatives, favoring an enhanced focus on corporate self-regulation, with all its imperfections or other soft approaches.[91] That said, even if one accepts that self-regulation can trump state or international regulation of corporate conduct, should this mean that corporations should be exempted from any form of oversight, whether direct or indirect? On this point, for example, the Guiding Principles provide that "[s]tates *should* exercise adequate oversight … when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights."[92]

Until the European Union's mandatory disclosure approach (i.e. obligating large public interest corporations to report their policies on various social responsibility aspects)[93] is extended to all corporations, CSR's emphasis on voluntary compliance with best business practices will remain unsatisfactory to many and will fail to exert the requisite compliance pull towards greater corporate accountability.[94] For their part, however, "soft law" instruments elaborated by international organizations could "generate as much or sometimes greater compliance than formally binding sources of international obligation like treaties," even though it is uncertain whether their breach would qualify as an internationally wrongful act.[95] It is perhaps understandable, therefore, that proponents of human rights-expansive

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[89] *See* Permanent Rep. of Switz. to the U.N., Letter dated Oct. 2, 2008 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008).

[90] *See* Aaron A. Dhir, *Shareholder Engagement in the Embedded Business Corporation: Investment Activism, Human Rights and TWAIL Discourse*, 22 BUS. ETHICS Q. 99 (2012) (applying this rationale to the expansion of corporate operations overseas in the extractive sector). For his earlier takes, including on using corporate law tools to advance international human rights with particular emphasis on investor activism, *see Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE HALL L.J. 47 (2009); *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365 (2006).

[91] *See* Ilias Bantekas, *Corporate Social Responsibility in International Law*, 22 B.U. INT'L L.J. 309, 317–25 (2004).

[92] GUIDING PRINCIPLES, *supra* note 70, at 8 (Principle 5) (emphasis added).

[93] Council Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 Amending Council Directive 2013/34/EU as Regards Disclosure of Non-Financial and Diversity Information by Certain Large Undertakings and Groups, 2014 O.J. (L 330) 1.

[94] *See, e.g.,* Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOB. POL'Y 127, 134–35 (2010). On the implications and effectiveness of voluntary standards in the field of business and human rights, *see* Andreas Rasche, *Voluntary Standards for Business and Human Rights – Reviewing and Categorizing the Field*, *in* Marx et al., *supra* note 74, at 161–75; Elizabeth Bennett, *Business and Human Rights: The Efficacy of Voluntary Standards, Sustainability Certifications, and Ethical Labels*, *in* Marx et al., *supra* note 74, at 176–203.

[95] JOSÉ E. ALVAREZ, THE IMPACT OF INTERNATIONAL ORGANIZATIONS ON INTERNATIONAL LAW 351, 359 (2017) (also suggesting that international law generated by international organizations exists along a bindingness continuum, thereby disabling the familiar positivist inclination to locate an "'on/off' switch where something is or isn't law"). *See also* Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

liability schemes insist on binding non-state actors, including corporations, to CIL-derived human rights obligations (i.e. "hard law").

Scholars increasingly attempt to better situate the role and place of individuals and non-state actors within the international legal system. Part and parcel of that quest is to better define and understand the concept of international legal personality,[96] which has a direct impact on whether those actors can bear international law rights and obligations and become partial or full-fledged participants in the international system.[97] To the extent that some degree of legal personality is conferred upon corporations to engage in various transnational transactions, those actors not only have the ability to sue other actors but, conversely, could themselves be held liable for violating specific obligations. That is the direct consequence of being granted a limited degree of international legal personality.[98] The outstanding uncertainty concerns the extent and source of those specific obligations.

One point of potential interaction between the legal personality and potential liability of non-state actors comes into focus in investor-state arbitration. Much of the traditional doctrine and scholarship have centered on violations of investors' rights by host-states, but nothing precludes more profound explorations of investor misconduct in states in which investors operate. After all, well-established arbitral jurisprudence suggests that investors who engaged in serious wrongdoing (e.g. fraud, illegality or corruption) should be deprived of the benefits of investment treaty protection.[99] More specifically, investor misconduct

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[96] *See* ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 152–66 (2016); PARLETT, *supra* note 35; d'Aspremont, *supra* note 28; Clapham, *supra* note 40. For various perspectives on this fundamental—but challenging—concept, *see* INTERNATIONAL LEGAL PERSONALITY (Fleur Johns ed., 2010).

[97] For various views, *see* d'Aspremont, *supra* note 28. In investment law, the debate of how to classify the nature of investor rights complicates this question. On one view, those rights can be classified as substantive (the "direct right model"), presumably militating in favor of greater recognition of investors' international legal personality. Conversely, others qualify investor rights as procedural in nature (the "derivative model"), suggesting that investors are merely empowered to exercise a modified version of diplomatic protection, with the home-states' rights never quite curtailed or affected in any fundamental way. A third position points to an "integrative model," positing that "investment treaty rights are jointly held by the investor and the home state in an interdependent manner." This approach implies that investment law and arbitration continuously exist and interact alongside diplomatic protection law and its attendant customary norms. *See* Javier García Olmedo, *Claims by Dual Nationals Under Investment Treaties: Are Investors Entitled to Sue Their Own States?*, 8 J. INT'L DISP. SETTLEMENT 695, 715–22 (2017). For one potential application of the integrative model, *see* Ahmadou Sadio Diallo (Republic of Guinea v. Dem. Rep. Congo), Preliminary Objections, 2007 I.C.J. 582, 615, ¶ 90 (24 May). As seen *infra* in section II.A.2.b. and notes 129–30, 166 and 199, investment law constitutes one potential mechanism through which international corporate legal responsibility can be actuated, even if on a random or selective basis.

[98] *See* Clapham, *supra* note 16, at 68–69, 79, 82; Emeka Duruigbo, *Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges*, 6 NW. J. INT'L HUM. RTS. 222 (2008); Jonathan I. Charney, *Transnational Corporations and Developing Public International Law*, 1983 DUKE L.J. 748 (1983). For a critical take on Clapham's position and similar views, *see* Alvarez, *supra* note 17, at 6–9.

[99] *See* Inceysa Vallisoletana, S.L. v. Republic of El Sal., ICSID Case No. ARB/03/26, Award (Aug. 2, 2006); Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/03/25, Award (Aug. 16, 2007); Plama Consortium Limited v. Republic of Bulg., ICSID Case No. ARB/03/24, Award (Aug. 27, 2008); Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (June 18, 2010); Metal-Tech Ltd. v. Republic of Uzb., ICSID Case No. ARB/10/3, Award (Oct. 4, 2013) [hereinafter Metal-Tech Ltd. Award]; Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Phil., ICSID Case No. ARB/11/12, Award (Dec. 10, 2014). *See also* Phoenix Action, Ltd. v. The Czech Republic, ICSID Case No.

might have an impact on jurisdictional or admissibility-based objections, which might drive arbitral tribunals to dispossess themselves of cases because of investors' wrongful conduct.[100] However, should an investor's claim(s) survive the preliminary stage of the arbitral proceedings, its wrongful conduct can nonetheless be considered at the merits, damages and costs phases of the proceedings.[101]

At one level, investor wrongdoing can be factored into a tribunal's calculus of the host-state's liability. This approach signals that a respondent state in investment arbitration proceedings can raise defenses—whether articulated through the prism of the investor's contributory fault[102] or illegality—when the facts suggest that the state's liability might be attenuated accordingly. These defenses may include "mismanagement, investment reprisal, and post-establishment illegality," amongst others.[103]

On another level, while most instances of calling out investor misconduct manifest through defenses raised by host-states against investor claims, especially in light of "the asymmetrical structure of most international investment agreements" ("IIAs"),[104] some

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ARB/06/5, Award, ¶ 78 (Apr. 15, 2009) ("ICSID protection should [not] be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs"). For a compatible case outside investment treaty arbitration, *see* World Duty Free Company Limited v. Republic of Kenya, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

[100] *See* Andrew Newcombe, *Investor Misconduct: Jurisdiction, Admissibility or Merits?*, *in* EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION 187–200 (Chester Brown & Kate Miles eds., 2011) [hereinafter *Investor Misconduct: Jurisdiction*]. *See also* Patrick Dumberry & Gabrielle Dumas-Aubin, *The Doctrine of "Clean Hands" and the Inadmissibility of Claims by Investors Breaching International Human Rights Law*, TRANSNAT'L DISPUTE MGMT. 1 (2013). On investor misconduct, more generally, *see* Andrew Newcombe, *Investor Misconduct*, *in* IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 195–211 (Armand de Mestral & Céline Lévesque eds., 2012) [hereinafter *Investor Misconduct*]. On corruption in investment arbitration, *see* ALOYSIUS LLAMZON, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION (2014).

[101] *See also Investor Misconduct: Jurisdiction*, *supra* note 100, at 189. Conversely, some tribunals opine that while "an investment might be 'legal' or 'illegal', or made in good faith or not, it nonetheless remains an investment." Saba Fakes v. Turk., ICSID Case No. ARB/07/20, Award, ¶ 112 (July 14, 2010). *See also* MAVLUDA SATTOROVA, THE IMPACT OF INVESTMENT TREATY LAW ON HOST STATES: ENABLING GOOD GOVERNANCE? 155–56 (2018).

[102] Int'l L. Comm'n, Articles on Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/56/10, art. 39 (2001), *reprinted in* [2001] 2(2) Y.B. Int'l L. Comm'n 26, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (and commentary, *id.*, at 31) [hereinafter "ARSIWA"] (governing an injured state's "contribution to the injury"). *See also generally* Jean-Michel Marcoux & Andrea K. Bjorklund, *Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration*, 69 INT'L & COMP. L.Q. 877 (2020); Yarik Kryvoi, *Economic Crimes in International Investment Law*, 67 INT'L & COMP. L.Q. 577 (2018); Bear Creek Mining Corporation v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶¶ 4, 35, 40 (Nov. 30, 2017) (partial dissenting Opinion of Professor Philippe Sands).

[103] *See generally* MARTIN JARRETT, CONTRIBUTORY FAULT AND INVESTOR MISCONDUCT IN INVESTMENT ARBITRATION (2019).

[104] This asymmetry results from the fact that most IIAs impose legal obligations on host-states but not on foreign investors. *See* Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award, ¶ 659 (Dec. 15, 2014) [hereinafter Al-Warraq Final Award] (stressing that "[c]ounterclaims are problematic in investment arbitration because of the 'inherently asymmetrical character' of an investment treaty"). *See also* Nicolás M. Perrone, *Bridging the Gap Between Foreign Investor Rights and Obligations: Towards Reimagining the International Law on Foreign Investment*, 7 BUS. & HUM. RTS. J. 375 (2022); Andrew Newcombe & Jean-Michel Marcoux, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia: Imposing International Obligations on Foreign Investors*, 30 ICSID REV. 525, 525 (2015); Karsten Nowrot, *Obligations of Investors*, *in* INTERNATIONAL INVESTMENT LAW: A HANDBOOK 1154, 1154–55 (Marc Bungenberg et al. eds., 2015). For other related

respondent states have nevertheless raised counterclaims against allegedly wrongdoing investors, with varying results.[105] Logically, it could be that incorporating counterclaims expressly in investment treaty-drafting, which has occurred in newer instruments, might assist in recalibrating investment law and addressing its in-built asymmetries.[106] Such an approach arguably provides a pathway—however modest or selective—to vindicate some of the CSR project's objectives in apposite cases.

Granted, a state launching a counterclaim or bringing a claim directly against an investor might not be principally motivated by a desire to push the CSR agenda forward, or at all for that matter. Yet, there is no reason to discount the prospect of such an action pursuing two aims concurrently, namely that of the state's immediate objective(s) in the investment-state arbitration proceeding and that of establishing investor responsibility in CSR's spirit. In that scenario, the latter aim inexorably flows from the pursuance of the former aim by the state, even if incidental, unintended, random, or ancillary.

The final award in *Al-Warraq v. Indonesia* recognized that states party to an IIA can impose international law obligations on a foreign investor, which was the case in those particular proceedings.[107] In response, some commentators highlight that "[t]his recognition, although not as foundational as acceptance of the idea of arbitration without privity, is potentially equally historic."[108] While there is still resistance to the idea that human rights should have a place in investment law and arbitration,[109] this line of cases does not preclude

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considerations, *see Investor Misconduct*, *supra* note 100, at 195–96, 209. *But see* Jorge E. Viñuales, *Investor Diligence in Investment Arbitration: Sources and Arguments*, 32 ICSID REV. 346, 367 (2017) (deeming such critiques "rather simplistic and not always accurate").

[105] *See, e.g.,* Rusoro Mining Ltd. v. Bolivarian Republic of Venez., ICSID Case No. ARB(AF)/12/15, Award, ¶¶ 618–29 (Aug. 22, 2016); Oxus Gold v. Republic of Uzb., UNCITRAL, Final Award, ¶¶ 906–59 (Dec. 17, 2015); Al-Warraq Final Award, *supra* note 104, ¶¶ 655–72; Metal-Tech Ltd. Award, *supra* note 99; Antoine Goetz & Consorts et S.A. Affinage des Metaux v. Republique du Burundi, ICSID Case No. ARB/01/2, Sentence, ¶¶ 267–87 (June 21, 2012); Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶¶ 859–77 (Dec. 7, 2011); Declaration of W. Michael Reisman in *id*.

[106] *See* Arnaud de Nanteuil, *Counterclaims in Investment Arbitration: Old Questions, New Answers?*, 17 L. & PRAC. INT'L CTS. & TRIBUNALS 374 (2018); Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17 LEWIS & CLARK L. REV. 461 (2013); Walid Ben Hamida, *L'arbitrage État-investisseur cherche son équilibre perdu: Dans quelle mesure l'État peut introduire des demandes reconventionelles contre l'investisseur privé?*, 7 INT'L L. F. DU DROIT INT'L 261 (2005). For a recent example, *see* Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Feb 4, 2016, art. 9.19(2), Feb 4, 2016, *available at* https://www.dfat.gov.au/trade/agreements/in-force/cptpp/official-documents (enabling respondents to submit counterclaims). For broader—but still relevant—arguments based on injustice and moral considerations, *see also* Steven R. Ratner, *Survey Article: Global Investment Rules as a Site for Moral Inquiry*, 27 J. POL. PHIL. 107 (2019); KATE MILES, THE ORIGINS OF INTERNATIONAL INVESTMENT LAW: EMPIRE, ENVIRONMENT AND THE SAFEGUARDING OF CAPITAL 133–34 (2013); Nitish Monebhurrun, *Essay on Unequal Treaties and Modernity through the Example of Bilateral Investment Treaties*, 11 BRAZILIAN J. INT'L L. 203, 204 (2014).

[107] This reality empowers respondent states to file counterclaims against wrongdoing investors. *See* Al-Warraq Final Award, *supra* note 104, ¶¶ 662–66.

[108] Newcombe & Marcoux, *supra* note 104, at 526.

[109] *See, e.g.,* JULIAN SCHEU ET AL., INVESTMENT PROTECTION, HUMAN RIGHTS, AND INTERNATIONAL ARBITRATION IN EXTRAORDINARY TIMES (2022); FILIP BALCERZAK, INVESTOR–STATE ARBITRATION AND HUMAN RIGHTS (2017); Bruno Simma, *Foreign Investment Arbitration: A Place for Human Rights?*, 60 INT'L & COMPAR. L.Q. 573 (2011) (arguing that human rights considerations can be considered by arbitrators through treaty interpretation and by including a "human rights audit" in investors' and host-states' due diligence). On the intersection of these two fields, *see generally* Riddhi Dhananjay Joshi & Shashikala Gurpur, *The Silent Spring of Human Rights in Investment Arbitration:* Jurisprudence Constante *through Case-Law Trajectory*, 36 ARB. INT'L

investors from assuming human rights obligations, the violations of which might be addressed through counterclaims.

A recent ICSID-administered tribunal entertained the possibility of holding an investor liable for such an obligation in *Urbaser v. Argentina*. It related to the investor's "obligation based on international law to provide the population living on the territory of the Concession with drinking water and sanitation services" (i.e. the human right to water), given that the tribunal was seized of a counterclaim to that effect —in fact, the first such tribunal to accept jurisdiction over a human rights counterclaim.[110] While the tribunal did not ultimately concede the claim,[111] this overture provides an attractive entry-point into a neglected area. Furthermore, the tribunal rejected the investor's assertion that it was not bound by human rights obligations, adding that, since they are subjects of international law, corporations not only benefit from rights under bilateral investment treaties ("BITs") but can also assume direct obligations thereunder.[112]

Equally important were two cases in which Ecuador, as a respondent state, successfully established the claimant investors' liability for considerable environmental damage.[113]

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557 (2020); Ursula Kriebaum, *Human Rights and International Investment Law*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND INVESTMENT 13 (Yannick Radi ed., 2018); Vivian Kube & Ernst-Ulrich Petersmann, *Human Rights Law in International Investment Arbitration*, *in* GENERAL PRINCIPLES OF LAW AND INTERNATIONAL INVESTMENT ARBITRATION 221 (Andrea Gattini et al. eds., 2018); Julian Scheu, *Trust Building, Balancing and Sanctioning: Three Pillars of a Systematic Approach to Human Rights in International Investment Law and Arbitration*, 48 GEO. J. INT'L L. 449 (2017); Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349 (2012); Yannick Radi, *Realizing Human Rights in Investment Treaty Arbitration: A Perspective from Within the International Investment Law Toolbox*, 37 N.C.J. INT'L L. & COM. REG. 1107 (2012); HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (Pierre-Marie Dupuy et al. eds., 2009); James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77 (2007).

[110] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award, ¶¶ 36, 1144, 1146-48, 1151, 1154, 1156–64 (Dec. 8, 2016) [hereinafter Urbaser Award]. For a considerably weaker and equivocal approach by the respondent state, *see* Copper Mesa Mining Corp. v. The Republic of Ecuador, UNCITRAL, PCA Case No. 2012-2, Award, ¶¶ 5.4, 5.39, 5.42 (Mar. 15, 2016) (redacted). For a critical assessment of that precedent, *see* Peter Muchlinski, *Can International Investment Law Punish Investor's Human Rights Violations?*, 37 ICSID REV. 359 (2022). For a pre-Urbaser account on the human right to water in investor-state arbitration, *see* Tamar Meshel, *Human Rights in Investor-State Arbitration: The Human Right to Water and Beyond*, 6 J. INT'L DISP. SETTLEMENT 277 (2015).

[111] Urbaser Award, *supra* note 110, ¶¶ 1143–55, 1182–1221, 1234(5). For general analysis, *see* Kevin Crow, *International Law and Corporate Participation in Times of Armed Conflict*, 37 BERKELEY J. INT'L L. 64 (2019).

[112] Urbaser Award, *supra* note 110, ¶¶ 1194-95. *See also* Boon, *supra* note 13, at 282 (emphasizing that "the award has paved the way towards permitting human rights considerations as the basis of a host state counterclaim"). Many scholars lobby for greater incorporation of investor obligations in IIAs. For an empirical account, *see* Mavluda Sattorova, *Investor Responsibilities from a Host State Perspective: Qualitative Data and Proposals for Treaty Reform*, 113 AJIL UNBOUND 22 (2019); SATTOROVA, *supra* note 101, at 61–70, chapter 5, part V. *See also* Urbaser Award, *supra* note 110, ¶ 1210 (holding that the human right to water involves an "obligation to perform" binding states but not corporations (absent "a contract or similar legal relationship of civil and commercial law")). Yet, the tribunal acknowledged that a customary "obligation to abstain, like a prohibition to commit acts violating human rights" could be of "immediate application, not only upon States, but equally to individuals and other private parties." *Id*.

[113] Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim, ¶¶ 34–42, 318, 611 (Aug. 11, 2015); Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶¶ 52, 79–119, 1075, 1099 (Feb. 7, 2017) (both resulting in investor liability). These decisions demonstrated that counterclaims may be used to hold investors

However, this outcome is tempered by the fact that the tribunals' findings on liability arose under Ecuadorian domestic law, rather than international law.[114] It thereby distinguished that liability precedent from corporate responsibility flowing from the violation of international law norms (i.e. CIL obligations), presumably the very type that could have arisen had *Nevsun* gone to trial before lower British Columbian courts. Nevertheless, one takeaway is that more counterclaims against wrongdoing investors should be expected in the future. In turn, this prospect can engender thorny jurisdictional issues (i.e. if the dispute settlement provision is (in)sufficiently broad for the tribunal to take jurisdiction or not) and challenges related to standing (i.e. should the host-state be the one launching the claim?).[115]

In tandem with these developments, scholars are paving the way for more robust inquiries into the creation of investor liability, which should prompt others to develop further intellectual and theoretical foundations for that subset of corporate wrongdoing.[116] A compelling argument can be made in favor of encouraging claims by host-states against investors, if only to instill greater stability, equality, and confidence in the investment arbitration system, though many other reasons exist for doing so.[117] Another potential selling point such reversed litigation roles might fulfil as between the parties—at least from the perspective of claimant states and proponents of enhanced investor liability—would turn the principle of consent's equalizing function on its head.

The foreign investor–host-state dynamic is often characterized by a lack of parity, translating into diminished bargaining power for the investor once its capital is invested. That said, consent to dispute settlement equalizes the parties' positions and empowers the investor to attempt to vindicate its rights against the state since the parties agree that, absent successful negotiations, compulsory arbitration will take place.[118] When the tables are turned as the state is suing the investor, that *home court advantage feel* becomes arguably skewed in favor of

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accountable in limited circumstances. *See also* Hugo Thomé, *Holding Transnational Corporations Accountable for Environmental Harm Through Counterclaims in Investor-State Dispute Settlement: Myth or Reality?*, 22 J. WORLD INV. & TRADE 651 (2021).

[114] *See* Jean Ho, *The Creation of Elusive Investor Liability*, 113 AJIL UNBOUND 10, 12 (2019) (arguing that "routinely reframing potentially internationally wrongful investor conduct as a violation of domestic law is problematic" because it suppresses "arbiters' ability to consider and confirm existing and emerging international obligations by which investors are bound," and "it belittles the impact on future investor conduct of a ruling finding investor responsibility").

[115] *See* Tomoko Ishikawa, *Counterclaims in Investment Arbitration: Is the Host State the Right Claimant*, *in* INVESTORS' INTERNATIONAL LAW 193 (Jean Ho & Mavluda Sattorova eds., 2021); Yaraslau Kryvoi, *Counterclaims in Investor-State Arbitration*, 21 MINN. J. INT'L L. 216 (2012).

[116] *See* PATRICK ABEL, INTERNATIONAL INVESTOR OBLIGATIONS: TOWARDS INDIVIDUAL INTERNATIONAL RESPONSIBILITY FOR THE PUBLIC INTEREST IN INTERNATIONAL INVESTMENT LAW (2022); Boon, *supra* note 13; Ho, *supra* note 114; Jean Ho, *International Law's Opportunities for Investor Accountability*, *in* Ho & Sattorova, *supra* note 115, at 13-44.

[117] *See generally* Gustavo Laborde, *The Case for Host State Claims in Investment Arbitration*, 1 J. INT'L DISP. SETTLEMENT 97 (2010).

[118] *See* W. Michael Reisman, *International Investment Arbitration and ADR: Married but Best Living Apart*, 24 ICSID REV. 185, 190–91 (2009); Sergio Puig & Gregory C. Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 369 (2018); *Investor Misconduct*, *supra* note 100, at 195. For an earlier empirical account, *see* Stephen J. Kobrin, *Testing the Bargaining Hypothesis in the Manufacturing Sector in Developing Countries*, 41 INT'L ORG. 609 (1987).

the state for the immediate purposes of the case,[119] and towards greater investor accountability in the grander scheme of things. This time around, the state seeks to vindicate its rights against the investor. Of course, additional work must be done to lay down guiding principles and streamline this emerging field of international practice. On balance, however, there is undeniably an upward trend in tackling investor misconduct through investment law—both in the case-law (either through counterclaims or states bringing claims directly against investors) and in scholarship—although the boundaries of the whole gamut of investor wrongdoing remains unsettled.[120]

Decidedly, investor wrongdoing and liability should find its way into any broader sustained study of individual civil responsibility in transnational law. These types of advances by different institutions, coupled with other incremental changes canvassed herein and beyond, suggest the existence of at least embryonic foundations of a regime of transnational individual civil liability, if not more.[121]

3. RELYING ON MUNICIPAL LAW VERSUS INTERNATIONAL LAW

Potential enhancement of CSR presents a singular implementation model, which is largely based on a paradox. While the would-be substantive law governing corporations' wrongful activities overseas derives from international law (or *should* derive from international law), the primary avenue of redress remains through domestic judicial remedies. There is nothing inherently troubling or perplexing about this paradox: domestic

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[119] Here, I am not suggesting that investor-state arbitration automatically provides an advantage to one party over the other. Conventional wisdom suggests the contrary: arbitral proceedings delocalize (at least, in ICSID proceedings) and depoliticize disputes, offering a neutral forum for dispute resolution. *See* Sundaresh Menon, *The Transnational Protection of Private Rights: Issues, Challenges, and Possible Solutions*, 108 AM. SOC. INT'L. L. PROC. 219, 224 n.33 (2014) (applying similar logic to international commercial arbitration). Equal treatment of parties remains paramount in the process. *See generally* Ilias Bantekas, *Equal Treatment of Parties in International Commercial Arbitration*, 69 INT'L & COMP. L.Q. 991 (2020). Nevertheless, some suggest that the system is rigged in favor of investors, an inequity counterclaims may partly assuage. *See* Ina C. Popova & Mark William Friedman, *Can State Counterclaims Salvage Investment Arbitration*, 8 WORLD ARB. & MEDIATION REV. 139 (2014).

[120] *See generally* ABEL, *supra* note 116; ANNA KOZYAKOVA, FOREIGN INVESTOR MISCONDUCT IN INTERNATIONAL INVESTMENT LAW (2021). For cases where states brought claims against investors directly, including through their state-owned enterprises, *see* Tanz. Elec. Supply Co. Ltd. v. Indep. Power Tanz. Ltd., ICSID Case No. ARB/98/8, Final Award, (July 12, 2001), 8 ICSID Rep. 226 (2005); Gabon v. Société Secrete S.A., ICSID Case No. ARB/76/1, Settlement and Order Noting Discontinuance, (Feb. 27, 1978). *See also* JOSE DANIEL AMADO ET AL., ARBITRATING THE CONDUCT OF INTERNATIONAL INVESTORS 19–24 (2018). On attributing the wrongful conduct of state-owned enterprises to states, *see* Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 U. PA. J. INT'L L. 895 (2019). On the role of state-owned enterprises in enhancing the prospect of direct corporate accountability in the rights-based universe, *see* Ma Xili, *Advancing Direct Corporate Accountability in International Human Rights Law: The Role of State-Owned Enterprises*, 14 FRONTIERS OF LAW IN CHINA 231 (2019).

[121] *See, e.g.,* Proulx, *supra* note 40. The first BIT "that incorporated a reference to ICSID to permit independent investor claims" allowed both the investor and host-state to be sued. *See* Agreement on Economic Cooperation (with Protocol and Exchanges of Letters Dated on 17 June 1968), Neth.-Indon., art. 11, July 7, 1968, 799 U.N.T.S. 13; ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 136 n.66 (2006). Consequently, some argue that enabling investor liability would simply constitute a return to the roots of the international investment arbitration regime. *See* Jackson Shaw Kern, *Investor Responsibility as Familiar Frontier*, 113 AJIL UNBOUND 28 (2019).

courts frequently apply international law principles when resolving disputes, and sometimes contribute to the development of relevant norms through judicial discourse, for instance in the field of state responsibility[122] or other areas of general international law.[123]

This judicial engagement with international legal norms has catalyzed a rich literature dissecting international law's role and place before domestic courts, both descriptive and critical.[124] In that process, the interpretive engagement with international law by domestic courts tends to straddle the divide between applying law and creating new norms or revising old law, rather than falling squarely on either end of the age-old dichotomy of "applying existing law versus creating new law" generally associated with courts, at least in the common law tradition.[125] In any event, this mode of human rights norms enforcement suggests a transnational governance model, as victims of corporate human rights violations increasingly turn to transnational litigation to secure remedies.

Such avenue is not without considerable challenges. It emphasizes the absence of a remedial mechanism at international law to hold corporations directly liable for human rights transgressions, evidencing an accountability vacuum and prompting a lobby for the urgent creation of a special legal framework to provide victims of human rights violations access to a judicial forum and empower their right to an effective remedy.[126] However, sceptics might ponder whether states, in sufficient numbers and with sufficient political will, would support such a development. As shown below, *Nevsun* must be appreciated against this background although, in some parts, the SCC appears to be fumbling in the dark rather than unfolding a sophisticated understanding of international law.

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[122] *See* SIMON OLLESON, STATE RESPONSIBILITY BEFORE INTERNATIONAL AND DOMESTIC COURTS: THE IMPACT AND INFLUENCE OF THE ILC ARTICLES (forthcoming, 2026); André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760 (2007). *See also generally* Eleni Methymaki & Antonios Tzanakopoulos, *Sources and the Enforcement of International Law: Domestic Courts–Another Brick in the Wall?*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 812 (Samantha Besson & Jean d'Aspremont eds., 2017); Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 LOY. L.A. INT'L & COMP. L. REV. 133 (2011). *See also* Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999); Prosecutor v. Krstić, Case No. IT-98-33-T, Judgement, ¶¶ 541, 575, 579–89 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeals Judgement, Joint Separate Opinion of Judge McDonald and Judge Voharah, ¶¶ 47–55 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

[123] *See generally* Case Concerning Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Judgment, 1926 P.C.I.J. (ser. A) No. 7, at 18–19 (May 25).

[124] *See generally* INTERNATIONAL LAW IN DOMESTIC COURTS: A CASEBOOK (André Nollkaemper et al. eds., 2019); Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015); Osnat Grady Schwartz, *International Law and National Courts: Between Mutual Empowerment and Mutual Weakening*, 23 CARDOZO J. INT'L & COMP. L. 587 (2015); Armand de Mestral & Evan Fox-Decent, *Rethinking the Relationship Between International and Domestic Law*, 53 MCGILL L.J. 573 (2008); GIB VAN ERT, USING INTERNATIONAL LAW IN CANADIAN COURTS (2d ed. 2008); John Mark Keyes & Ruth Sullivan, *A Legislative Perspective on the Interaction of International and Domestic Law*, *in* THE GLOBALIZED RULE OF LAW: RELATIONSHIPS BETWEEN INTERNATIONAL AND DOMESTIC LAW 277 (Oonagh E. Fitzgerald ed., 2005); Louis LeBel & Gloria Chao, *The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion?: Recent Developments and Challenges in Internalizing International Law*, 16 SUP. CT. L. REV. 23 (2002).

[125] *See, e.g.,* ODILE AMMANN, DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW: METHODS AND REASONING BASED ON THE SWISS EXAMPLE 133–58 (2019).

[126] *See generally* Prihandono, *supra* note 3; Cohen, *supra* note 44.

The abovementioned paradox emerges in the interstices between the applicable substantive law and the available enforcement mechanisms to implement this law. To recall, the substantive law presumably originates in international law while the enforcement channels remain tied to domestic legal systems. As to enforcement mechanisms, there are a few obvious options. First, in an ideal world, a truly international mechanism would exist to hold corporate wrongdoers *directly* liable under international law, presumably within the confines of an international legal or judicial institution. Such proposals, though logistically and substantively challenging, have been put forward mostly within the ranks of academia.[127] As seen earlier—despite considerable traction amongst various non-state constituencies to embrace such a model—there is insufficient will to do so among states. As a corollary, this limited appetite arguably impedes the development of firm and robust CIL norms to bind corporations directly.

These realities have fomented what some rightly perceive as an accountability gap, which behooves relevant stakeholders to contemplate alternate enforcement scenarios.[128] As seen above, one countervailing but perhaps limited option resides in investor-state arbitration. That regime does not preclude investors from being sued for corporate wrongdoing. However, in many cases, such eventuality can only materialize once a series of jurisdictional and admissibility-based hurdles have been cleared.[129] Moreover, while enticing, the prospect of holding investors accountable through investment law—including through contract-based liability and the affirmation of investor's obligations—runs up against considerable obstacles.[130]

Second, an alternate enforcement scenario is to sue corporate wrongdoers before domestic courts, but to subsume any would-be international law violation within domestic civil law. Otherwise put, domestic law, particularly tort law, may be suited to capture and regulate the same corporate wrongdoing that international law would presumably proscribe. On the other hand, the applicable domestic civil law will be qualitatively different from its international counterpart—and arguably narrower—than the would-be relevant applicable international law principles. Consequently, claimants might frame their allegations both within international law and domestic civil law, on a primary-subsidiary basis, with domestic courts entirely sidestepping international law in their final decisions, rather favoring the more familiar (and perhaps less controversial) language and logic of domestic law. By contrast,

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[127] *See, e.g.,* MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2018).

[128] *See generally* NADIA BERNAZ, BUSINESS AND HUMAN RIGHTS: HISTORY, LAW AND POLICY-BRIDGING THE ACCOUNTABILITY GAP (2017); JENNIFER A. ZERK, MULTINATIONALS AND CORPORATE SOCIAL RESPONSIBILITY: LIMITATIONS AND OPPORTUNITIES IN INTERNATIONAL LAW (2006).

[129] *See generally* Ludovica Chiussi, *Responsabilité des entreprises en matière de droits de l'homme: un rôle effectif du droit international de l'investissement?*, *in* DROITS DE L'HOMME ET DROIT INTERNATIONAL ÉCONOMIQUE 13 (Catharine Titi ed., 2019).

[130] S*ee, e.g.,* Arnaud de Nanteuil, *Responsabilité contractuelle des investisseurs pour violation des droits de l'homme*, *in* Titi, *supra* note 129, at 33–49; Makane Moïse Mbengue, *Les obligations des investisseurs étrangers*, *in* L'ENTREPRISE MULTINATIONALE ET LE DROIT INTERNATIONAL 295 (Laurence Dubin et al. eds., 2017). A related approach is to incorporate more robust obligations—including on sustainable development—incumbent on investors into IIAs. *See generally* Adeline Michoud, *L'intégration de la responsabilité sociale des entreprises dans les traités internationaux d'investissement: une question de (ré)équilibre*, 49 REVUE GÉNÉRALE DE DROIT 399 (2019). On corporations' role in advancing global sustainable development objectives, *see* THE ROLE OF MULTINATIONAL ENTERPRISES IN SUPPORTING THE UNITED NATIONS' SDGS (John McIntyre et al. eds., 2022).

while the Eritrean workers in *Nevsun* framed their claims both within CIL and domestic tort law, the SCC devoted much of its analysis to CIL.

Another case in point arose before the UK Supreme Court in the *Vedanta Resources* litigation and centered on determining whether a parent company may be held responsible under domestic civil law for human rights violations and environmental harm authored by its foreign subsidiary. This case revolves around a group tort claim launched on behalf of several rural farming communities in Zambia, arguing negligence in tort and breach of statutory duty against both the parent company and its subsidiary. The claimants allege that detrimental and adverse effects on their health and farming operations resulted from toxic emissions discharged from a copper mine owned and operated by the subsidiary in Zambia's Chingola District.[131] In a unanimous decision, the Court held that the UK parent company arguably owes a duty of care to residents living nearby its Zambian subsidiary.[132]

This line of cases empowers claimants to seek enforcement of international law standards—for instance, the Guiding Principles discussed above—through domestic civil law.[133] As illustrated by *Vedanta Resources*, domestic courts' resulting analysis often remains couched primarily—if not exclusively—within the purview of domestic civil law, much to the chagrin of human rights proponents. Despite his best efforts as intervener in *Vedanta Resources* to plead relevant international law standards and "comparative jurisprudence," Robert McCorquodale levelled his disappointment at the Court's failure to refer to these standards and case-law in its judgment.[134]

As seen below, the *Nevsun* decision shares many commonalities with *Vedanta Resources*, not least the fact that it also omits important international law standards from its analysis. Moreover, *Vedanta Resources* mirrors many of *Nevsun*'s technical aspects, both in regard to judicial approach and the way in which the parties' arguments were framed. The former case arose in the context of a procedural appeal whereas the *Nevsun* decision was made on an appeal from a declined motion to strike.[135] However, on substance the *Vedanta Resources* court confined its analysis of the parent company's liability solely within domestic

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[131] The 1826 Zambian farmers stress that these toxic emissions were discharged into watercourses that constitute their only source of drinking and irrigation water for their crops. *See* Vedanta Res. PLC and Another v. Lungowe and Others [2019] UKSC 20, ¶ 1.

[132] *Id.* ¶¶ 44, 46, 49, 53-57, 59-62.

[133] The Vedanta Resources holding might illuminate at least two other cases pending before U.K. courts involving similar facts: Okpabi and Others v. Royal Dutch Shell PLC and Another [2021] UKSC 3 (relying heavily on Vedanta Resources); AAA and Others v. Unilever PLC [2018] EWCA (Civ) 1532 (U.K.).

[134] Robert McCorquodale, *Vedanta v. Lungowe Symposium: Duty of Care of Parent Companies*, OPINIOJURIS (Apr. 18, 2019), http://opiniojuris.org/2019/04/18/symposium-duty-of-care-of-parent-companies/. For a prescriptive account seeking to pierce the corporate veil to ensure parent company liability more frequently for claims involving fundamental human rights violations, *see* Hassan M. Ahmad, *Parent Company Liability in Transnational Human Rights Disputes: An Interactional Model to Overcome the Veil in Home State Courts*, 12 TRANSNAT'L LEGAL THEORY 501 (2021).

[135] On the Vedanta Resources decision, *see* Marilyn Croser et al., *Vedanta v Lungowe and Kiobel v Shell: The Implications for Parent Company Accountability*, 5 BUS. & HUM. RTS. J. 130 (2020); Laura Green & David Hamer, *Corporate Responsibility for Human Rights Violations: UK Supreme Court Allows Zambian Communities to Pursue Civil Suit Against UK Domiciled Parent Company*, EJIL:TALK! (Apr. 24, 2019), https://www.ejiltalk.org/corporate-responsibility-for-human-rights-violations-uk-supreme-court-allows-zambian-communities-to-pursue-civil-suit-against-uk-domiciled-parent-company/. On Nevsun, *see also* JEFFREY BONE, GOVERNING THE EXTRACTIVE SECTOR: REGULATING THE FOREIGN CONDUCT OF INTERNATIONAL MINING FIRMS 88, 103 (2021).

tort law, despite the abovementioned efforts, whereas in *Nevsun* the SCC was much more inclined to engage with international law principles.

As a subset of this second enforcement option, potential claimants might sue corporate human rights violators before domestic courts but rely primarily (or exclusively) on international law in framing their claims. Thus, plaintiffs will rely upon the actual substance of international law in framing their claims before domestic courts. This approach was espoused in claims launched before U.S. courts under ATCA, which gradually emerged as a model of transnational law governance.[136] Indeed, this jurisdictional mechanism has been used to hold foreign investors indirectly liable for human rights violations perpetrated by states in which they operate, although this approach to transnational remedies potentially raises tensions with existing international law principles.[137] ATCA provides that "[t]he 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."[138]

Presumably, the framers of this jurisdictional legislative scheme initially envisaged merging CIL and tort law to enable suits based on extraterritorial torts, in which international law principles would be front and center. At the very least, SCOTUS—while acknowledging that ATCA does not enumerate torts falling under its purview—specified that this legislation was "enacted on the understanding that [federal] common law would provide a cause of action for [a] modest number of international law violations."[139] Some would argue that certain aspects of corporate social/legal responsibility should fall squarely within this category.

In CSR's early days, a Canadian company—Talisman Energy—was sued under ATCA for allegedly aiding and abetting the Sudanese government in perpetrating genocide, war crimes, and crimes against humanity to secure further oil during the Sudanese civil war. Ultimately, the U.S. Court of Appeals held that, while international law should inform the applicable legal standard related to aiding and abetting, this standard was one of purpose, as opposed to knowledge alone.[140] The Court had to be convinced that "Talisman acted with the 'purpose' to advance the Government's human rights abuses," as opposed to simply having knowledge of those violations, a conclusion the facts and evidence did not support in the Court's view.[141]

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[136] *See, e.g.,* Ellis, *supra* note 37. For broader interdisciplinary accounts on global governance instruments pertaining to business and human rights, *see* Marx et al. eds., *supra* note 74.

[137] *See* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271 (2009).

[138] Alien Tort Claims Act, 28 U.S.C. § 1350 (1948). For a key decision opening U.S. courts to human rights litigation by subsuming CIL within federal common law, *see* Filartiga v. Pena-Irala, 630 F.2d 876, 885–86 (2d Cir. 1980). On its importance for human rights protection, *see* Richard M. Buxbaum & David D. Caron, *The Alien Tort Statute: An Overview of the Current Issues*, 28 BERKELEY J. INT'L L. 511, 511–12 (2010).

[139] Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 115 (2013). *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004); Buxbaum & Caron, *supra* note 138, at 514. *See also generally* DALIA PALOMBO, BUSINESS AND HUMAN RIGHTS: THE OBLIGATIONS OF THE EUROPEAN HOME STATE 25 (2019).

[140] Presbyterian Church of Sudan, et al. v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

[141] *Id.* at 260, 263–64. *See also* James Morrissey, *Presbyterian Church of Sudan v. Talisman Energy, Inc.: Aiding and Abetting Liability Under the Alien Tort Statute*, 20 MINN. J. INT'L L. 144 (2011); Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. INT'L L. & POL. 425 (2004). On the decision's aftermath and impact on Talisman's activities, *see* Aaron A. Dhir, *Of Takeovers, Foreign Investment and Human Rights: Unpacking the Noranda-Minmetals Conundrum*, 22 BANKING & FIN. L. REV. 77, 99–100 (2006).

In parallel, certain constituencies lobbied for greater development and use of the concept of universal civil jurisdiction,[142] although the existence and applicability of that concept remain contested.[143] That principle operates even absent a jurisdictional nexus between the decisional forum and international law breach and might eventually be harnessed with a view to addressing extraterritorial corporate wrongdoing.[144] One perspective conceives of the traditional divide between public and private international law[145] as artificial—whether dealing with public international law issues or dispute resolution involving private parties in municipal legal orders—given that any exercise of jurisdiction by domestic judges is necessarily synonymous with an exercise of state jurisdiction. Consequently, the argument goes, all such jurisdictional exercises would necessarily be regulated—and subject to any constraints imposed—by public international law principles. This reasoning would most relevantly apply to the exercise of domestic curial jurisdiction in civil matters, including in transnational human rights litigation involving corporations.[146]

The reality, however, is that both ATCA and universal civil jurisdiction currently present shrinking remedial avenues to tackle transnational corporate wrongdoing. SCOTUS' recent jurisprudence—especially through the combined effect of *Kiobel* and *Jesner*—closed the door to suing foreign corporations before American courts for transnational torts (including parent company accountability for similar transgressions).[147] In summary, these cases

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[142] *See generally* UNIVERSAL CIVIL JURISDICTION: WHICH WAY FORWARD? (Serena Forlati & Pietro Franzina eds., 2020).

[143] *See, e.g.,* Abhimanyu George Jain, *Universal Civil Jurisdiction in International Law*, 55 INDIAN J. INT'L L. 209 (2015). For the case against using universal jurisdiction to hold corporations accountable, *see* Patrick Macklem, *Corporate Accountability under International Law: The Misguided Quest for Universal Jurisdiction*, 7 INT'L L. FORUM 281 (2005).

[144] It is sometimes referred to as "universal tort jurisdiction." *See generally* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 135 (2nd ed. 2015); Menno T. Kamminga, *Universal Civil Jurisdiction: Is It Legal? Is It Desirable?*, 99 AM. SOC'Y INT'L. L. PROC. 123, 123 (2005); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 142, 145-46 (2006); Donald Francis Donovan, *Universal Civil Jurisdiction—The Next Frontier?*, 99 AM. SOC'Y INT'L. L. PROC. 117 (2005).

[145] Relatedly, CSR poses challenges for private international law. *See, e.g.*, Catherine Kessedjian, *Questions de Droit International Privé de la Responsabilité Sociétale des Entreprises*, *in* GENERAL REPORTS OF THE XXTH GENERAL CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW 221–48 (Katharina Boele-Woelki et al. eds., 2021). On private international law issues raised by similar tort litigation before English courts, *see* Ekaterina Aristova, *The Future of Tort Litigation against Transnational Corporations in the English Courts: Is Forum (Non) Conveniens Back?*, 6 BUS. & HUM. RTS. J. 399 (2021). On the intersection of CSR and private international law, *see* Geert Van Calster, *The Role of Private International Law in Corporate Social Responsibility*, ERASMUS L. REV. 125 (2014).

[146] *See* Lucas Roorda & Cedric Ryngaert, *Public International Law Constraints on the Exercise of Adjudicatory Jurisdiction in Civil Matters*, *in* Forlati & Franzina, *supra* note 142, at 74–98 (also couching this analysis within ECtHR jurisprudence and underscoring that resort to *forum necessitatis* jurisdiction must be authorized or required by CIL or international conventions). On adjudicatory jurisdiction in this context, *see* Pietro Franzina, *The Changing Face of Adjudicatory Jurisdiction*, *in* Forlati & Franzina, *supra* note 142, at 170–87.

[147] *See* Proulx, *supra* note 40, at 277–78 (discussing, *inter alia*, Kiobel, *supra* note 139, at 124–25 and Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1407 (2018)). *See also* Doreen Lustig, *Three Paradigms of Corporate Responsibility in International Law: The Kiobel Moment*, 12 J. INT'L CRIM. JUST. 593 (2014); David P. Stewart & Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013); Julian G. Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT'L L. 841 (2013).

precluded suits in two instances, namely where the impugned wrongful conduct transpired almost entirely abroad or where the defendant is a foreign corporation. On substance, in 2004 SCOTUS had already restricted U.S. courts' jurisdiction under ATCA by requiring that any international law rule forming the object of a suit be specific and universally recognized.[148]

SCOTUS recently maintained this narrowing jurisprudential trend in *Nestlé*, in which six individuals from Mali alleged they were trafficked into Ivory Coast as child slaves to produce cocoa.[149] While they did not own or operate cocoa farms in that state, U.S.-based companies Nestlé USA, Inc. and Cargill, Inc. nonetheless purchased cocoa from farms located in that country and "provide[d] those farms with technical and financial resources."[150] The Malian individuals sued the two companies, alleging that their arrangement with local cocoa farms in Ivory Coast—which vested the two corporations with an exclusive right to purchase cocoa—"aided and abetted child slavery."[151]

The majority essentially held that the corporations' operations in the U.S. were insufficiently connected to the alleged human rights abuses in Ivory Coast. Relying on *Kiobel*, SCOTUS recalled the general presumption against the extraterritorial application of U.S. legislation, including ATCA.[152] It follows that these cases "reflect a two-step framework for analyzing extraterritoriality issues,"[153] namely: (i) presuming that a statute does not apply extraterritorially, absent "a clear, affirmative indication" to the contrary in the statute itself (in *Kiobel*, SCOTUS held that nothing in ATCA rebuts the presumption against extraterritorial application); and (ii) in the absence of the statute's extraterritorial application, plaintiffs must demonstrate that "the conduct relevant to the statute's focus occurred in the United States."[154] If this latter eventuality materializes, the case then "involves a permissible domestic application even if other conduct occurred abroad."[155] Thus, a plaintiff who fails to successfully rebut the presumption against extraterritoriality "must allege and prove a *domestic* injury".[156] In *Nestlé*, however, SCOTUS opined that the individuals had "improperly s[ought] extraterritorial application of [ATCA]."[157]

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[148] Sosa v. Alvarez-Machain, 542 U.S. at 725.

[149] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1935-36 (2021). *See also* Adam Liptak, *Supreme Court Limits Human Rights Suits Against Corporations*, N.Y. TIMES, June 17, 2021.

[150] Nestlé, 141 S. Ct. at 1935.

[151] *Id*.

[152] Kiobel v. Royal Dutch Petrol. Co., 569 U.S. at 115–16 (2013); Nestlé, 141 S. Ct. at 1936-38. For a critical account arguing that *Kiobel* erroneously applied the presumption against extraterritoriality, *see* Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013). On the judicial genesis of the presumption against extraterritorial application of U.S. laws, *see* United States v. Palmer, 16 U.S. 610, 611 (1818); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 355, 357 (1909). *But see* United States v. Bowman, 260 U.S. 94 (1922) (constituting an exception to the extraterritorial application of national laws). The law came into focus more squarely in Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949) (defining the presumption as follows: "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States"). For recent judicial confirmation in another context, *see* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247 (2010) (applying it to securities law).

[153] RJR Nabisco, Inc. v. Eur. Cmty, 579 U.S. 325, 336-37 (2016).

[154] Nestlé, 141 S. Ct. at 1936-37; Kiobel, 569 U.S. at 115–18, 124.

[155] RJR Nabisco, 579 U.S. at 337.

[156] Nestlé, 141 S. Ct. at 1936 (citing RJR Nabisco, 579 U.S. at 346) (emphasis added).

[157] Nestlé, 141 S. Ct. at 1932-33.

SCOTUS took the view that all of the alleged wrongful conduct—i.e. falling within ATCA's "focus"—occurred overseas, in Ivory Coast. SCOTUS similarly rejected the argument that all major operational decisions by Nestlé and Cargill were made or approved in the U.S. should suffice to establish ATCA's domestic application.[158] Relatedly, in *Kiobel* SCOTUS similarly held that a defendant's "mere corporate presence" was insufficient to establish ATCA's domestic application, reserving a similar fate to "allegations of general corporate activity—like decisionmaking" in *Nestlé*.[159] Since making "operational decisions" is fairly routine for most corporations, SCOTUS concluded that the individuals' "generic allegations" failed to establish the requisite nexus between the cause of action they relied upon—aiding and abetting forced labor abroad—and domestic conduct.[160]

Thus, under ATCA plaintiffs must allege "more domestic conduct than general corporate activity" to establish that legislative scheme's domestic application.[161] As seen below, *Nestlé* shares other interesting points of rapprochement with the *Nevsun* decision. For now, suffice it to say that recent SCOTUS jurisprudence appears to entirely preclude suits brought in U.S. courts against corporate wrongdoing committed abroad.

Ultimately, universal civil jurisdiction remains a fairly controversial and unsettled area, partly because of its collapse within existing and more prominent international criminal narratives.[162] Its dwindling relevance was also precipitated by international courts like the ECtHR, which have severely limited its scope in recent jurisprudence involving human rights violations by individuals before municipal courts.[163] These developments cast doubt over the role of domestic courts and the extent to which they may be resorted to as implementers of corporate liability under international law.

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[158] *Id.* at 1935-37.

[159] Kiobel, 569 U.S. at 125; Nestlé, 141 S. Ct. at 1937. On Kiobel's broader implications, *see* Daniel Augenstein, *Paradise Lost: Sovereign State Interest, Global Resource Exploitation and the Politics of Human Rights*, 27 EUR. J. INT'L L. 669 (2016).

[160] Nestlé, 141 S. Ct. at 1937. *See also* Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 266 (2010) ("the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case").

[161] Nestlé, 141 S. Ct. at 1937. Three justices concluded that U.S. courts cannot create a cause of action under ATCA, as opposed to Congress, save in three limited circumstances: "violation of safe conducts, infringement of the rights of ambassadors, and piracy." Opinion of Thomas J., joined by Gorsuch and Kavanaugh, JJ., in *id*. at 1937-39. This position elicited a strong separate opinion critiquing this narrowing interpretation of ATCA. *See* Partly Concurring Opinion of Sotomayor, J., joined by Breyer and Kagan, JJ., in *id*. at 1944-49.

[162] *See* Anna Su, *Rise and Fall of Universal Civil Jurisdiction*, 41 HUM. RTS. Q. 849 (2019). On emergent unsettled domestic practices involving reparations against individuals and corporations, *see* Andreas Bucher, *Universal Civil Jurisdiction with Regard to Reparation for International Crimes*, 75 Y.B. INT'L L. INSTITUTE 1, 7–37 (2015). *See also generally* Andreas Bucher, *La Compétence Universelle Civile*, 372 RECUEIL DES COURS 9 (2014). For a more optimistic take on the gradual—but firm—development of universal criminal jurisdiction, *see* Máximo Langer & Mackenzie Eason, *The Quiet Expansion of Universal Jurisdiction*, 30 EUR. J. INT'L L. 779 (2019). On its relationship with the concept of "authority", *see* Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT'L L. 427 (2018).

[163] *See, e.g.,* Proulx, *supra* note 40, at 278–81 (discussing Naït-Liman v. Switzerland, App. No. 51357/07, Judgment (Eur. Ct. H.R. June 21, 2016) and Naït-Liman v. Switzerland [GC], App. No. 51357/07, Judgment (Eur. Ct. H.R. Mar. 15, 2018) and their interaction with the Kiobel jurisprudence). *See also* Serena Forlati, *The Role of the European Court of Human Rights in the Development of Rules on Universal Civil Jurisdiction*, *in* Forlati & Franzina, *supra* note 142, at 38–55.

Recourse to domestic courts to implement international liability does not alter the fact that international law imposed such responsibility in the first place; consequently, one must not confuse the very existence of liability under international law with the means to implement such responsibility.[164] However, any chicken-and-egg conundrum arising between would-be liability under international law versus existing domestic judicial remedies to implement such liability is compounded by the uncertainty regarding the existence and source of any corporate human rights obligations under international law. This takes us back to the age-old discussion of *soft law* versus *hard law*, which pervades this field.

One way to sidestep this obstacle is to push for greater involvement of local courts of the state in which the alleged human rights abuses occurred (i.e. the host-state),[165] but this only provides a partial—and very imperfect—avenue despite potential entry-points for liability before domestic courts or through investment law.[166] This is especially true when such states have weak judiciaries, no relevant legislation or a questionable rule of law culture and track record, judicial corruption, or are ravaged by armed conflict. Another workaround explored above is to push for greater involvement of local courts in the wrongdoing corporation's home-state. But this prospect is more attractive when envisaged in states where there is strong adherence to the rule of law, along with robust procedural and judicial safeguards in place. Again, this leads to a partial, uneven, and unsatisfying picture. For example, the *Nestlé* precedent suggests that U.S. courts will be inhospitable fora for such claims,[167] whereas the *Nevsun* decision offers a perhaps more optimistic prognosis for Canadian courts.

A final potential—but perhaps unsatisfying—enforcement option is to fall back on state responsibility law to hold the home-state of such corporations responsible for their nationals' wrongdoing abroad. This idea is mostly premised on that home-state's failure to effectively

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[164] *See* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 481 (2001) (also cautioning against "confus[ing] the existence of responsibility with the mode of implementing it"); KARAVIAS, *supra* note 13, at 15 (also underscoring that "[t]he application of an international norm by a municipal court entitled to apply international law does not add to or detract from the nature of the rule").

[165] This argument, based on *forum non conveniens*, posits that the host-state where the alleged human rights abuses occurred is a more propitious forum to handle any ensuing litigation than the home-state of the corporate wrongdoer. For Canada, *see* Bil'in (Vill. Council) v. Green Park Int'l Inc., 2009 QCCS 4151 (Can.); Assoc. canadienne contre l'impunité c. Anvil Mining Ltd., 2012 QCCA 117 (Can.); Susana C. Mijares Peña, *Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc*, 5 W.J. LEGAL STUD. 3 (2014). On subsequent development in the first case before the Human Rights Committee, *see* Olivier de Frouville, *La Responsabilité des États pour les Activités Extraterritoriales des Entreprises et l'Interprétation de la Notion de "Juridiction" par le Comité des Droits de l'Homme*, *in* JUSTICE ET DROITS DE L'HOMME : MÉLANGES EN HOMMAGE À CHRISTINE CHANET 67–86 (Emmanuel Decaux et al. eds., 2019).

[166] *See, e.g.*, Yulia Levashova, *The Accountability and Corporate Social Responsibility of Multinational Corporations for Transgressions in Host States through International Investment Law*, 14 UTRECHT L. REV. 40 (2018); JUHA KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION: AN ANALYSIS OF LEGAL RELATIONSHIPS (1979); *supra* note 130 and accompanying text.

[167] On the substance of potential ATCA claims, U.S. courts have been apprehensive about recognizing corporate liability under international human rights law. *See, e.g.*, Kiobel v. Royal Dutch Petrol. Co., 621 F.3d at 120, 148–49 (2d Cir. 2010) (underscoring, *inter alia*, that "[n]o corporation has ever been subject to any form of liability … under the [CIL] of human rights", and that "corporate liability has not attained a discernible, much less universal, acceptance among nations of the world"). For a critical account, *see* William S. Dodge, *Corporate Liability Under Customary International Law*, 43 GEO. J. INT'L L. 1045 (2012).

regulate its corporate national's operations abroad, which might result in that government being held internationally responsible for human rights transgressions committed by that corporation domiciled in that state.[168]

However, this course of action may be fraught with difficulties, including implementing responsibility absent a valid compulsory dispute settlement clause or special agreement between the injured and responsible states. Moreover, the Guiding Principles dictate that states must protect against human rights abuses within their territory or jurisdiction and provide for effective remedies for such violations, but do not obligate states to regulate the operations of their corporate nationals abroad.[169] Indeed, that document seeks to outline the obligations—and/or "responsibilities"—of both states and corporations regarding overseas business operations, without laying down binding obligations on corporations.[170]

This approach has the dual advantage and disadvantage of focusing on states' duties, as opposed to imposing more stringent human rights obligations on corporations themselves, which might leave some constituencies dissatisfied. Thus, the state is not held responsible for wrongful conduct of third parties, but rather for its failure to meet its own obligations with respect to regulating, preventing, or punishing/remedying that conduct. The Guiding Principles provide that states must protect against human rights abuses through an array of measures, such as legislation, regulation and policymaking, but also through punishment and redress.[171] States' "duty to protect" is a standard of conduct which, while it will not trigger states' responsibility for corporate wrongful conduct itself, might result in states breaching "their international human rights law obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse."[172]

The state responsibility option exists irrespective of whether the primary norms governing non-state actors' conduct are sufficiently defined at international law, and those actors' own liability is ultimately engaged. Should that conduct infringe human rights guarantees, the home-state might be liable for its own failures and omissions.[173] Otherwise

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[168] *See, e.g.,* Peña, *supra* note 165, at 7; Cohen, *supra* note 44, at 1501.

[169] *See* GUIDING PRINCIPLES, *supra* note 70, at 3 (Principle 1), 27 (Principle 25).

[170] Principle 11 provides that "[b]usiness enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved". The commentary adds:

> The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights.

GUIDING PRINCIPLES, *supra* note 70, at 13.

[171] GUIDING PRINCIPLES, *supra* note 70, at 3 (Principle 1), 3-4 (Principle 2). *See also* Cohen, *supra* note 44, at 1502.

[172] GUIDING PRINCIPLES, *supra* note 70, at 3. *See also generally* Pierre Bodeau-Livinec, *La Responsabilité des États à Raison des Activités des Entreprises Multinationales*, *in* Daubin et al., *supra* note 130, at 409–28.

[173] *See generally* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: Extraterritorial Violations by Corporations of International Human Rights*, 70 MODERN L. REV. 598 (2007); Shadrack Gutto, *Violation of Human Rights in the Third World*, 23 INDIAN J. INT'L LAW 56 (1983); Shadrack Gutto, *Responsibility and Accountability of States, Transnational Corporations, and Individuals in the Field of Human Rights to Social Development: A Critique*, 3 THIRD WORLD LEG. STUD. 175 (1984).

put, any would-be liability of non-state actors does not absolve the state from its own potential international responsibility.[174] If non-state actors' potential responsibility created an escape clause for states, it could dispossess injured parties of any effective access to a remedy for international law violations.[175] In what some perceive as an inadequate international law arsenal, therefore, the state responsibility option remains the default backstop to ensure some measure of accountability for overseas corporate wrongdoing.

B. A BROADER IMPETUS FOR INTERNATIONAL CIVIL INDIVIDUAL RESPONSIBILITY

This patchy and mostly non-binding international legal framework prompted some interlocutors to advocate the creation of harder law. The Guiding Principles have been helpful in providing guidance on business and human rights and have sometimes been successfully implemented. The CSR movement's checkered history spawned an appetite in some quarters to transform aspirations into actual treaty law, a development which would presumably fit within a broader regime of individual civil responsibility in transnational law defended more fully elsewhere.[176] This growing appetite manifests in various ways, not least through acknowledging that individuals and groups should assume more international law obligations, access to justice and remedial mechanisms should be expanded to capture a broader range of non-state actors, etc.[177]

Even if detractors deny the existence of an emerging legal framework governing international civil responsibility, some publicists have made the case that some of its major building blocks are already in place.[178] Surely, this possibility becomes more palatable in easier scenarios, i.e. when the U.N. Security Council holds individuals/non-state entities accountable for international human rights and humanitarian law violations and breaches of counterterrorism duties.[179] Admittedly, that line of argument is perhaps more challenging to defend in the CSR context or to countenance in the business world, as states might be disinclined to support the creation or tightening of corporate international law obligations, and some corporations reticent to take them onboard.

One compelling—but arguably flawed—workaround is to analogize the corporation to a state: since both are abstract entities, operated by individuals, should they be able to assume direct international law obligations and incur responsibility for their violation? If we artificially extend the notions of legal personality and international responsibility to the state

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[174] *See also* Proulx, *supra* note 40, at 216 n.3.

[175] *See generally* CHRISTINE EVANS, THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT 236 (2012); PETERS, *supra* note 96, at 165–66.

[176] *See generally* Proulx, *supra* note 40.

[177] *See generally* PETERS, *supra* note 96.

[178] *See* Proulx, *supra* note 40.

[179] As regards humanitarian law, *see* Gregory H. Fox et al., *The Contributions of United Nations Security Council Resolutions to the Law of Non-International Armed Conflict: New Evidence of Customary International Law*, 67 AM. U. L. REV. 649, 656 (2018). On counterterrorism, *see generally* Proulx, *supra* note 40; Vincent-Joël Proulx, *An Incomplete Revolution: Enhancing the Security Council's Role in Enforcing Counterterrorism Obligations*, 8 J. INT'L DISP. SETTLEMENT 303 (2017).

apparatus, why not do the same for corporations?[180] The ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") enshrine a savings clause, which recognized in 2001 that international law could eventually anchor a regime of individual *civil* responsibility.[181] If both states and individuals can be held responsible under international law, why not extend this rationale to corporations given that both individuals and states act through corporations?[182] When non-state actors wield considerable power, as some if not many corporations do (including influencing international lawmaking and the substance and direction of investment jurisprudence)—the argument goes—a corresponding increase of those actors' responsibilities should be expected, including in legal terms.[183] However, there are probably as many arguments for and against these propositions as there are detractors to elaborating a legally binding framework for CSR-related issues.

Historically, accountability gaps have appeared and persist regarding corporations' overseas conduct. Consequently, many harms and violations have gone unaddressed and ultimately unremedied. Given the aforementioned challenges, in 2014 the Human Rights Council instituted an open-ended intergovernmental working group ("OEIGWG"), tasked with elaborating an "international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises."[184] It held several sessions which culminated into an evolving draft treaty ("Draft

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[180] This implies that corporations can engage in normative activities. *See* Hervé Ascensio, *Les Activités Normatives des Entreprises Multinationales*, *in* Daubin, *supra* note 130, at 265–78. *But see* Alvarez, *supra* note 17, at 8–9 (arguing that "subject-hood" of corporations is a clumsy policy and legal angle to tackle this challenge).

[181] ARSIWA, *supra* note 102, art. 58. For a full-fledged discussion of this provision, its history, and implications, *see* Proulx, *supra* note 40, at 223–26. On the ILC's past engagement with non-state actors, *see* Zyberi, *in* d'Aspremont, *supra* note 28, at 165–78.

[182] *See infra* note 258 (discussing this proposition in the context of a scholarly contribution by Harold Koh). *But see* B.S. Chimni, *The Articles on State Responsibility and the Guiding Principles of Shared Responsibility: A TWAIL Perspective*, 31 EUR. J. INT'L L. 1211, 1220 (2020) (opining that "ARSIWA seeks to defend corporate concerns."); Rachel Brewster & Philip Stern, *Introduction to the Proceedings of the Seminar on Corporations and International Law*, 28 DUKE J. COMP. & INT'L L. 413, 413 (2018); Boon, *supra* note 13, at 260–61.

[183] *See generally* Karsten Nowrot, *Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities*, 80 PHIL. L.J. 563 (2005-2006); Frédéric Mégret & Florian Hoffmann, *The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities*, 25 HUM. RTS. Q. 314 (2003) (applying similar reasoning to the U.N.). *See also* Ian Binnie, *Legal Redress for Corporate Participation in International Human Rights Abuses*, 38 THE BRIEF 44, 45 (2009) (observing that "transnational companies have power and influence approaching and sometimes exceeding that of the states in which they operate but without the public law responsibilities of statehood"); André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework*, 34 MICH. J. INT'L L. 359, 375 (2013). On corporations' role in dictating international law's evolution alongside states—absent robust liability mechanisms to regulate the former—*see* Doreen Lustig, *The Enduring Charter: Corporations, States, and International Law*, *in* STATES, FIRMS, AND THEIR LEGAL FICTIONS: ATTRIBUTING IDENTITY AND RESPONSIBILITY TO ARTIFICIAL ENTITIES (Melissa Durkee ed., forthcoming 2023); Chimni, *supra* note 182, at 1211–16, 1219–21. For compatible takes in specific public and private international law areas, including in investment law, trade, antitrust, intellectual property, and telecommunications, *see* Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2017); Julian Arato, *Corporations as Lawmakers*, 56 HARVARD INT'L L.J. 229 (2015); Alvarez, *supra* note 17; Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011). *See also generally* Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

[184] *See* Human Rights Council Draft Res. 26/. . . U.N. Doc. A/HRC/26/L.22/Rev.1 (June 25, 2014); Human Rights Council Res. 26/9, ¶ 1 (July 14, 2014).

Treaty on CSR"), the most recent version of which was released August 17, 2021.[185] Unsurprisingly, it draws heavily from the Guiding Principles but also converts many of their recommendations into legally binding undertakings.[186] It enshrines obligations for states to protect human rights from corporate wrongdoing, extending its potential reach over both private and public international law aspects.[187]

Obviously, the draft text and its fate present a fluid situation,[188] although its adoption will likely encounter resistance, at least from states. Proponents of a responsibility-expansive legal framework to regulate corporations' activities nonetheless cling to the draft treaty's promise, arguing "that a binding treaty is the only vehicle which would not only recognise but clarify that businesses do in fact have legal obligations under international human rights law."[189] Despite these aspirations, the draft treaty has generated considerable critiques, which are as numerous as they are predictable.[190]

A legally binding instrument might be unwarranted given the relatively good track record of compliance and influence generated by the Guiding Principles, which a treaty could compromise. By way of imperfect analogy, consider how the adoption of an international convention on state responsibility, which the U.N. General Assembly has called for, could

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[185] *See* Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises, OEIGWG Chairmanship Third Revised Draft (Aug. 17, 2021), https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf [hereinafter Draft Treaty on CSR]. In November 2022, the Chair of OEIGWG announced the release of the commentary on informal proposals for revisions to the Draft Treaty on CSR, which is *available at* https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg/session8/2022-11-24/igwg-8th-suggested-chair-proposals-commentary.pdf.

[186] The draft couches its liability provision in legally binding language, but leaves it up to states parties to impose legal responsibility upon wrongdoing corporations through their own domestic legal systems. For a related critique on an earlier version of the draft, *see* Ioana Cismas & Sarah Macrory, *The Business and Human Rights Regime under International Law: Remedy Without Law?*, *in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION AND ENFORCEMENT 222–59 (James Summers & Alex Gough eds., 2018) (suggesting that the content of primary norms governing corporations' activities is absent and/or underdefined, despite the widespread view that corporate wrongdoers should redress human rights abuses). On different aspects to consider when finalizing the treaty, *see* Deva & Bilchitz, *supra* note 83; Penelope Simons, *The Value-Added of a Treaty to Regulate Transnational Corporations and Other Business Enterprises*, *in id.*, at 48–78; THE FUTURE OF BUSINESS AND HUMAN RIGHTS: THEORETICAL AND PRACTICAL CONSIDERATIONS FOR A UN TREATY (Jernej Cernic & Nicolás Carrillo-Santarelli eds., 2018); David Bilchitz, *The Necessity for a Business and Human Rights Treaty*, 1 BUS. & HUM. RTS. J. 203 (2016); Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RTS. J. 41 (2016).

[187] *See, e.g.*, Draft Treaty on CSR, *supra* note 185, arts. 5–8, 14. The interface between public and private international law has long been a CSR feature, particularly regarding environmental wrongs in the Global South. *See* Sara L. Seck, *Environmental Harm in Developing Countries Caused by Subsidiaries of Canadian Mining Corporations: The Interface of Public and Private International Law*, 37 CANADIAN Y.B. INT'L L. 139 (2000). On the intersection of CSR and public international law, *see* Ludovica Chiussi Curzi, *A Public International Law Outlook on Business and Human Rights*, 24 INT'L CMTY. L. REV. 11 (2022).

[188] Relatedly, *see* Araya et al. v. Nevsun Res. Ltd., [2017] BCCA 401, para. 197 (Can.).

[189] Cohen, *supra* note 44, at 1509. On the draft treaty's emergence and potential, *see* Radu Mares, *The United Nations Draft Treaty on Business and Human Rights*, *in* Marx et al., *supra* note 74, at 21–43.

[190] *See also* Angelica Bonfanti & Marco Pertile, *How Can a Treaty on Business and Human Rights Fit with International Law? Assessing the Development of International Rules on Corporate Accountability and Their Relationship with Other International Legal Regimes*, 83 QUESTIONS INT'L L. 1, 2 n.5 (2021).

potentially jeopardize the ILC's longstanding work on ARSIWA.[191] Indeed, such an instrument could engender a decodifying effect on ARSIWA's diffuse and soft authority, upend their in-built compromises, and dissuade states from signing onto a formal, legally binding instrument.[192] Granted, the Guiding Principles incorporate "soft law" standards, as opposed to ARSIWA which largely codify existing CIL principles (even that document arguably introduced, at least in 2001, instances of progressive development). Nevertheless, the parallel seems apt, if only to underscore how shifting from a series of abstract principles, codified in a "soft" document, to a full-fledged legally binding instrument might deter states from supporting the end-product.

Another potential shortcoming is that the Draft Treaty on CSR fails to incorporate compulsory and binding dispute settlement procedures for any dispute arising over the draft treaty's interpretation or application. As it stands, the Draft Treaty replicates the essence of the optional clause declaration provision in the ICJ Statute, along with an option for disputing parties to agree to settle their disagreements through arbitration.[193] Others lament the abstract and strict nature of states' obligations in the draft text, both as regards the content of those primary norms and their extraterritorial scope.[194]

Another recurring critique is levelled at the draft's restrictiveness when it comes to its scope of application and almost-exclusive focus on state-centrism, signifying that it fails to promulgate obligations binding on corporations themselves.[195] Yet another point of contention assails the perceived weakness of any would-be international oversight and/or

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[191] *See* UNGA Sixth Committee (62nd Session), Draft Res. Agenda Item 78: Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/C.6/62/L.20, ¶ 4 (Nov. 9, 2007); G.A. Res. 62/61, ¶ 4 (Jan. 8, 2008). *See also* UNGA Sixth Committee (62nd Session), Responsibility of States for Internationally Wrongful Acts, Rep. of the Sixth Committee, ¶¶ 5–7, U.N. Doc. A/62/446, (Nov. 21, 2007). On the desirability and challenges of adopting a convention, *see* Laurence T. Pacht, *The Case for a Convention on State Responsibility*, 83 NORDIC J. INT'L L. 439 (2014); Constantine Économidès, *Le Projet de la Cdi sur la Responsabilité de l'État Pour Fait Internationalement Illicite: Necessité d'une Convention Internationale*, 58 REVUE HELLENIQUE DE DROIT INT'L. [RHDI] 77 (2005); James Crawford & Simon Olleson, *The Continuing Debate on a UN Convention on State Responsibility*, 54 INT'L & COMP. L.Q. 959 (2005).

[192] *See* ALVAREZ, *supra* note 95, at 311–12; David D. Caron, *The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority*, 96 AM. J. INT'L L. 857, 858, 862–64, 868–73 (2002); VINCENT-JOËL PROULX, INSTITUTIONALIZING STATE RESPONSIBILITY: GLOBAL SECURITY AND UN ORGANS 115 (2016). On codification of the ILC's work, *see generally* Fernando Lusa Bordin, *Reflections on Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law*, 63 INT'L & COMP. L.Q. 535 (2014). On the Guiding Principles' role in informing corporate conduct, *see* Peter Muchlinski, *The Impact of the UN Guiding Principles on Business Attitudes to Observing Human Rights*, 6 BUS. & HUM. RTS. J. 212 (2021). On the domestic implementation of the Guiding Principles through national action plans, *see* Carmen Márquez Carrasco, *The United Nations Guiding Principles on Business and Human Rights*, *in* Marx et al., *supra* note 74, at 75–98.

[193] *See* Draft Treaty on CSR, *supra* note 185, art. 18.

[194] *See* Bonfanti & Pertile, *supra* note 190, at 2.

[195] *Compare* Draft Treaty on CSR, *supra* note 185, arts. 3, 5–8. Some publicists lament that the international human rights framework remains exceedingly state-centric. *See* Tilmann Altwicker, *Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts*, 29 EUR. J. INT'L L. 581 (2018). For a similar critique concerning ARSIWA, *see* Riccardo Pisillo Mazzeschi, *The Marginal Role of the Individual in the ILC's Articles on State Responsibility*, 14 ITALIAN Y.B. INT'L L. 39, 39–40 (2004). For a broader critique, *see* Susan Marks, *State-Centrism, International Law, and the Anxieties of Influence*, 19 LEIDEN J. INT'L L. 339, 340 (2006). *But see* José E. Alvarez, *The Return of the State*, 20 MINN. J. INT'L L. 223 (2011).

monitoring mechanism(s) under the draft treaty,[196] and the legal ambiguity surrounding attribution of jurisdiction and the identification of the applicable law to CSR-related disputes in the same instrument.[197]

Despite these shortcomings, the Draft Treaty on CSR has been described as "the most ambitious step so far towards the establishment of a comprehensive international legal regime on business and human rights, based on enhanced international cooperation and aimed at hardening and harmonizing the international standards and processes on corporate accountability and access to remedies for corporate-related human rights violations."[198] Its framers must determine how the draft treaty's final iteration will interact with different areas of international law, including investment law,[199] international environmental law,[200] and international humanitarian law.[201]

Significant obstacles lie ahead but many proponents of the draft treaty see it as a worthwhile enterprise, holding the promise that soft commitments might be transformed into hard law. Ultimately, international commitments would presumably be transformed into domestic legal obligations, a process which operates in other areas of international law involving a mixture of "hard law" and "soft law," such as counterterrorism.[202] In fact, several nations—including Australia, China, Denmark, France, India, Indonesia, Mauritius, Nepal, The Netherlands, Norway, South Africa, Sweden, and the United Kingdom—have already legislated several CSR-related corporate obligations with varying degrees of normativity, such as mandatory CSR reporting requirements and due diligence, corporate philanthropy,

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[196] *See* Draft Treaty on CSR, *supra* note 185, arts. 6.3.c., 16.

[197] *Id.*, arts. 9, 11. For similar—but nuanced—critiques, *see* Nadia Bernaz, *Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty*, 22 HUM. RTS. REV. 45 (2021); Claire Methven O'Brien, *Transcending the Binary: Linking Hard and Soft Law Through AUNGPs-Based Framework Convention*, 114 AJIL UNBOUND 186 (2020); Marco Fasciglione, *A Binding Instrument on Business and Human Rights as a Source of International Obligations for Private Companies: Utopia or Reality?*, *in* LEGAL SOURCES IN BUSINESS AND HUMAN RIGHTS: EVOLVING DYNAMICS IN INTERNATIONAL AND EUROPEAN LAW 31, 32–33 (Martina Buscemi et al. eds., 2020); John G. Ruggie, *A UN Business and Human Rights Treaty?*, HARVARD JOHN F. KENNEDY SCHOOL OF GOVERNMENT (Jan. 28, 2014), https://media.business-humanrights.org/media/documents/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf.

[198] Bonfanti & Pertile, *supra* note 190, at 3. On international cooperation under the proposed text, *see* Draft Treaty on CSR, *supra* note 185, art. 13. On various aspects of international corporate legal responsibility, *see* INTERNATIONAL CORPORATE LEGAL RESPONSIBILITY (Stephen Tully ed., 2012).

[199] *See* Roberta Greco, *The Draft Treaty on Business and Human Rights: What Way Forward for Greater Consistency Between Human Rights and Investment Agreements?*, 83 QUESTIONS INT'L L. 5 (2021). *See generally supra* section II.A.2.b. and notes 97, 129–30, 166, 199 and accompanying text.

[200] Jacques Hartmann & Annalisa Savaresi, *Corporate Actors, Environmental Harms and the Draft UN Treaty on Business and Human Rights: History in the Making?*, 83 QUESTIONS INT'L L. 27 (2021).

[201] Mara Tignino, *Corporate Human Rights Due Diligence and Liability in Armed Conflicts: The Role of the ILC Draft Principles on the Protection of the Environment and the Draft Treaty on Business and Human Rights*, 83 QUESTIONS INT'L L. 47 (2021); David Hughes, *Differentiating the Corporation: Accountability and International Humanitarian Law*, 42 MICH. J. INT'L L. 47 (2000); Muriel Ubéda-Saillard, *La Responsabilité des Entreprises en Zone de Conflit Armé*, *in* Daubin, *supra* note 130, at 449–74.

[202] *See generally* Vincent-Joël Proulx, *A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty*, 11 HARVARD NAT'L SEC. J. 151 (2020). On the role of soft law in counterterrorism, *see* Fionnuala Ní Aoláin, *"Soft Law", Informal Lawmaking and "New Institutions" in the Global Counter-Terrorism Architecture*, 32 EUR. J. INT'L L. 919 (2021).

certain governance structures, and imposing CSR as a duty under corporate law.[203] However, the draft treaty in its current state does little to suggest that corporations should and can assume direct, legally binding obligations under international law.

III. THE NEVSUN RESOURCES DECISION AS POTENTIAL SEA CHANGE?

Against this background, we must canvass key features of the recent *Nevsun* decision to ascertain whether it constitutes a true shift in access to justice on CSR issues or, at the very least, whether it can provide guidance and how it fits within broader international responsibility discourses.

Nevsun did not occur in a vacuum, as Canadian courts have handled human rights litigation involving alleged corporate wrongdoing overseas previously. Nevertheless, they have been reticent to hold corporations legally accountable for human rights violations on many grounds, including the lack of a duty of care for such actors, the doctrine of *forum non conveniens*, or lack of jurisdiction. Most of the earlier cases were dismissed on jurisdictional grounds,[204] which elicited criticisms that Canada is falling short in meeting its obligations to protect against human rights abuses.[205] However, that trend was perhaps gradually changing in lower courts, even before *Nevsun*. For instance, the *Garcia v. Tahoe Resources* and *Choc v. Hudbay Minerals* cases both involved allegations of overseas human rights abuses by Canadian mining companies, acting through their subsidiaries and contracted employees, against Guatemalan residents.

In *Garcia*, the Guatemalan plaintiffs alleged that they were shot and injured by security personnel during a protest outside a mine.[206] While British Columbia's Supreme Court ("BCSC") dismissed the case based on *forum non conveniens*,[207] the British Columbia Court of Appeal ("BCCA") reversed that decision. The BCCA opined that there was considerable risk that judicial proceedings in Guatemala would result in an unfair trial, citing various reasons ranging from procedural difficulties and the limitation period to judicial

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[203] For a comparative study, *see* Li-Wen Lin, *Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences*, 23 U. PA. BUS. L.J. 429 (2021) (but underscoring that "while the new legislative methods appear progressive, politics and the open-ended notion of CSR significantly weaken the compulsory nature of the laws"). *See also* Gabriela Quijano & Carlos Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6 BUS. & HUM. RTS. J. 241 (2021); Florian Wettstein, *Betting on the Wrong (Trojan) Horse: CSR and the Implementation of the UN Guiding Principles on Business and Human Rights*, 6 BUS. & HUM. RTS. J. 312 (2021). For an innovative proposal targeting the United States—which still lacks relevant legislation on the matter—*see* Rachel Chambers & Jena Martin, *Reimagining Corporate Accountability*, 18 N.Y.U. J.L. & BUS. 773 (2022).

[204] *See* Piedra v. Copper Mesa Mining Corporation, [2012] QCCA 2455, rev'g 2011 QCCS 1966 (Can.); Recherches Internationales Québec v. Cambior Inc., [1998] Q.J. No. 2554, 1998 CanLII 9780 (Can. Que. Sup. Ct).

[205] *See* Cohen, *supra* note 44, at 1505; Paré & Tate Chong, *supra* note 44, at 914.

[206] Garcia v. Tahoe Res. Inc., [2015] BCSC 2045, para. 1, 6–9 (Can.).

[207] *Id*. para. 33, 35, 64, 66, 71, 105–06 (determining through a full-fledged analysis that, despite being corrupt, Guatemala's legal system offered the plaintiffs meaningful remedies and was a more appropriate forum).

corruption.[208] Since then, the parties settled their dispute, after Pan American Silver purchased Tahoe Resources in 2019.[209]

In *Choc*, Maya-Q'eqchi' villagers from eastern Guatemala complained that HudBay Minerals and its subsidiaries perpetrated gross human rights violations, including bodily harm, shooting, killing and gang-rapes, which they alleged should be captured by a new duty of care.[210] The Superior Court of Justice of Ontario found that Hudbay Minerals had made several representations to the plaintiffs concerning the observance of the human rights of local indigenous communities, which generated expectations on their part and drove them to rely on those representations.[211] The Court held that a *prima facie* duty of care existed based on the applicable jurisprudential test, namely that the impugned harm was reasonably foreseeable, sufficient proximity existed between the parties, and no policy reason(s) justified disregarding or restricting the duty of care.[212]

A. THE NEVSUN RESOURCES DECISION

In light of the foregoing considerations—which serve as a prism through which the rest of this article should be contemplated—this next sub-section delves into various features of *Nevsun*.

1. FACTS AND PROCEDURAL BACKGROUND

In *Nevsun*, three refugees and former Eritrean citizens claimed that they had been subject to indefinite conscription through their military service. They alleged having been coerced into "a forced labour regime" at Eritrea's Bisha mine, where they said they sustained "violent, cruel, inhuman and degrading treatment."[213] The mine was owned and operated by the Bisha Mining Share Company, in which the Etritrean National Mining Corporation—a state owned enterprise—held a 40% ownership share. Nevsun, a publicly held corporation incorporated under British Columbia's Business Corporations Act, owned the outstanding 60%.[214]

The workers' claims first arose alongside class action proceedings launched in British Columbia on behalf of more than 1,000 individuals, all of whom similarly claimed to have been forced to work at the Bisha mine between 2008 and 2012. Seeking relief for various human rights abuses, the claimants requested damages for domestic torts, including

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[208] Tahoe Res. Inc. v. Garcia, [2017] BCCA 39, para. 49–132 (Can.).

[209] *See* Josh Scheinert et al., *Pan American Silver Resolves Human Rights Claim Against Tahoe*, CANLII CONNECTS (Oct. 2, 2019), https://canliiconnects.org/en/commentaries/67623.

[210] Choc v. Hudbay Mins., [2013] ONSC 1414, para. 4–7 (Can.).

[211] *Id.* para. 66–70.

[212] *Id.* para. 40–75. For further discussion of the case, *see* Peña, *supra* note 165. On the test to determine the existence of a new duty of care, *see* Anns v. Merton London Borough Council, [1978] AC 728 (H.L.(E.)); Kamloops v. Nielsen, (1984) 2 S.C.R. 2, 8–27 (Can.); Odhavji Est. v. Woodhouse, (2003) 3 S.C.R. 263, 295, para. 52 (Can.).

[213] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 3 (Can.).

[214] Business Corporations Act, S.B.C. 2002, c 57 (Can.); Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 7 (Can.).

conversion, battery, "unlawful confinement" (false imprisonment), conspiracy, and negligence.[215] Additionally, they sought damages for alleged violations of CIL prohibitions against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity.[216]

Before the Chambers Judge, Nevsun introduced a number of applications seeking, *inter alia*: (i) an order dismissing or striking the pleadings on the ground that British Columbia courts lacked subject-matter jurisdiction based on the act of state doctrine;[217] and (ii) an order striking the pleadings' portion based on CIL as "being unnecessary and disclosing no reasonable cause of action."[218] In addition to denying the proceeding the status of representative action,[219] the Judge held that, while it had never been applied in Canada, the act of state doctrine nonetheless formed part of Canadian common law. However, he opined that it did not apply in the present proceedings.[220]

Turning to Nevsun's motion to strike the CIL-based claims, the Judge underlined that the essential issue was "whether claims for damages arising out of the alleged breach of *jus cogens* or peremptory norms of [CIL] … may form the basis of a civil proceeding in British Columbia."[221] He emphasized that, assuming the facts to be true, such claims should only be struck if it is "plain and obvious" that the pleadings "disclose no reasonable likelihood of success and are bound to fail."[222] Thus, there was no reasonable likelihood that the trial court would necessarily decline to recognize claims grounded in CIL, or in novel torts premised on adopting relevant customary norms formulated by the workers. No Canadian legislation, including the State Immunity Act, barred the workers' claims, [223] prompting the Judge to recall that CIL is incorporated into Canadian common law absent municipal legislation indicating otherwise.[224]

While he recognized the claims' novel character, he declared that they should be admissible at trial, where they could be assessed and appreciated against the relevant legal and factual backdrop. The Chambers Judge further underscored that allowing the claims to proceed at trial was particularly important given that they involved alleged violations of peremptory CIL norms, namely prohibitions on slavery, forced labor, and crimes against humanity.[225]

On appeal, a unanimous BCCA echoed the Chamber Judge's conclusion that no Canadian court had ever directly applied the act of state doctrine, adding that it was adopted

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[215] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 4 (Can.).

[216] *Id.* On the atrocities allegedly sustained by the workers, *see id.*, para. 11–15.

[217] Nevsun relied on rule 21-8 or, alternatively, rule 9-5 of the S.C. Civ. Rules, B.C. Reg. 168/2009 (Can.) to ground this claim.

[218] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 16 (Can.). Nevsun supported this application by reference to rule 9-5 of the S.C. Civ. Rules, *supra* note 217.

[219] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 18 (Can.). This signified that "the Eritrean workers were not permitted to bring claims on behalf of the other individuals, many of whom [were] still in Eritrea". *Id.*

[220] *Id.* para. 19.

[221] *Id.* para. 20.

[222] *Id.*

[223] State Immunity Act, R.S.C. 1985, c S-18 (Can.).

[224] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 20 (Can.).

[225] *Id.*

in British Columbia's Law and Equity Act.[226] However, the Court held that this doctrine was inapplicable in this case given that the workers' claims did not impugn the juridical validity of a sovereign state's laws or executive acts.[227] Invoking the principle of state immunity, the Court further recalled that both England and Canada have not recognized a private law cause of action when domestic proceedings are launched against a foreign state.[228] Here, such principle did not bar the claims since they were not launched against a foreign state.

The BCCA was alive to international law's dynamic and evolving nature and its relationship to municipal legal systems. This rapport manifests through domestic courts' increasing willingness to tackle international law issues where relevant. The Court perceived this as a "fundamental change" in the ethos of public international law. It aptly encapsulated the pivotal question as "whether Canadian courts, which have thus far not grappled with the development of what is now called 'transnational law', might also begin to participate in the change described."[229] Consequently, the justiciability of the workers' claims as private law torts did not deprive them of a "reasonable chance of success on the basis of [CIL]."[230] Emphasizing the evolving state of this legal field, the Court held accordingly that the CIL-based claims were not necessarily "bound to fail."[231]

2. THE SUPREME COURT'S DECISION

Before the SCC, Nevsun focused its pleadings on two core questions, namely: (i) whether the act of state doctrine forms part of Canadian common law; and (ii) whether the relevant CIL prohibitions (i.e. against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity) can serve as a basis to claim damages under Canadian law.[232]

a. THE ACT OF STATE DOCTRINE

The SCC's handling of the first issue generated a voting record of seven judges for and two against. Since it is not central to the issues explored in this article, I shall briefly highlight the relevant holding before turning to the second, more controversial legal issue. To recall, England's House of Lords described the act of state doctrine as "a rule of domestic law which holds the national court incompetent to adjudicate upon the lawfulness of the sovereign acts

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[226] Law and Equity Act, R.S.B.C. 1996, c 253, § 2 (Can.), which provides that English common law, as it existed in 1858, forms part of the law of British Columbia.

[227] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 22 (Can.). The BCCA further stated that, even if the doctrine applied, the claims would be allowed to proceed since they would be captured by one or more of the doctrine's recognized exceptions.

[228] *Id.* para. 23. In Canada, such principle is now codified in the State Immunity Act, *supra* note 223.

[229] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 24 (Can.).

[230] *Id.*

[231] *Id.* para. 25. On the BCCA's decision—along with a review of other relevant Canadian cases involving the extractive industry—*see* Jolane T. Lauzon, Araya v. Nevsun Resources*: Remedies For Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad*, 31 REVUE QUÉBÉCOISE DE DROIT INT'L 143 (2018).

[232] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 26 (Can.).

of a foreign state."[233] Nevertheless, the SCC stressed that this doctrine is of no direct import in Canadian law, thereby not precluding the workers' claims.[234] Acknowledging the undeniable lineage from English to Canadian law, the Court underscored that the latter has not incorporated a catch-all, overarching act of state doctrine. Rather, Canadian law and jurisprudence have fostered the development of the dual principles underpinning the doctrine, as formulated in seminal English case-law, without coalescing into a single doctrine.[235] Those two principles are conflict of laws and judicial restraint.

This evolution prompted the SCC to recall that well-established principles of private international law guide Canadian courts in addressing matters related to the enforcement of foreign laws, which typically calls for judicial deference but also enables courts to exercise discretion in declining to enforce foreign laws for reasons of public policy, for instance if they violate public international law.[236] Canadian courts remain particularly reticent to deliver legally binding pronouncements against foreign states, though they remain free to address foreign law issues when required for—or incidental to—the settlement of a domestic legal dispute of which they are properly seized.[237] The SCC's holding that the act of state doctrine has not been subsumed under Canadian law—nor that it constituted an obstacle to the workers' case—elicited a strong dissenting opinion.[238]

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[233] Regina. v. Bow Street Metro. Stipendiary Magistrate, *Ex parte Ugarte* (No. 3), (2000) 1 AC 147, 269 (H.L.) (per Lord Millett). While the act of state doctrine shares similarities with state immunity—since both doctrines flow from observing sovereign equality between states—the former is qualitatively different. State immunity, which enjoys widespread support in international law, affords *personal* immunity to state officials for acts performed in their official capacity, whereas the act of state doctrine operates on *subject-matter* immunity. Moreover, the common law entirely created the latter and, according to the U.K. Supreme Court, the "foreign act of state doctrine is at best permitted by international law". *See* Belhaj v. Straw, [2017] UKSC 3, ¶ 200 (per Lord Sumption). On this decision and subsequent developments, *see* Marcus Teo, *Narrowing Foreign Affairs Non-Justiciability*, 70 INT'L & COMP. L.Q. 505 (2021).

[234] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 28, 56–59 (Can.) (also holding that the act of state doctrine cannot be imported into Canadian law, despite Nevsun's best efforts, without disturbing a long line of cases). For relevant historical jurisprudence, with reference to the doctrine's exceptions and limitations, *see id.*, para. 31–43.

[235] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 44 (Can.), referencing Buttes Gas and Oil Co. v. Hammer (No. 3), [1982] AC 888 (H.L.) and remarking that "[b]oth principles [conflict of laws and judicial restraint] have developed separately in Canadian jurisprudence rather than as elements of an all-encompassing 'act of state doctrine.'" The Court added that these twin principles "have been completely subsumed within this jurisprudence." *Id.* para. 44, 57. *But see* Marcus Teo, *Public Law Adjudication, International Uniformity and the Foreign Act of State Doctrine*, 16 J. PRIV. INT'L L. 361, 371 (2020).

[236] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 45 (Can.). For further development and jurisprudence, *see id.*, para. 46–55 (also highlighting that none of the cases canvassed mention the doctrine).

[237] *Id.* para. 47. *See* Laane v. Estonian State Cargo & Passenger Line, [1949] S.C.R. 530, 545 (Can.) (per Rand J.) ("there is the general principle that no state will apply a law of another which offends against some fundamental morality or public policy"); Hunt v. Lac d'Amiante du Québec Ltée, [1993] 4 S.C.R. 289, 308–09 (Can.) (per La Forest J.); Reference re Secession of Quebec, [1998] 2 RCS 217, para. 23. *See also* Gib van Ert, *The Domestic Application of International Law in Canada*, *in* THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 501 (Curtis Bradley ed., 2019).

[238] *See* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 267–313 (Can.) (Côté, J., dissenting; Moldaver J., concurring) (arguing that the workers' claims are not justiciable before Canadian courts, largely because they would necessitate—for their disposition—determining that Eritrea and its agents committed an internationally wrongful act, which would unduly interfere with the Canadian executive's conduct of international relations).

b. THE CLAIMS UNDER CUSTOMARY INTERNATIONAL LAW

The second issue before the SCC was more narrowly divisive amongst the bench, resulting in a final tally of five votes against four. At the outset, the workers framed their CIL-based claims as justiciable and compensable under Canadian law. They argued that the prohibitions allegedly violated by Nevsun—namely, against forced labor, slavery, cruel, inhuman or degrading treatment, and crimes against humanity—have been incorporated into Canadian law.[239] Here, recall that the question before the Court was not to determine whether the CIL-based claims would necessarily prevail or result in an award of damages. Given the appealed motion to strike, the Court was rather tasked with ascertaining whether those claims should be struck on a preliminary basis. This eventuality would only materialize if the pleadings in question failed to disclose a reasonable claim or were unnecessary.[240]

Relying on well-established case-law, the SCC acknowledged that the law is dynamic and that a novel claim not yet recognized in law—as was the case in these proceedings—will not necessarily be fatal to the case in a motion to strike.[241] Rather, the standard should be to query whether, assuming the facts pleaded to be true, "there is a reasonable prospect that the claim will succeed."[242] The lower courts echoed this sentiment in the earlier stages of this case, with the Chambers Judge observing that the "proceeding raises issues of transnational law being the term used for the convergence of [CIL] and private claims for human rights redress."[243] This reality prompted the conclusion that the claimants' allegations "raised novel and difficult issues" and that "the claims were not bound to fail"; they "should be allowed to proceed for a full contextual analysis at trial."[244]

The BCCA similarly held that the CIL-based claims should not be struck, as they may result in successful private law redress, and recognizing such a cause of action judicially might amount to "an incremental first step in the development of this area of the law."[245] Here, the lower courts in *Nevsun* were earnest in applying and shaping international law principles, a mantle enthusiastically taken up by the SCC.

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[239] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 60–61 (Can.). On incorporating CIL norms into domestic law, generally, *see* Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996).

[240] Nevsun grounded these twin arguments on rules 9-5(1)(a) and 9-5(1)(b) of the Supreme Court Civil Rules, *supra* note 217, respectively. In the first scenario, a pleading that does not disclose a reasonable claim would imply that it is "plain and obvious" that that claim has no reasonable prospect of success. *See* R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45, para. 17, 22 (Can.) (also citing Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441, 455 (Can.) and emphasizing that the analysis must assume the veracity of the facts pleaded "unless they are manifestly incapable of being proven"); Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263, para. 14–15 (Can.). In the second scenario, a pleading may be struck if "it is unnecessary, scandalous, frivolous or vexatious". *See* Willow v. Chong, [2013] BCSC 1083, para. 20 (Can.).

[241] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 66 (Can.). The Chambers Judge recognized that "the current state of the law in this area remains unsettled" and, assuming the facts pleaded to be true, declared that "Nevsun has not established that the [CIL] claims have no reasonable likelihood of success". *Id*. Para. 69.

[242] R. v. Imperial Tobacco Canada Ltd., [2011] 3 S.C.R. 45, para. 21 (Can.) (adding that "[t]he approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial").

[243] This translated into the issue whether claims for damages stemming from alleged violations of *jus cogens* CIL norms could form the basis of a civil proceeding in British Columbia. Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 67 (Can.).

[244] *Id.*

[245] *Id.* para. 68.

The SCC underscored that Canadian courts, just like their foreign counterparts, have a vital role to fulfill in implementing and developing international law.[246] Explicit in this reasoning is that international law develops from the ground up through municipal courts, as opposed to being solely imposed vertically by the international legal order. Therefore, courts should be inclined to be active participants in the lawmaking and enforcement processes.[247] In this case, the SCC had to first ascertain whether the prohibitions invoked by the Eritrean workers form part of CIL to then determine whether they constitute actionable norms under Canadian law.

The Court briefly reviewed the theory of international law sources before analyzing CIL's constitutive elements and the custom formation process in some detail, labeling that normative scheme "the common law of the international legal system."[248] The Court drew emphasis on a subset of international law norms falling under the rubric of peremptory norms or *jus cogens*, thereby bolstering its subsequent analysis and holding that the prohibitions invoked by the workers attracted such characterization.[249] The Court recalled that, absent conflicting legislation, CIL norms are automatically adopted into Canadian law without enabling or implementing legislation, as opposed to treaties requiring legislative action for their domestic adoption.[250] This posture aligns with recent empirical evidence demonstrating that the near-totality of states espouse a similar approach.[251] Essentially, CIL norms form part of Canadian common law and must attract equal treatment and consideration, as other more-established black-letter law areas, when addressed by the judiciary.[252] This proposition has received substantial scholarly support.[253]

Unsurprisingly, Nevsun objected that, even if the CIL norms in dispute form an integral part of Canadian law, its status as a corporation shields it against liability.[254] The SCC swiftly

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[246] *Id.* para. 70–72. *See also* Gérard V. La Forest, *The Expanding Role of the Supreme Court of Canada in International Law Issues*, 34 CANADIAN Y.B. INT'L L. 89, 100–01 (1996).

[247] *See also* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 69 (2011); Jutta Brunnée & Stephen J. Toope, *A Hesitant Embrace: The Application of International Law by Canadian Courts*, 40 CANADIAN Y.B. INT'L L. 3, 4–6, 8, 56 (2002); Hugh Kindred, *The Use and Abuse of International Legal Sources by Canadian Courts*, *in* Fitzgerald, *supra* note 124, at 5, 7.

[248] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 73-82 (Can.).

[249] *Id.* para. 83–84, 99–103 (singling out only the prohibition against forced labor as potentially not having reached the status of *jus cogens*, but unreservedly qualifying it as a CIL norm). S*ee also* Kazemi Estate v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, para. 47 (Can.); Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT'L L. 491 (2008); Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of* Jus Cogens, 34 YALE J. INT'L L. 331 (2009).

[250] For the full analysis, *see* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 85-99, 128 (Can.). *See also* R. v. Hape, [2007] 2 S.C.R. 292, para. 36, 39 (Can.); Gib van Ert, *What Is Reception Law?*, in Fitzgerald, *supra* note 124, at 85, 89.

[251] *See* Verdier & Versteeg, *supra* note 124, at 528.

[252] For another application, *see* R. v. Hape, [2007] 2 S.C.R. 292, para. 39 (Can.). *See also* Louis LeBel, *A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law*, 65 UNIV. N.B. L.J. 3, 15 (2014). For a skeptical take on the innovations introduced uncritically in Hape, *see* John H. Currie, *Weaving a Tangled Web:* Hape *and the Obfuscation of Canadian Reception Law*, 45 CANADIAN Y.B. INT'L L. 55 (2007).

[253] *See, e.g.,* Stephen J. Toope, *Inside and Out: The Stories of International Law and Domestic Law*, 50 UNIV. N.B. L.J. 11, 23 (2001); Rosalyn Higgins, *The Relationship Between International and Regional Human Rights Norms and Domestic Law*, 18 COMMONWEALTH L. BULL. 1268, 1273 (1992).

[254] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 104 (Can.).

discarded this position and observed that, outside of customary norms intended for strict inter-state application, international law has evolved from an exclusively state-centric paradigm to a more anthropocentric conception.[255] Consequently, certain CIL norms will unquestionably apply to private actors beyond the state—especially in the human rights field—signifying that they can also be violated by those actors.[256] The SCC saw no principled reason why the "private actors" category should exclude corporations,[257] relying heavily on a scholarly article by Harold Koh to buttress that proposition.[258]

These conclusions led Justice Abella, who wrote for the majority, to hold that "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under [CIL] for violations of 'obligatory, definable, and universal norms of international law,' or indirect liability for their involvement in … 'complicity offenses.'"[259] Hence, the violations of CIL norms identified by the workers, the majority of which were infringements of *jus cogens* prohibitions, could apply to Nevsun.[260] The outstanding question, therefore, was for the Court to determine whether any Canadian laws conflicted with the adoption of the relevant CIL norms within the national legal landscape. Relying on various Canadian policies ensuring that corporations respect fundamental human rights abroad, including the creation of an Ombudsperson for Responsible Enterprise, the SCC held that the relevant norms have been incorporated into Canadian law.[261]

This reasoning led the Court squarely to the remedial question. The Court was confronted with the question whether any civil remedy was available at common law to redress a violation of CIL prohibitions, or whether appropriate redress could be developed

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[255] *Id.* para. 105–14. At para. 113, the Court specified that given that some CIL norms are of a strictly inter-state character, the trial judge would be called upon to determine whether the relevant norms attract such designation, or whether they can be applied to Nevsun. In the latter eventuality, "the question for the court will be whether the common law should evolve so as to extend the scope of those norms to bind corporations". On the broader point, *see also* Payam Akhavan, *Canada and International Human Rights Law*, 22 CAN. FOREIGN POL'Y J. 331, 332 (2016); Emmanuelle Jouannet, *What Is the Use of International Law? International Law as a 21st Century Guardian of Welfare*, 28 MICH. J. INT'L L. 815, 821 (2007); Christopher C. Joyner, "*The Responsibility to Protect*": *Humanitarian Concern and the Lawfulness of Armed Intervention*, 47 VA. J. INT'L L. 693, 717 (2007).

[256] *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 73 (2002); CLAPHAM, *supra* note 16, at 58; PATRICK MACKLEM, THE SOVEREIGNTY OF HUMAN RIGHTS 22 (2015).

[257] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 111 (Can.).

[258] Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 264–68 (2004) (suggesting, *inter alia*, that it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability", and attempting to dispel the "myth" that municipal courts cannot hold corporations civilly liable for international law breaches). At 265, he adds:

> The commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals *act through* corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation?

To bolster its central holding on the second issue under appeal, the majority also enlisted the support of SIMON BAUGHEN, HUMAN RIGHTS AND CORPORATE WRONGS 130–32 (2015).

[259] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 113 (Can.). *See also* STUART CASEY-MASLEN, THE RIGHT TO LIFE UNDER INTERNATIONAL LAW: AN INTERPRETATIVE MANUAL 655 (2021) (discussing Nevsun and adding that "b[y] 'universal norm', one might be tempted to sugges[t] peremptory norm as a suitable synonym").

[260] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 114 (Can.).

[261] *Id.* para. 114–16.

under that scheme.[262] The Court was easily convinced that recognizing such a remedy in this case was a "necessary development" in the common law, namely to "clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society."[263] Turning to the specific claims, the SCC underscored Canada's international commitments—including under the International Covenant on Civil and Political Rights—to protect *all* individuals against fundamental human rights violations authored by states, private persons and entities.[264]

It followed that a right inherently implies the existence of a remedy for its breach, an oft-reiterated proposition by the SCC.[265] Unlike in *Kazemi*—where the State Immunity Act constituted express legislation barring a remedy against Iran for torture[266]—no such law or other procedural bar existed in *Nevsun*. Moreover, nothing in the *Kazemi* jurisprudence suggested that a Canadian corporation cannot be sued in Canada for CIL breaches—including *jus cogens*—perpetrated in a foreign state. Consequently, it was not "plain and obvious" that Canada's judiciary "cannot develop a civil remedy in domestic law for corporate violations of the [CIL] norms adopted in Canadian law."[267]

While Nevsun argued that the workers' CIL-based claims were captured under the domestic torts of conversion, battery, "unlawful confinement," conspiracy and negligence, the SCC considered that the alleged misconduct arguably extended beyond those narrower categories. Hence, the CIL prohibitions are qualitatively different from those municipal torts, in that the public and abhorrent nature of the conduct they seek to regulate attracts the international community's strong opprobrium.[268] Later, the Court picked up this thread, insisting that a just and effective remedy for CIL violations—particularly those affecting *jus cogens*—may require "stronger responses than typical tort claims."[269]

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[262] *Id.* para. 117.

[263] *Id.* para. 118 (citing Sidaway v. Bd. of Governors of the Bethlem Royal Hosp., [1985] 1 AC 871, 884 (H.L.)).

[264] *Id.* para. 119.

[265] *See* Kazemi Estate v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, para. 159 (Can.); Henry v. British Columbia, [2015] 2 S.C.R. 214, para. 65 (Can.); Doucet-Boudreau v. Nova Scotia, [2003] 3 S.C.R. 3, para. 25 (Can.); R v. 974649 Ontario Inc., [2001] 3 S.C.R. 575, para. 20 (Can.); Great Western Ry. v. Brown, [1879] 3 S.C.R. 159, 179 (Can.).

[266] Kazemi Estate v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, para. 159 (Can.). *See also* R v. Hape, [2007] 2 S.C.R. 292, para. 39 (Can.).

[267] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 121-22 (Can.).

[268] *Id.* para. 123–24 (also citing M. Cherif Bassiouni, *International Crimes:* Jus Cogens *and* Obligatio Erga Omnes, 59 L. & CONTEMP. PROBS. 63, 69 (1996) to emphasize that violations of such norms "shock the conscience of humanity"). Ignoring the difference between both types of norms, the Court added, may undercut its "ability to adequately address the heinous nature of the harm caused by this conduct". *Id.* para. 125. *See also* Bruce W. Johnston, *Liability of Multinational Corporations in Canada for International Human Rights Violations*, *in* HUMAN RIGHTS LITIGATION AGAINST MULTINATIONALS IN PRACTICE 113, 129–30 (Richard Meeran ed., 2021); Graham Virgo, *Characterisation, Choice of Law, and Human Rights*, *in* TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION 325, 335 (Craig Scott ed., 2001). While a punitive damages award addresses the gravity of harm arising from wrongful conduct, reliance on municipal torts may not "do justice to the specific principles that already are, or should be, in place with respect to the human rights norm". *See* Craig Scott, *Translating Torture into Transnational Tort*, *in* Scott, *supra* note 268, at 62. *See also* Nevsun Res. Ltd. v. Araya, [2020] S.C.R. 5, para. 126 (Can.).

[269] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 129 (Can.) (also citing Vancouver v. Ward, [2010] 2 S.C.R. 28, para. 22 (Can.)). For the Court, such stronger approaches recognize "the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives,

Since the workers' CIL-based claims were broadly framed, the Court suggested that they potentially opened several pathways to compensation under domestic law. More importantly, it declared that "[t]he mechanism for how these claims should proceed is a novel question that must be left to the trial judge," including but not only through recognizing "new nominate torts."[270] Explicit in this reasoning was the fact that, since the relevant CIL norms have been incorporated into Canadian law, a compelling case can be made for direct compensation of CIL violations by a Canadian company under domestic law.[271] Consequently, the success of the workers' CIL-based claims need not necessarily depend on their conversion into newly articulated torts, as the underlying international law norms have already been directly incorporated into Canadian law.[272] It follows that such claims could trigger the right to a direct remedy under domestic law.

The SCC recalled that the proceeding was still in a preliminary phase and that "it will ultimately be for the trial judge to consider whether the facts of this case justify findings of breaches of [CIL] and, if so, what remedies are appropriate," adding that "[t]hese are complex questions."[273] Ultimately, it was not "plain and obvious" to the SCC that the workers' allegations of CIL breaches against Nevsun cannot succeed.[274]

A. A MIXED RESULT?: POSITIVE AND NEGATIVE IMPLICATIONS

Nevsun's takeaways and implications, some which were highlighted above, are not universally positive. Ultimately, this case presents a mixed picture in the SCC's efforts to advance CSR, featuring both positive and negative aspects. Demonstrating palpable self-awareness, the Court "embrac[ed] [its] role in implementing and advancing [CIL]," stressing that such approach enables "Canadian courts to meaningfully contribute, as [they] already assertively have, to the 'choir' of domestic court judgments around the world shaping the 'substance of international law.'"[275] Time will tell whether the SCC was being atonal, singing off-key, or rather offering a delightful serenade.

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and the need to deter subsequent breaches". *Id.* On civil remedies for terrorism, *see also* Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combatting Terrorism through Transnational Public Law Litigation*, 50 TEX. INT'L L.J. 661, 675 (2016) (arguing that American civil judgments remedying terrorism fulfil two objectives, namely that of "traditional tort law" and the "objectives of public international law").

[270] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 127 (Can.).

[271] *Id.*

[272] The Court concluded that it is not "plain and obvious" that "our domestic common law cannot recognize a direct remedy for their breach." It further observed that "[r]equiring the development of new torts to found a remedy for breaches" of such norms "may not only dilute the doctrine of adoption, it could negate its application." *Id.* para. 128.

[273] *Id.* para. 131. The SCC cited Wilson, J. in Hunt v. Carey Can. Inc., [1990] 2 S.C.R. 959, 990–91 (Can.), whose remarks are apposite:

> The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law . . . will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[274] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 132 (Can.).

[275] *Id.* para. 72. *See also* Schwartz, *supra* note 124, at 616; René Provost, *Judging in Splendid Isolation*, 56 AM. J. COMPAR. L. 125, 171 (2008).

Suffice it to emphasize that *Nevsun* is far from perfect. On a perhaps superficial—but nonetheless serious—level, it perpetuates that court's tradition of introducing slight inaccuracies, or flat-out errors, into its judgments when addressing international law issues. One must look no further than *Suresh* to decipher at least one major misunderstanding of international legal principles. There, the Court devotes considerable space to addressing the evolution of the prohibition of torture as a CIL norm, canvassing international instruments, judicial decisions, domestic perspectives, and academic commentary available during a period of upheaval for international law (recall that this decision was delivered shortly after 9/11).[276]

Following this lengthy discussion, the Court concluded that this prohibition was either an emerging or established *jus cogens* norm. Puzzlingly, however, the Court postulated that "the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that *it cannot be easily derogated from*."[277] The incongruity between this norm's nature and the Court's conclusion will prompt any careful reader to ponder whether—in its extensive review of relevant international law sources and perspectives—it ever understood the fundamental Vienna Convention on the Law of Treaties ("VCLT").[278]

Nevsun is similarly not insulated from inaccuracies, which likely weakens the judgment's rigor. For instance, drawing from the oft-cited Article 38(1) of the ICJ Statute, the SCC subsumes judicial decisions and scholarly works within "[t]he four authoritative sources of modern international law."[279] However, judicial decisions and academic commentary are not formal sources of law, but rather serve as "subsidiary means for the determination of rules of law."[280] In fairness, this is not an isolated incident as this residual "subsidiary means" category is sometimes erroneously treated as encompassing proper sources of law, although it technically does not have that status under international law. Investment and trade arbitration tribunals have similarly fallen prey to the misclassification of Article 38(1)'s elements.[281] Nevertheless, words matter and can engender consequences in law, particularly in international law.

Nevsun probably suffers most from methodological weakness and oversights. It draws heavily from scholarly works which, in and of itself, is not troubling; indeed, this practice is

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[276] Suresh v. Canada, [2002] 1 S.C.R. 3, para. 46–65 (Can.).

[277] *Id.* para. 65 (emphasis added).

[278] *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (providing, *inter alia*, that "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole *as a norm from which no derogation is permitted*" (emphasis added)). *But see* Suresh, 1 S.C.R. 3, para. 60 (citing this provision).

[279] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 76 (Can.). *See also* Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 8 U.N.T.S. 993.

[280] Statute of the International Court of Justice, *supra* note 279, art. 38(1)d. *See also* Anna Ventouratou, *The Law on State Responsibility and the World Trade Organization*, 22 J. WORLD INV. & TRADE 759, 787 (2021).

[281] *See, e.g.,* SEMPRA Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, ¶ 147 (May 11, 2005) (underscoring the tribunal's duty to interpret the terms of a treaty and suggesting that "[t]his is precisely *the role of* ***judicial decisions as a source of international law*** *in Article 38(1)*" (emphasis added)). *See also* ADC Affiliate Ltd.v. Hung., ICSID Case No. ARB/03/16, Award, ¶ 293 (Oct. 2, 2006); Decision of the Arbitrator, *United States–Tax Treatment for 'Foreign Sales Corporations' (US – FSC)*, ¶ 91 & n.68, WTO Doc. WT/DS108/ARB (adopted Aug. 30, 2002).

widespread in common law judicial systems and beyond.[282] However, it may become worrisome when coupled with the formal-international-law-source-status the SCC appears to bestow upon scholarship. This apprehension is amplified by the near-gospel status the SCC ascribes to Harold Koh's work. The majority references four articles authored by Professor Koh, citing him eight times, and reproducing long passages from his scholarship on key issues.[283] This overreliance on a single scholar's output results in a misleading misapplication of the theory of international law sources. Again, this judicial reflex illustrates a regrettable tendency of Canada's apex court playing fast and loose with this theory of sources.[284]

A particularly intractable aspect of *Nevsun* arises when the majority relies on Professor Koh's academic article to reach its most consequential holding, namely: "it is not 'plain and obvious' that corporations today enjoy a blanket exclusion under [CIL] from direct liability for violations of 'obligatory, definable, and universal norms of international law', or indirect liability for their involvement in what Professor Clapham calls 'complicity offences'."[285] This holding arguably goes to the core of this case's most important issue, and certainly the most contested. Here, at best one could accuse the Court of misunderstanding foundational tenets of public international law methodology; at worst, one could accuse it of intellectual laziness.

Strikingly, it prefaced its reliance on Koh's work with the phrase "[c]anvassing the jurisprudence and academic commentaries, Professor Koh observes" before citing his scholarship, upon which the Court then erects possibly its most important finding. The task of "[c]anvassing the jurisprudence and academic commentaries" fell squarely on the Court, especially in a field where the law is so unsettled. Most importantly, it fell upon it to survey and analyze CIL's two constitutive elements by parsing through relevant state practice and evidence of *opinio juris*. As a minimum, counsel should lead evidence on those elements concerning the existence of a controversial or emerging CIL norm, which the Court should then consider.[286] Rather, in *Nevsun* the end-result feels like an intellectual cop-out with the effect "that the reader expecting a closely-argued decision will be left instead with the impression that the Court's holding[] ha[s] a tinge of oracularity (oracles indeed are not required to give reasons)," a critique which was levelled at the ICJ as well.[287]

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[282] *See generally* Robert J. Sharpe & Vincent-Joël Proulx, *The Use of Academic Writing in Appellate Judicial Decision-Making*, 50 CAN. BUS. L. J. 550 (2011).

[283] *See* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 77, 85, 105, 112–13, 130 (Can.).

[284] *See also generally* Kindred, *supra* note 247, at 5–30.

[285] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 112–13 (Can.) (citations omitted). The dissenting judges reached the opposite conclusion, although they would have left this issue to be decided by the trial judge. *See id.* para. 189–91 (Brown & Rowe, JJ., dissenting).

[286] *See generally* Gib van Ert, *International Law Evidence after Nevsun*, at 4–6 (Nov. 18, 2020), https://gibvanertblog.files.wordpress.com/2020/11/evidence-after-nevsun.pdf.

[287] Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 EUR. J. INT'L L. 649, 651 (2007). He continues his critique of the Nicaragua and Bosnian Genocide judgments, opining that, in the first decision, "[n]o reference is made by the Court either to state practice or to other authorities. This is in keeping with a regrettable recent tendency of the Court not to corroborate its pronouncements on international customary rules … with a showing, if only concise, of the relevant practice and *opinio juris.*" *Id.*, at 653–54. For a broader compatible critique, *see* Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L. 417 (2015).

The dissenting judges rightly underscore that the above conclusion[288] was reached on exceedingly dubious legal grounds, remarking that "[t]he authority the majority cites in support of this proposition is a single law review essay by Professor Harold Koh."[289] Emphasizing again the importance of this holding, they add that the majority "cites no cases where a corporation has been held civilly liable for breaches of [CIL] anywhere in the world, and we do not know of any."[290] This strikes as a crucial oversight and the Court should have undertaken a serious inquiry into the matter. In the same excerpt, the majority doubles down by invoking other scholarly materials not on point to further buttress its main holding,[291] a practice from which international tribunals are not always insulated.[292]

Perhaps the judgment's most damning omission is the absence of any reference to the Guiding Principles, the Draft Treaty on CSR's elaboration, or many of the abovementioned "soft law" documents. The judgment also makes no reference to John Ruggie's work—be it his official work at the U.N. or his scholarly output—nor do the conclusions of the judges writing separately. This approach entirely sidesteps the CSR project's evolution and its relevant documents, giving the impression that the SCC was working on a separate intellectual track. Invoking this work would have assisted the Court in providing more guidance on the issues before it. Moreover, it would have been in the interest of the sound administration of justice as similar cases are expected to come before the SCC.

While the Court may have been uncomfortable discussing soft law, instead seeking comfort within hard law's confines, its end-product will hardly convince international law purists of its accuracy. One is left with what is arguably a flimsy and methodologically unsound judicial approach. At least, the dissenting judges invoked an apposite U.N.-based document to bolster their conclusion that CIL does not support corporate legal responsibility.[293] They also rightly chastise the majority for citing James Crawford on one point but failing to recognize that his writings directly contradict the majority's central

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[288] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 112–13 (Can.) (majority opinion).

[289] *Id.* para. 188 (Brown & Rowe, JJ., dissenting).

[290] *Id.*

[291] *Id.* (observing that the other works the majority cites by Simon Baughen and Andrew Clapham do not support its views, the first one discussing "norms of international criminal law imposing civil liability on aiders and abetters … specific to [ATCA]" and the second concerning "the recognition of the complicity of corporations in international criminal law and human rights violations, not the recognition of civil liability rules").

[292] One such example is the *Trail Smelter* case, in which the majority relied upon and misquoted Clyde Eagleton on state responsibility. *See* VINCENT-JOËL PROULX, TRANSNATIONAL TERRORISM AND STATE ACCOUNTABILITY: A NEW THEORY OF PREVENTION 20–21 (2012); Jaye Ellis, *Has International Law Outgrown Trail Smelter?*, *in* TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE *TRAIL SMELTER* ARBITRATION 56–65 (Rebecca M. Bratspies & Russell A. Miller eds., 2006). *But*, on substance, *see* Roberto Ago (Special Rapporteur), *Third Report on State Responsibility*, U.N. Doc. A/CN.4/246 & Add.1-3 (1971), [1971] 2(1) Y.B. Int'l L. Comm'n 199, 233.

[293] *See* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 190 (Can.) (Brown & Rowe, JJ., dissenting) (declaring that, "against Professor Koh's lone essay," they "would pit the United Nations General Assembly's *Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises*, U.N. Doc. A/HRC/4/035, February 9, 2007, which states that 'preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under [CIL]'"). To be fair, this document was delivered thirteen years earlier and, like the majority, these dissenting judges did not consider the wealth of relevant contemporaneous CSR developments.

holding.[294] Similarly, one must surmise that the majority endorsed the proposition that CIL contains a rule "that renders a corporation directly civilly liable to an individual," which was not pleaded by the Eritrean individuals.[295]

Given the importance and highly contested nature of this would-be norm, it is troubling that the majority once again hangs its hat on "the aforementioned academic essay by Professor Koh" to support this assertion.[296] To recall, Professor Koh sweepingly concludes that it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability."[297] In response, the dissenting judges are right to conclude: "[i]f the majority is relying on this essay as evidence of the existence of such a rule, then we would say simply that a single essay does not constitute state practice or *opinio juris*."[298] This reality should be self-evident to any international law student or practitioner.

Professor Koh has himself acknowledged that his writings on the subject are prescriptive (the dissenting judges use the term "normative"), as opposed to "descriptive."[299] He acknowledges that CIL has not evolved in this particular direction, but simply that it *could* develop along such lines (or perhaps *should*).[300] Here, the majority's analysis would hook squarely onto the first rung of the dichotomy between *lex ferenda* and *lex lata*. It follows that "[s]tate practice is not a normative concept, but a descriptive one," inexorably signaling that it "cannot be established based on how a single U.S. academic thinks international law should work, but rather must be based on how states in fact behave."[301]

While it triggers other points of contention, *Nevsun* also potentially offers positive developments for CSR. For one thing, this judgment—with all its imperfections—likely provides a welcome response, and a glimmer of hope for human rights proponents, at a time when U.S. courts have restricted suits against corporations for extraterritorial human rights violations. Historically, Canada was seen as a leader in the social justice and human rights movements and *Nevsun* falls squarely within this tradition, perhaps hinting at future pro-CSR judicial overtures in Canada and beyond. The overall picture will be positive to many;

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[294] *Id.* para. 97 (majority opinion) (citing CRAWFORD, *supra* note 76, at 630).

[295] *Id.* para. 198 (Brown & Rowe, JJ., dissenting).

[296] *Id.* para. 199 (Brown & Rowe, JJ., dissenting).

[297] *See supra* note 258. The imposition of potential criminal corporate liability in domestic settings is very much a live issue in some jurisdictions, which also intersects with CSR objectives. For instance, France's top court held that French cementer Lafarge should be subject to investigation on charges of complicity in crimes against humanity for financing the terrorist group Daesh/ISIS in northern Syria. *See* Cour de cassation [Cass.] [supreme court for judicial matters], Sept. 7, 2021, Bull. crim., No. 00868 (Fr.), <https://www.courdecassation.fr/decision/6137092ff585960512dfe635?search_api_fulltext=lafarge&op=Rechercher%20sur%20judilibre&date_du=&date_au=&judilibre_juridiction=all&previousdecisionpage=0&previousdecisionindex=8&nextdecisionpage=1&nextdecisionindex=0>. The Court of Appeal subsequently confirmed that the matter could go to trial. *See* Liz Alderman, *French Company to Face Charges of Complicity in Human Rights Violations*, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/05/18/business/lafarge-human-rights-violations.html.

[298] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 199 (Can.) (Brown & Rowe, JJ., dissenting). On *opinio juris*' modalities, *see* Jo Lynn Slama, *Opinio Juris in Customary International Law*, 15 OKLA. CITY UNIV. L. REV. 603 (1990).

[299] *See* Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 201 (Can.) (Brown & Rowe, JJ., dissenting).

[300] *Id.* para. 200 (also highlighting that, while courts have discretion to alter the common law, no such power exists regarding statutory law or CIL).

[301] *Id. See also generally* Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 762–63 (2001).

Nevsun was heralded as a "landmark judgment for transnational human rights litigation" since the SCC recognized that CIL could give rise to directly enforceable claims for various breaches before Canadian courts.[302]

Even if clumsily decided, *Nevsun* further illustrates the appetite for expanding and bolstering international and transnational accountability mechanisms for corporate wrongdoing, even if that prospect is enacted through domestic courts applying common law. Indeed, courts are attempting to empower the basic proposition that CIL violations should be redressed through access to justice and to an effective and meaningful remedy. On this score, it is telling that both the BCSC and BCCA upheld the Eritrean workers' right to sue (as did the SCC when faced with the appealed motion to strike). Coming back to the distinction between the home-state and host-state, *Nevsun* could assist in de-localizing disputes away from weak rule-of-law nations, where a remedy for human rights violations may not be available for various reasons. Despite these promising implications, challenges remain on the horizon.

IV. CHALLENGES GOING FORWARD

The picture that emerges from the *Nevsun* saga is one of uncertain legacy and imprecise legality. It is unclear whether it has truly advanced the law, opened the judicial doors to transnational human rights litigation against corporations, or should be disregarded or its value attenuated. One running theme throughout *Nevsun* is the role of national courts in interpreting and developing international law. When CIL is not entirely formed on a given issue, should domestic courts step in to precipitate the "crystallisation" process of norms?[303] Or is that doing more harm than good, especially when domestic courts do not have a firm grasp on international law doctrine and methodology? If one buys the first argument, recall that (wrongful) domestic court decisions can trigger the state's international responsibility.[304] If that is indeed true, then municipal judicial decisions should be indicative of state practice, to the extent that they pronounce on CIL and/or treaty law issues.

It is important to see what domestic courts are doing to get a full account of state practice when attempting to establish a customary norm's existence.[305] The uncertainty here is whether *Nevsun* will hold any sway in the face of considerable resistance to recognizing international corporate legal responsibility in the civil sense.[306] In the affirmative, local

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[302] Julianne Jennett & Marjun Parcasio, *Corporate Civil Liability for Breaches of Customary International Law*, EJIL: TALK! (Mar. 29, 2020), https://www.ejiltalk.org/corporate-civil-liability-for-breaches-of-customary-international-law-supreme-court-of-canada-opens-door-to-common-law-claims-in-nevsun-v-araya. *See also* FLORIAN WETTSTEIN, BUSINESS AND HUMAN RIGHTS: ETHICAL, LEGAL, AND MANAGERIAL PERSPECTIVES 282–85 (2022).

[303] The expression is borrowed from North Sea Continental Shelf, Judgment, 1969 I.C.J. Rep. 3, ¶¶ 61–62 (Feb. 20). *See also id.* at 55 (Declaration of Judge Sir Muhammad Zafrulla Khan).

[304] *See* ARSIWA, *supra* note 102, art. 4 and accompanying commentary.

[305] *See generally* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99 (Feb. 3) (analyzing state practice concerning jurisdictional immunities of sovereign states before domestic courts).

[306] *Consider* Justice Kennedy's conclusion for the majority that "the Court need not resolve the questions whether corporate liability is a question governed by international law, or, if so, whether international law imposes liability on corporations." Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018).

courts will then begin to accommodate claims of extraterritorial human rights violations against corporations. Despite the CSR agenda's advances, however, considerable barriers persist and block potential judicial avenues to remedy such harms, which some commentators perceive as fomenting a "jurisdictional vacuum" for transnational corporate human rights suits.[307] As seen above, one key substantive stumbling block is the lack of agreement over whether corporations can assume direct international law obligations.

From a common-sense perspective, one workaround is to recognize that corporations can assume such obligations since their home-states have a duty to regulate those actors and their wrongful conduct. Thus, a logical inconsistency would ensue if those private actors were allowed—and their potential responsibility absolved—to do the very thing their home-states are obligated to regulate and prevent. Otherwise put, "it is important to recognize that if states are required by international law to ensure that third parties (including corporations) comply with binding human rights requirements, then this entails that third parties are themselves obligated to comply with such requirements."[308] Evidently, it is difficult to glean any enduring lessons from an appeal of a declined motion to strike, but any future treatment of this topic must achieve a balance between access to justice and an effective remedy and predictability in the law.

Undoubtedly, the law is far from clear. *Nevsun* perhaps stands as an outlier, rather than a trendsetter, although this decision's fate and reach could change over time. Nevertheless, future courts attempting to inch the common law forward on this issue will be well advised not to overstep the reasonable boundaries of judicial lawmaking.[309] For now, one takeaway for Canadian corporations conducting business overseas is straightforward: a foreign state's acts taken within the purview of its sovereignty, which have human rights implications, could trigger onerous litigation and potential civil liability for Canadian companies that allegedly benefit from those sovereign acts. This is particularly so in situations where Canadian companies operate abroad in partnerships or joint ventures with foreign governments.[310] The

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[307] Hassan M. Ahmad, *The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*, 70 AM. J. COMPAR. L. (forthcoming in 2023), https://doi.org/10.1093/ajcl/avac036. *See also* Surya Deva, *The UN Guiding Principles on Business and Human Rights and its Predecessors: Progress at a Snail's Pace?*, *in* THE CAMBRIDGE COMPANION TO BUSINESS & HUMAN RIGHTS LAW 145, 171 (Ilias Bantekas & Michael Stein eds., 2021); Cohen, *supra* note 44, at 1507–08.

[308] Bilchitz, *supra* note 186, at 208 (adding that "[t]he logic of the state 'duty to protect' at international law thus necessarily entails the notion that non-state actors, including corporations … already have binding legal obligations"). For a compatible argument reversing the roles of non-state actors and the state, *see* Vincent-Joël Proulx, *Counterterrorism and National Security: The Domestic/International Law Interface*, *in* THE POLITICS OF INTERNATIONAL CRIMINAL LAW 314, 339–41 (Holly Cullen et al. eds., 2020) (arguing that it would be nonsensical to require states to prevent terrorism financing by private individuals under the Terrorism Financing Convention, but not to hold them accountable for financing terrorism themselves). That said, the I.C.J. held that state financing of terrorism falls outside that instrument's purview. *See* Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2019 I.C.J. Rep. 558, ¶¶ 59–60.

[309] *Consider* ROBERT J. SHARPE, GOOD JUDGMENT: MAKING JUDICIAL DECISIONS 93 (2018).

[310] The fact that such collaborations often occur against the backdrop of armed conflict, or with the assistance of repressive regimes, exacerbates the legal dilemma. In addition to the legal remedies explored above, other mechanisms—such as transitional justice arrangements—may sometimes be enlisted to enhance corporate legal accountability. *See generally* IRENE PIETROPAOLI, BUSINESS, HUMAN RIGHTS AND TRANSITIONAL JUSTICE (2022). On potential slippages and challenges engendered by overlapping relations between public and private actors on the global stage—with a focus on corporate actors in various contexts, including armed conflict,

majority's—at times emphatically worded—judgment issues a strong reminder to Canada's business community to always consider human rights norms in all domestic and overseas corporate operations, legal and business planning. As part of their due diligence calculus, companies should assess their risk of direct or indirect involvement in potential human rights-infringing activities, such as torture or forced labor, and adopt appropriate measures to address such risks.

A more immediate and practical challenge arising out of *Nevsun* relates to evidence. For one thing, it might be more difficult to establish a CIL norm's existence in a domestic judicial setting than *Nevsun* suggests. It might be challenging to prove a widespread and consistent state practice for reasons of (or lack of) access to relevant materials and linguistic barriers alone. Here, a more sustained and informed discussion distinguishing "soft law" and "hard law" would also have been helpful, and perhaps even instrumental in resolving the CIL formation issue. Such a discussion would have presumably (and expectedly) stemmed from a more robust understanding of major developments in the CSR agenda.

For their part, treaty norms are relatively unambiguous, and, in the event of uncertainty, the VCLT and the canons of interpretation can assist in filling gaps. By contrast, CIL rules are by their nature more dynamic, open to interpretation, and prone to "definitional [im]precision," a reality acknowledged by the SCC.[311] Consequently, those norms might be modulated, encounter various permutations, and evolve over time. As discussed above, here the would-be relevant norms on corporate legal responsibility are particularly fluid, if not flat-out controversial, i.e. underdeveloped.

Nevsun's discussion following the statement that "established norms of [CIL] are law, to be judicially noticed"[312] is potentially problematic. Certainly, in the case of well-established CIL norms courts can rely on the *jura novit curia* principle to take judicial notice of those rules. However, this was not the case in *Nevsun*: the would-be norms were and remain highly contentious. Typically, it is for the party asserting a CIL norm's existence to prove it in court, including in domestic settings. While *Nevsun* recognized that establishing *new* CIL norms might require evidence of state practice, it abandoned this evidentiary issue given the would-be norms' (questionable) existence and peremptory character.[313] As argued above, *Nevsun*'s holding on international corporate legal responsibility's existence strikes as methodologically and analytically unsatisfying.[314] Going forward, more evidentiary guidance and rigor would be helpful when litigating CSR disputes domestically. It is also uncertain whether other courts will be as inclined as the SCC to recognize CSR-based obligations absent a more compelling evidentiary record.

The principal challenge going forward will be to make sense of *Nevsun* since the Court relegated much of the future work to lower courts. For instance, the task of ascertaining

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financial markets, and electoral interference—*see* SWATI SRIVASTAVA, HYBRID SOVEREIGNTY IN WORLD POLITICS (2022).

[311] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 74 (Can.). *See also* Monica Hakimi, *Making Sense of Customary International Law*, 118 MICH. L. REV. 1487 (2020).

[312] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 97–98 (Can.).

[313] *Id*. para. 99. *See also supra* notes 286–87, 290, 298, 301.

[314] This trend concerning judicially driven CIL identification appears pervasive across domestic courts beyond Canada. *See* Cedric M.J. Ryngaert & Duco W. Hora Siccama, *Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts*, 65 NETH. INT'L L. REV. 1 (2018).

whether certain CIL norms are of a "strictly interstate character and will have no application to corporations" must be left to the trial judge concerning the disputed norms, whereas "norms governing treaty making" fall within this "strictly interstate" norms category.[315] Again, this assertion is slightly misleading, if only because it ignores the law of treaties' analogical repurposing to govern relations between states and non-state actors. This exercise usually involves equating private actors with state parties—or conferring upon them limited legal personality—for limited purposes (e.g. armed opposition groups signing truces/peace agreements or investors in investment law disputes where the VCLT and related interpretive rules will apply).[316] There is no reason to exclude the possibility that corporations might one day be propped up to a similar standing under international law outside investment law.

Nevsun left some of the most important issues unaddressed, relegating the task of clarifying them to the trial judge. It appears to open Canadian courts to claims alleging CIL breaches but suggests that the trial judge should delineate the contours of such novel claims. Similarly, while CIL could ground a civil remedy for such violations, again lower courts will have to determine this issue.[317] *Nevsun* espoused a choose-your-own-adventure model when punting the matter back to lower courts, stressing that they would determine whether CIL claims are directly actionable in Canadian courts, or whether new nominate torts should be created. How will future plaintiffs mount claims that CIL violations have occurred? Will they frame their arguments around CIL breaches at common law, or on the basis of new CIL-inspired torts, or both?[318] While the *Nevsun* majority sidestepped this issue's resolution, it hinted at its preference for a stand-alone CIL-based cause of action whereby plaintiffs seek direct redress for a corporation's overseas CIL violations.[319] For the Court, the Eritrean workers' CIL-based claims "need not be converted into newly recognized categories of torts to succeed."[320]

While this approach may be sensible from the standpoint of judicial retenue, especially on an appealed motion to strike, lower courts will have to do most of the initial analytical heavy lifting when choosing their adventure: tort, CIL, or both. Tort law is likely more familiar to domestic courts, operating on well-established concepts such as "duty", "breach", "causation", and "loss."[321] By contrast, the modalities of an eventual CIL-based claim at common law present more ambiguities, not least the fact that lower courts will confront challenging attribution and liability issues when creating a common law cause of action. Recall that the Eritrean workers alleged that Nevsun directly violated CIL norms, but that it was also indirectly responsible based on various attribution theories, including, *inter alia*, aiding and abetting, inducement, acquiescence, knowing, and intentional contribution.[322]

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[315] Nevsun Res. Ltd. v. Araya, [2020] S.C.C. 5, para. 105, 113 (Can.).

[316] *See* Proulx, *supra* note 40, at 227. Increasingly, non-state actors assume states' traditional role in conflict or post-conflict settings, including administering justice and applying legal principles. *See* RENÉ PROVOST, REBEL COURTS: THE ADMINISTRATION OF JUSTICE BY ARMED INSURGENTS (2021).

[317] *See supra* notes 270–73.

[318] Time will tell whether common law will track CIL and accommodate international law-based claims in domestic courts. For a post-Nevsun optimistic take, *see* H. Scott Fairley, *International Law Matures within the Canadian Legal System: Araya et al v Nevsun Resources Ltd*, 99 CAN. BAR REV. 193 (2021).

[319] Nevsun Res. Ltd. v. Araya [2020] S.C.C. 5, para. 127–28 (Can.).

[320] *Id.* para. 128.

[321] *See also* Jennett & Parcasio, *supra* note 302.

[322] Araya et al. v. Nevsun Res. Ltd., [2017] BCCA 401, para. 4 (Can.).

While the normative operation of attribution has been a veritable staple of state responsibility—and to a lesser extent also governs individuals' wrongful conduct—its application to corporate conduct is extremely contentious and uncertain. There is every indication that "[f]uture judicial decisions on this point will have immediate practical consequences for businesses with operations in high risk sectors and geographies."[323]

Many of these questions will remain untouched for some time, as the *Nevsun* parties reached an out-of-court settlement. What is certain is that *Nevsun* "offers plaintiffs a degree of latitude to argue before Canadian courts an alternative legal basis with which to vindicate claims for breaches of human rights"; "they are not necessarily restricted to the conventional actions based in tort, which we have seen in Canada and other jurisdictions overseas."[324] Despite these reservations, on balance *Nevsun*'s outcome is likely very positive for the CSR movement, regardless of its questionable reasoning. For the first time, a majority in the highest court of a major common law nation explicitly acknowledged the possibility of holding corporations legally accountable for overseas human rights violations based on CIL norms. There will likely be an influx of litigation in Canada and beyond on the loaded questions *Nevsun* remanded to lower courts.

Given the SCC's influence in other jurisdictions, *Nevsun* will likely also have considerable purchase legally, if only gradually as states warm up to enhancing corporate liability for overseas activities. As one commentator underscores:

> the law on this point had been at a cross-road for some time. A majority of the Canadian Supreme Court have decided that it should follow the progressive side of the path rather than to stay stuck with directional uncertainty. This may have a domino effect in other jurisdictions which are wondering whether to go right or left on that issue.[325]

As Canadian and other courts grapple with these issues, it will be vital to achieve a sensible balance between human rights-holders' legitimate interests in accessing justice and remedies, on one hand, and instilling legal certainty for businesses, on the other. Hopefully, future judicial decisions on these issues will take stock of the Guiding Principles and related developments. Responsible corporations rely on these standards "to frame and develop systems and processes to identify and address human rights issues in their operations and supply chains"; therefore, the "jurisprudence must develop in such a way as to consolidate and encourage such processes, rather than undermine them."[326] One also hopes that *Nevsun*'s

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[323] Jennett & Parcasio, *supra* note 302. *But see* Chimni, *supra* note 182, at 1215–16 (suggesting amending attribution under ARSIWA, based on the "thick and structural links" between corporations and states); MUTHUCUMARASWAMY SORNARAJAH, THE INTERNATIONAL LAW OF FOREIGN INVESTMENT 175 (5th ed., 2020) ("it may be possible to argue that a multinational corporation is constituted as an agent of its parent state").

[324] Jennett & Parcasio, *supra* note 302.

[325] *Id.* (citing Professor Guénaël Mettraux).

[326] *Id.* As seen above, companies can wield considerable influence in transnational lawmaking, including as "translators of international law". In this light, legal anthropologists analyze global supply chain governance through an ethnographic prism to shed light on this corporate influence. *See* Galit A. Sarfaty, *Corporate Actors as Translators in Transnational Lawmaking*, 115 AJIL UNBOUND 278 (2021); Galit A. Sarfaty, *Translating Modern Slavery into Management Practice*, 45 LAW & SOC. INQ. 1027 (2020). On other mechanisms through which businesses shape transnational law, including lobbying legislators, influencing administrative rulemaking, and

reasoning will not only be expanded by other courts towards a more coherent and transnational, if not trans-judicialized, CSR legal discourse, but also extended to other serious harms beyond strictly human rights violations, such as environmental wrongdoing.[327] The challenges are as numerous as they are complex, which is par for the course in CSR's ever-evolving field.[328]

V. CONCLUSION

There has been growing appetite for instituting corporate legal responsibility in some corners, be it through the mechanisms of international/transnational law or domestic law, or some combination of both. However, significant doubt remains as to whether relevant international law obligations even exist and/or can bind corporations directly. Overall, most domestic courts remain apprehensive to recognize and empower such a norm, whereas some governments are unable to effectively implement judicial decisions highlighting corporate wrongdoing.[329]

At the international level, the requisite state practice and *opinio juris* appear to be lacking, as is the will of states to get behind an actionable concept of legal corporate liability. Many initiatives aimed at translating would-be corporate obligations into legal norms with a view to enhancing corporate accountability have resulted in "soft law" instruments, including the Guiding Principles.[330] Similar instruments have been added to the list. They include The Hague Rules on Business and Human Rights Arbitration, which aim to govern business and human rights disputes in the arbitral context, partly to elude barriers typically faced when pursuing CSR-related claims before national courts.[331] Such initiatives build and expand

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resorting to litigation to shape the development and interpretation of legislation, *see* Shaffer, *supra* note 183. *See also supra* note 183 and accompanying text. This corporate influence extends to treatymaking as well. *See* Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016). For a nuanced and critical theory of corporate lobbying power, *see* Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. 1742 (2018).

[327] *Consider* Christelle Chalas & Horatia Muir Watt, *Vers un Régime de Compétence Adapté à la Responsabilité Environnementale des Entreprises Multinationales? Point d'étape post-Brexit*, 110 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 333 (2021); Gilles Lhuilier, *La Nouvelle Responsabilité des Entreprises Transnationales pour Risques Environnementaux*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES 25 (2020); Luca d'Ambrosio, *La "Responsabilité Climatique" des Entreprises: une première analyse à partir du contentieux américain et européen*, 4 ÉNERGIE-ENVIRONNEMENT-INFRASTRUCTURES 39 (2018).

[328] For a more skeptical account on imposing direct international liability on corporations, both in the human rights and environmental sectors, *see* André Nollkaemper, *Responsibility of Transnational Corporations in International Environmental Law: Three Perspectives*, *in* MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 179, 191–99 (Gerd Winter ed., 2006).

[329] For example, Nigeria was unable to implement the Federal High Court's decisions and the United Nations Environment Programme's recommendations holding Shell liable for the ongoing and systematic oil spills and gas flaring in the Niger Delta region. *See* Joint Written Statement Submitted by the Europe-Third World Centre (CETIM), a non-governmental organization in General consultative status, Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN), a non-governmental organization in Special consultative status, U.N. Doc. A/HRC/26/NGO/100 (May 26, 2014). On CSR in the oil and gas sector, *see* Nasser Khodaparast, *The Transnational Corporate Social Responsibility in Oil and Gas Industry: From Soft Law to Mandatory Rule*, 15 J. EAST ASIA & INT'L LAW 77 (2022).

[330] *See, e.g., supra* section II.A.2.a., notes 84–95 and accompanying text.

[331] CTR. FOR INT'L LEGAL COOP., THE HAGUE RULES ON BUSINESS AND HUMAN RIGHTS ARBITRATION (2019), https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-

upon prior voluntary mechanisms, such as the United Nations Global Compact.[332] For its part, the Draft Treaty on CSR continues to evolve, providing hope to different constituencies commonly invested in the adoption of a legally binding instrument to regulate transnational corporate human rights abuses. However, for reasons explored in this article, this draft instrument faces considerable obstacles, not to mention that its current text fails to convincingly set out direct, binding corporate legal obligations.[333]

Nonetheless, in some discrete areas of international law, such as investment arbitration, counterclaims and fresh/direct claims against investors are increasingly turned to by states as a viable channel to pursue corporate accountability, while the text of recent IIAs incorporate compatible mechanisms.[334] The prospect of developing a cogent framework for counterclaims in that context features prominently on the agenda of the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III, especially in light of the inherent asymmetry characterizing many IIAs.[335] As part of its process, the Working Group is "consider[ing] proposals with respect to whether obligations of investors (for example, in relation to human rights, the environment as well as to corporate social responsibility) warrant[] further consideration."[336]

In tandem, counsel and tribunals have begun making the case for actuating corporate legal responsibility in a more binding fashion, at least in principle. For instance, the *Urbaser* case marked the first time an investment arbitration tribunal took jurisdiction over a counterclaim against an investor for alleged human rights violations, although it ultimately rejected the claim against the investor.[337] Nevertheless, the tribunal acknowledged that corporations can assume direct international law obligations, both under treaty and

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Arbitration_CILC-digital-version.pdf. For analysis, *see* Bhavya Mahajan, *New Kid on the Block: An Introduction to the Hague Rules on Business and Human Rights Arbitration*, 22 CARDOZO J. CONFLICT RESOL. 221 (2021); Keon-Hyung Ahn & Hee-Cheol Moon, *An Introductory Study on the Draft Hague Rules on Business and Human Rights Arbitration*, 29 J. ARB. STUD. 3 (2019).

[332] *See* Kabir Duggal & Rekha Rangachari, *International Arbitration Promoting Human Rights: The Hague Rules on Business and Human Rights Arbitration*, 22 ASIAN DISP. REV. 102, 103 (2020).

[333] *See supra* notes 184–203 and accompanying text.

[334] *See supra* notes 104–20 and accompanying text. Investment treaties also provide a potential gateway for the introduction of human rights obligations binding upon investors. *See, e.g.,* Eric de Brabandere, *(Re)Calibration, Standard-Setting and the Shaping of Investment Law and Arbitration*, 59 B.C. L. REV. 2607, 2625–29 (2018). Other commentators investigate alternate entry-points in IIAs to incorporate human rights sensibilities and references. *See, e.g.,* Moshe Hirsch, *Social Movements, Reframing Investment Relations, and Enhancing the Application of Human Rights Norms in International Investment Law*, 34 LEIDEN J. INT'L L. 127, 130–31 (2021); Barnali Choudhury, *Exception Provisions as a Gateway to Incorporating Human Rights Issues into International Investment Agreements*, 49 COLUM. J. TRANSNAT'L L. 670 (2011).

[335] *See, e.g.,* U.N. Comm'n on Int'l Trade L. Working Grp III (Investor-State Dispute Settlement Reform), Possible Reform of Investor-State Dispute Settlement (ISDS): Multiple Proceedings and Counterclaims, ¶¶ 32–45, U.N. Doc. A/CN.9/WG.III/WP.193 (Jan. 22, 2020); *supra* notes 104–06 and accompanying text. For more cynical accounts, however, *see, e.g.,* Boon, *supra* note 13, at 283 (arguing that "counterclaims will only address investor obligations at the margins"); AMADO ET AL., *supra* note 121, at 118.

[336] U. N. Comm'n on Int'l Trade L. Working Grp III (Investor-State Dispute Settlement Reform), *supra* note 335, at ¶¶ 40–41 (suggesting that "the Working Group may wish to consider formulating provisions on investor obligations which would form the basis for a State's counterclaims" and specifying that "the obligations may relate to the protection of human rights and the environment, compliance with domestic law, measures against corruption and the promotion of sustainable development").

[337] *See supra* notes 110–12 and accompanying text.

customary law.[338] While it has spawned some detractors,[339] the *Urbaser* award has wielded some degree of influence on subsequent tribunals and arbitrators.[340] Select domestic courts have felt similarly emboldened to advance the prospect of holding corporations accountable for violating international law norms, with the SCC's *Nevsun* decision leading the charge.

That said, *Nevsun* leaves many unanswered queries. Undoubtedly, existing common law torts could have captured the impugned corporate conduct. Indeed, the Eritrean workers pleaded part of their case on that basis. After all, diverse jurisdictions, both in the Global South and North, provide private law avenues or other recourses to remedy transnational human rights violations, with a limited degree of success for plaintiffs.[341] So, why is the CIL and international law route better or more desirable? Will it result in a broader cause of action, offering plaintiffs a wider margin of latitude in framing their claims, as suggested above? After all, some international law publicists lobby for recognizing the reach of corporate power and influence through establishing corporate CIL, namely by extending the state-based rules of customary formation to corporate entities.[342] What is clear is that several options—including creating a novel duty of care in negligence, new nominate torts and/or direct liability for CIL violations, or enhancing liability schemes to regulate parent companies or complex corporate structures—remain on the table in Canada and beyond.[343] In the interim, *Nevsun* arguably empowers international law and gives some teeth to the CSR movement, even though—paradoxically—the judgment fails to mention any of that

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[338] *See supra* note 112. This development should be appreciated in tandem with increased scholarly inquiries into the question whether foreign investors should also assume responsibilities, not just inherit rights. *See generally* James Gathii & Sergio Puig, *Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law*, 113 AJIL UNBOUND 1, 1 (2019); Kate Miles, *Investor-State Dispute Settlement: Conflict, Convergence, and Future Directions*, 7 EUR. Y.B. INT'L ECON. L. 273, 273 (2016); Stephan Schill, *In Defense of International Investment Law*, 7 EUR. Y.B. INT'L ECON. L. 309 (2016); Wolfgang Alschner & Elisabeth Tuerk, *The Role of International Investment Agreements in Fostering Sustainable Development*, *in* INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES 217–31 (Freya Baetens ed., 2013).

[339] *See, e.g.,* Markus Krajewski, *A Nightmare or a Noble Dream? Establishing Investor Obligations Through Treaty-Making and Treaty Application*, 5 BUS. & HUM. RTS. J. 105, 122–25 (2020); Edward Guntrip, *Private Actors, Public Goods and Responsibility for the Right to Water in International Investment Law: An Analysis of Urbaser v. Argentina*, 1 BRILL OPEN L. 37, 60 (2018). For a more nuanced—mostly positive—yet critical take, *see* Kevin Crow & Lina Lorenzoni Escobar, *International Corporate Obligations, Human Rights, and the* Urbaser *Standard: Breaking New Ground?*, 36 BOS. U. INT'L L.J. 87 (2018).

[340] *See, e.g.,* David Aven et al. v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award, ¶¶ 738–42 (Sept. 18, 2018); Bear Creek Mining v. Republic of Perú, ICSID Case No. ARB/14/21, Award, ¶¶ 10–11 (Nov. 30, 2017) (partial dissenting Opinion of Professor Philippe Sands). *See also* Krajewski, *supra* note 339, at 125–27.

[341] *See* CIVIL REMEDIES AND HUMAN RIGHTS IN FLUX: KEY LEGAL DEVELOPMENTS IN SELECTED JURISDICTIONS (Ekaterina Aristova & Ugljesa Grusic eds., 1st ed. 2022) (canvassing various domestic private law and other mechanisms to actuate corporate legal responsibility in several jurisdictions, including in Argentina, Australia, Bangladesh, Brazil, Canada, England and Wales, France, Germany, India, Kenya, The Netherlands, The Philippines, South Africa, Switzerland, Ukraine, and the U.S.); Phillip Paiement, *Transnational Sustainability Governance and the Law*, *in* THE OXFORD HANDBOOK OF TRANSNATIONAL LAW 821, 840–43 (Peer Zumbansen ed., 2021).

[342] *See, e.g.,* Kirsten Stefanik, *Rise of the Corporation and Corporate Social Responsibility: The Case for Corporate Customary International Law*, 54 CANADIAN Y.B. INT'L L. 276 (2017).

[343] For a recent account of the Canadian situation, *see* Penelope Simons & Heather McLeod-Kilmurray, *Canada: Backsteps, Barriers and Breakthroughs in Civil Liability for Sexual Assault, Transnational Human Rights Violations and Widespread Environmental Harm*, *in* Aristova & Grusic, *supra* note 341, at 118–22.

movement's key documents and developments.

Again, lower courts will be tasked with much of the conceptual heavy lifting to instill the requisite normative and enforcement power into the relevant CIL norms. It might be some time before another similar case comes before the SCC or any other credible apex court.[344] In the meantime, non-governmental organizations will likely use this precedent to advance the CSR agenda in various fora, while scholars will tease out the implications of the SCC's treatment of international law principles.[345] Litigants with sympathetic facts might also attempt to seize Canadian courts as an alternative forum in cases where U.S. judicial avenues may be foreclosed given recent SCOTUS jurisprudence, provided all jurisdictional hurdles are cleared.[346] The open question, however, remains whether lower Canadian courts will build on *Nevsun*'s procedural decision when handling proceedings involving overseas corporate misconduct. Will courts of third states follow or seek inspiration from *Nevsun*? From a separation of powers perspective, it is the legislative branch—not the courts—which should be promulgating relevant CSR regulation and legislation, thereby casting doubt as to *Nevsun*'s transferability.

Given current mistrust in international law and its institutions, *Nevsun* might be a welcome development in some circles. There is arguably a need to identify alternative targets of liability to avoid impunity, for instance when state responsibility, international criminal justice, and other mechanisms prove ineffective.[347] For example, in *Nevsun* Eritrea basically operationalized and executed the forced conscription scheme which engulfed the workers. Had a case been pursued against the Eritrean state, it would have been precluded before Canadian courts by the State Immunity Act.[348] All the more reason to explore and pursue alternate liability targets and causes of action.

Nevsun might be a step in the right direction in circumnavigating similar situations and pushing for enhanced corporate liability. In many nations, especially in more fragile states, governments might be openly or covertly pulling the corporate strings leading to such incidents, either through ownership and/or control of relevant companies or more clandestine channels. Relatedly, powerful corporations often assume various state-like functions in failed or fragile states, which may lead them to overstep their mandates and raise CSR-related issues.[349] Conversely, while we should not overstate *Nevsun*'s reach and importance, it is telling that the SCC heard the case even though it only involved an appeal from a declined

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[344] Recently, a case was introduced against the Barrick Gold Corporation before the Ontario Superior Court of Justice. In those proceedings, a group of Tanzanian citizens allege that several CIL violations and breaches of international human rights standards were perpetrated in connection with the operation of a mine over which the Toronto-based company exerts operational control through a joint venture deal with the Tanzanian government. At the outset, this case presents some parallels with *Nevsun*. *See* Gabriel Friedman, *'Barrick Is Responsible for the Violence': New Lawsuit Filed in Ontario About Troubled Tanzania Mine*, FINANCIAL TIMES, November 23, 2022, https://financialpost.com/commodities/mining/barrick-gold-lawsuit-ontario-tanzania-mine.

[345] *See, e.g.,* Hassan M. Ahmad, *Transnational Torts Against Private Corporations: A Functional Theory for the Application of Customary International Law Post-Nevsun*, 54 U.B.C. L. REV. 299 (2021).

[346] On other potential avenues to enforce corporate accountability before U.S. courts in the wake of ATCA's perceived demise, *see* Rachel Chambers & Jena Martin, *United States: Potential Paths Forward after the Demise of the Alien Tort Statute*, *in* Aristova & Grusic, *supra* note 342, at 351–70.

[347] *See also* Proulx, *supra* note 40, at 274, 285.

[348] *See also* Kazemi Estate v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, para. 47 (Can.); Bouzari v. Islamic Republic of Iran, [2004] 243 D.L.R. 4th, 406.

[349] *See generally* Jay Butler, *Corporations as Semi-States*, 57 COLUM. J. TRANSNAT'L L. 221 (2019).

motion to strike.

On a profoundly cynical view, the flipside to that argument is to cast the whole decision—or most of it on CSR points—as *obiter dictum*. As discussed, it is doubtful that the requisite state practice exists to ground a norm regulating corporate liability for human rights violations in transnational law, not to mention the accompanying *opinio juris* from relevant stakeholders.[350] Nevertheless, *Nevsun* will likely exert some degree of influence in Canada and beyond. All three levels of court involved in this litigation sided with the proposition that CIL-based claims for alleged overseas corporate wrongdoing *might* be justiciable in Canada, again highlighting a willingness to enhance access to justice for human rights-holders. However, why did *Nevsun* not unfold any robust analysis of whether civil liability and corporate civil liability for CIL violations are themselves established CIL norms? While the SCC considered the relevant CIL prohibitions to be part of Canadian law,[351] it left it to lower courts to determine whether those norms also support corporate civil liability in the event of their breach. Presumably, this approach can partly be explained by the fact that *Nevsun* was decided on an appeal from a motion to strike.

Admittedly, *Nevsun* has other considerable weaknesses and blind spots. Perhaps the SCC got the case right on the justice but not on the law, thereby hinting at a goal-oriented or outcome-dependent judicial approach. A critical observer might infer that the majority read the news headlines correctly but misread the law and arguably overreached or overcompensated, resulting in a methodologically questionable judgment. *Nevsun*'s great paradox is that the SCC was likely coming from a laudable, progressive place considering the abovementioned CSR agenda. It proceeded to fill gaps created by SCOTUS' restrictive tendencies under ATCA, but ultimately unfolded an unconvincing application of international law principles.

Despite these misgivings, *Nevsun* should be appreciated against the prospect of establishing a general regime of individual civil responsibility in transnational law, to better capture and sanction non-state actors' wrongful conduct. Realistically, the avenues for advancing international legal corporate responsibility, as suggested by *Nevsun*, should be embraced as a mixed blessing, with cautious optimism.

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[350] *But see* JOANNA DINGWALL, INTERNATIONAL LAW AND CORPORATE ACTORS IN DEEP SEABED MINING 191–92 (2021) (relying on *Nevsun* and arguing that state practice "supports the conclusion that customary law may bind corporate actors directly").

[351] A related critique—extending beyond this article's scope—lies in the SCC's eschewal of the distinction between prohibitive and permissive CIL norms in the context of its analysis of the doctrine of adoption of CIL into Canadian law. *See* Charles-Emmanuel Côté, *L'Arrêt Nevsun, le Capitaine Keyn et les Normes Prohibitives de Droit International Coutumier au Canada*, REVUE QUÉBÉCOISE DE DROIT INT'L 51 (2022) (special issue).


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THE INEFFECTIVE INTERPRETATIONS OF INTERNATIONAL REFUGEE LAW IN THE ADJUDICATION OF ASYLUM CLAIMS FOR WOMEN VICTIMS OF DOMESTIC VIOLENCE IN CANADA AND THE UNITED STATES

*Stefanie Orn**

ABSTRACT

Since the creation of international refugee law under the 1951 Refugee Convention and the subsequent 1967 Protocol Relating to the Status of Refugees, state parties are obliged to protect displaced persons if they fit within the treaties' definition of a refugee. Among other criteria, there are certain protected groups that individuals must be members of to be considered a refugee, one of which is membership in a particular social group. There is no strict definition of what membership in a particular social group is under international law, so state parties are left to interpret this language within their domestic legal systems. Two state parties to these treaties that are of concern in their interpretation of this aspect of the definition of a refugee under international law are Canada and the United States. Particularly of concern in this context is their interpretations of whether women victims of domestic violence fall within that protected ground.

Both Canada and the United States have sometimes recognized the asylum claims of women victims of domestic violence as valid based on their respective interpretive definitions of particular social group. However, both systems interpret whether a group of individuals fit within the definition of a particular social group on a case-by-case basis. This breeds inconsistency and oftentimes impossibly high legal thresholds for the protection of women domestic violence victims as refugees, a particularly vulnerable sect of displaced persons. As such, to uphold international human rights standards and to promote consistency in the adjudication of these types of asylum claims in each respective state, Canada and the United States must act swiftly to codify gender-based asylum claims as a protected ground under their domestic refugee laws.

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INTERNATIONAL LAW

TABLE OF CONTENTS

I. INTRODUCTION

Time and time again, refugee crises spring up across the globe and millions of individuals become "forcibly displaced" as a result of persecution and human rights violations in their home countries.[1] One specific type of human rights violation that is of international concern is gender-based violence.[2] Gender-based violence is defined by the United Nations High Commissioner for Refugees as "harmful acts directed at an individual based on their gender . . . rooted in gender inequality, the abuse of power and harmful norms."[3] In certain countries, this issue is of particular concern because "women and girls face discrimination and violence every day simply because of their gender."[4] Thus, it is an acutely pressing global issue, especially considering that "it is estimated that one in three women will experience sexual or physical violence in their lifetime."[5]

In response to these types of conditions, many women and girls look to Canada or the United States in search of asylum to improve their circumstances for the better.[6] However, what many find is that international refugee law generally is not as friendly to these types of asylum claims as they might hope. This is largely due to the fact that, despite gender-based violence being recognized as a human rights violation, international refugee law has yet to specifically recognize gender as its own protected group that is eligible for refugee status.[7] As a result, many states that adhere to international refugee law, like Canada and the United States, also do not recognize gender as its own protected group that is eligible for asylum.[8]

This comment explores how Canada and the United States compare in their

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[1] *Refugee Statistics*, USA FOR UNHCR: THE UN REFUGEE AGENCY, https://www.unrefugees.org/refugee-facts/statistics/#:~:text=27.1%20million%20refugees,4.6%20million%20asylum%20seekers (last visited Feb. 18, 2022).

[2] *Gender-based Violence*, UNHCR, THE UN REFUGEE AGENCY: USA, https://www.unhcr.org/en-us/gender-based-violence.html (last visited Feb. 18, 2022).

[3] *Id*.

[4] *Women*, UNHCR, THE UN REFUGEE AGENCY: USA, https://www.unhcr.org/en-us/women.html (last visited Feb. 18, 2022).

[5] *Gender-based Violence*, *supra* note 2.

[6] *See Gender-based Analysis Plus*, GOVERNMENT OF CANADA, (Aug. 11, 2021), https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-performance-reports/2020/gender-based-analysis-plus.html. ; *See Number of refugees arriving in the United States in 2020 by gender*; STATISTA (Apr. 22, 2022) 7, 2022), https://www.statista.com/statistics/247062/number-of-refugees-arriving-in-the-us-by gender/#:~:text=In%202019%2C%20a%20total%2014%2C651,in%202019%20amounted%20to%2029%2C916.

[7] 1951 Convention Relating to the Status of Refugees art. 1(A)(2), Jul 28, 1951, 189 U.N.T.S. 137. Gender is not listed within the Convention as its own category. Instead, countries are left with the option of the "particular social group" category as a possible means to read gender into international refugee law as a protected class.

[8] *State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*, UNCHR, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, 1-2 https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf (last visited Feb. 18, 2022) [hereinafter *State Parties*]; *See Countries with Asylum/Refugee Laws That Explicitly Protect those Fleeing Gender-Based Persecution*, TAHIRIH JUSTICE CENTER 2021, https://www.tahirih.org/wp-content/uploads/2021/03/Appendix-1-List-of-other-countries-with-gender-listed-in-asylum-laws.pdf (last visited Jan. 28, 2022) [hereinafter *Gender-Based Persecution Refugee Laws*]. There are 149 country parties to either The Convention or The Protocol, but only 32 of them explicitly protect those fleeing gender-based persecution in their asylum laws.

interpretations of international refugee law in the adjudication of asylum claims rooted in gender-based violence – particularly regarding such claims made by women victims of domestic violence – in their respective legal systems. More specifically, this comment will analyze how each state defines "particular social group" and how that concept interplays with their definitions of "persecution" in the adjudication of these types of asylum claims. Additionally, this comment will seek to determine which states' policies trend more toward inclusivity and provide recommendations for how both states could become more inclusive to these types of asylum claims.

II. BACKGROUND ON INTERNATIONAL REFUGEE LAW: "PARTICULAR SOCIAL GROUP" AND ITS ROLE IN THE ASYLUM CLAIMS OF WOMEN VICTIMS OF DOMESTIC VIOLENCE IN CANADA AND THE UNITED STATES

While states around the world all have their own requirements for a valid asylum claim, international refugee law primarily originates from the 1951 Refugee Convention (the "Convention").[9] The Convention established a set of protocols as part of international refugee law and was adopted by a diplomatic conference in Geneva in response to the influx of displaced persons in the aftermath of World Wars I and II.[10] Subsequently, the Convention was amended in 1967 by the passing of the 1967 Protocol Relating to the Status of Refugees (the "Protocol"), which "expanded [the Convention's] scope as the problem of displacement spread around the world."[11] Owing to their statuses as international treaties, the Convention and the Protocol are binding on any signatory state, and each respective state must implement its policies in their domestic legal systems.[12]

Two state signatories of the Convention or the Protocol which have implemented the Convention's definition of a refugee in their domestic legal systems are Canada and the United States.[13] The definition of a refugee under the Convention is "someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[14] While this comment primarily focuses on asylum claims, the term "refugee" will be used when describing the applicable law as asylum claims are based on

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[9] *See The 1951 Refugee Convention*, UNHCR, THE UN REFUGEE AGENCY: USA, https://www.unhcr.org/en-us/1951-refugee-convention.html (last visited Feb. 18, 2022) [hereinafter *UNHCR 1951 Convention*].

[10] *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, UNHCR, THE UN REFUGEE AGENCY: USA, 1 (Sept. 2011), https://www.unhcr.org/en-us/about-us/background/4ec262df9/1951-convention relating-status-refugees-its-1967-protocol.html.

[11] *Id.*

[12] UNHCR, THE UN REFUGEE AGENCY: USA, *Information Note on Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees,* U.N. Doc. EC/SCP/66, UNHCR, (July 22, 1991), https://www.unhcr.org/en-us/excom/scip/3ae68cd34/information-note-implementation-1951-convention-1967-protocol-relating.html.

[13] *Asylum Law and Procedure*, HUMAN RIGHTS FIRST, https://humanrightsfirst.org/asylum-law-and-procedure/ (last visited Feb. 18, 2022); *State Parties*, *supra* note 8, at 2, 4; Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.). While the U.S. is not a signatory of The Convention, it is a signatory of The Protocol. Canada is a signatory of both The Convention and The Protocol. Accordingly, both the U.S. and Canada have codified the definition of a refugee under The Protocol in their domestic laws.

[14] 1951 Refugee Convention, *supra* note 7, at 2.

meeting the criteria of refugee status, as defined under international law, in both Canada and the United States.[15]

The meaning of "membership in a particular social group" is one aspect of this definition that remains unclear.[16] As such, Canada and the United States have implemented this aspect of refugee law in highly individualized ways within their domestic legal systems.[17] Because gender is not explicitly included as a protected ground under international refugee law, whether gender is included as a particular social group when adjudicating asylum claims is a unique aspect of refugee law in both states.[18] Historically, it has not always been clear whether certain highly gender-specific forms of persecution, like domestic violence, qualify victims for asylum in either state.[19]

In the United States, the interpretation of particular social group and persecution within its jurisprudence varies widely because these claims are evaluated on a case-by-case basis.[20] The most universally accepted definition of particular social group for the purposes of an asylum claim comes from the amalgamation of two precedential cases.[21] It is defined as a group of persons who: (1) share a common immutable characteristic; (2) have social distinction in society; and (3) have particularity where the group is sufficiently distinct.[22] How gender-based asylum claims, especially those concerning domestic violence, fit into the United States' legal system is relatively unsettled because there is no large-scale recognition of gender as a particular social group under the aforementioned definition; nor is there a consistent recognition of domestic violence as a valid form of gender persecution.[23] Typically, gender-based particular social group claims trend toward denials within the appellate courts because "women" as a particular social group is considered to be "overbroad."[24]

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[15] *See Asylum in the United States*, AM. IMMIGR. COUNCIL, (Aug. 2022), https://www.americanimmigrationcouncil.org/research/asylum-united-states; *see Claiming Asylum in Canada – what happens?*, GOV'T OF CAN. (Oct. 6, 2021), https://www.canada.ca/en/immigration-refugees-citizenship/news/2017/03/claiming_asylum_incanadawhathappens.html.

[16] *Id.* The definition of what constitutes a particular social group is not enumerated in The Convention.

[17] *See* Ward v. Canada, [1993] 2 S.C.R. 689 (Can.); *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985); *In re W-G R-*, 26 I. & N. Dec. 208 (B.I.A. 2014) (determining what constitutes "membership in a particular social group" through precedential caselaw in Canada and the U.S. respectively).

[18] Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, the United Kingdom, and the United States*, 23 AM. U. J. GENDER SOC. POL'Y & L. 529, 531–32 (2015) [hereinafter *Particularized Social Groups*].

[19] *See id.*; *See* Lauren Lee, *Sanctuary, Safe Harbor and Asylum. But is it Available for Domestic Violence Victims? The Analysis of Domestic Violence Asylum Seekers in the United States and Internationally*, 21 SAN DIEGO INT'L L.J. 495, 497-98 (2020).

[20] *Particularized Social Groups*, *supra* note 18, at 553.

[21] *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985); *In re W-G-R-*, 26 I. & N. Dec. 208, 213-18 (B.I.A. 2014).

[22] *In re Acosta*, *supra* note 21, at 233; *In re W-G-R-*, *supra* note 21, at 213-18.

[23] Melanie Randall, *Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution*, 25 HARV. WOMEN'S L.J. 281, 294–95 [hereinafter *Refugee Law*]; Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L.J. 25, 60 (1998).

[24] Macklin, *supra* note 23, at 61.

In addition, the requirements for what constitutes a particular social group and persecution can vary widely from presidential administration to administration based on the actions of the appointed Attorney General.[25] At this time, under the current Attorney General of the Biden administration, *Matter of A-R-C-G-*, an immigration case that recognized a subset of women domestic violence victims as a particular social group, is once again considered as binding precedent in the adjudication of asylum claims.[26] This is significant because it is a case that was previously vacated under the Trump administration's Attorney General.[27] Consequently, asylum eligibility for women victims of domestic violence as a particular social group is rather inconsistent in the United States legal system.

In the Canadian legal system, the general definition of particular social group also comes from caselaw.[28] The Supreme Court of Canada, in *Canada (Attorney General) v. Ward* of 1993, determined that a particular social group is defined by: "1) an innate or unchangeable characteristic; 2) voluntary association for reasons so fundamental to human dignity that members should not be forced to forsake the association; and 3) past membership in a voluntary association, unalterable due to its historical permanence."[29] In addition, the Court recognized that gender could be an example of a particular social group.[30] Subsequently, the Canadian interpretive guidelines for asylum claims were amended to include "Women Refugee Claimants Fearing Gender-Related Persecution" as a valid particular social group.[31] Moreover, recent Canadian caselaw generally recognizes domestic violence as a human rights violation as well as a form of gender persecution.[32] As a result of Canada's "more gender-sensitive approach" in adjudicating asylum claims of women facing gender-related persecution, Canada has commonly been viewed as an example for other states to follow in adjudicating these types of claims.[33] Thus, the Canadian legal system can generally be considered more inclusive than that of the United States to asylum claims of women victims of domestic violence under the particular social group framework.

III. IS THE CANADIAN LEGAL SYSTEM'S ADJUDICATION OF THE ASYLUM CLAIMS OF WOMEN VICTIMS OF DOMESTIC VIOLENCE AN EXEMPLARY ONE

Since Canada is typically held as an example for other states to follow in gender-based asylum claims,[34] a natural question that arises in the context of this discussion is whether the U.S. should look to the Canadian Guidelines as a model to follow in its own adjudication of

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[25] EOIR Policy Manual, Chapter I.4(b)(7) (Dec. 16, 2021); Lee, *supra* note 19, at 500–01; *See Matter of A-B-*, 28 I & N Dec. 307, 308–09 (A.G. 2021) (vacating a precedential decision made by the previous Attorney General that vacated a case determining that domestic violence as persecution and a specific gender-based particular social group did not qualify for asylum).

[26] *Matter of A-B-*, 28 I & N Dec. 307, 308–09 (A.G. 2021).

[27] *Matter of A-B-*, 28 I & N Dec. 307, 308–09 (A.G. 2021).

[28] *See* Macklin, *supra* note 23, at 59.

[29] Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 739.

[30] *Id*.

[31] *Particularized Social Groups*, *supra* note18, at 536.

[32] *Id.* at 541.

[33] *Id*. at 536-37.

[34] *Id.*

such claims.

Not necessarily. At a cursory glance, the Canadian Guidelines appear to be entirely inclusive of asylum claims made by women victims of domestic violence under the particular social group umbrella. However, in practice, the Canadian system is not without its flaws.

Similar to the U.S. legal system, the application of the Canadian Guidelines in the adjudication of these types of claims is rather inconsistent according to an academic review of reported decisions on this matter.[35] The review, which was conducted within this past decade, reported a notable absence of recognizing domestic violence as a human rights violation in any of the outcomes of asylum cases based on gender persecution claims made by women domestic violence victims.[36] This finding is not particularly unexpected because, although the Canadian Guidelines do recognize a "gender-defined particular social group," the requirements that must be met to consider gender as a particular social group for the sake of an asylum claim makes it difficult for these types of cases to be successful. The Canadian Guidelines state:

> Because refugee status is an *individual remedy*, the fact that a claim based on social group membership may not be sufficient in and of itself to give rise to refugee status. The woman will need to show that she has a genuine fear of harm, that one of the grounds of the definition is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility that the feared persecution would occur if she was to return to her country of origin and that she has no reasonable expectation of adequate national protection.[37]

Because of these additional requirements, in particular the requirement that the woman "has no reasonable expectation of adequate national protection," these women have a significant evidentiary hurdle to overcome in demonstrating that "their home state is unwilling or unable to protect them from their abuser."[38] This high evidentiary threshold in the Canadian courts, often makes it difficult for women victims of domestic violence to meet the standard for a grant of asylum in Canada.[39] Therefore, even though the Canadian system facially appears to be an exemplary one that the U.S. should emulate in its adjudication of asylum claims of women victims of domestic violence, at a deeper level, the Canadian system is not entirely the best model for other states to follow.

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[35] *Id.* at 542.

[36] *Id.*

[37] Immigration and Refugee Board, Ottawa, Canada, *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the* Immigration Act, 5 INT'L J. REFUGEE L. 278 (1993).

[38] Lee, *supra* note 19, at 505.

[39] *Id.*

IV. WHAT BOTH THE CANADIAN AND U.S. LEGAL SYSTEMS CAN DO TO BECOME MORE INCLUSIVE TO ASYLUM CLAIMS OF WOMEN VICTIMS OF DOMESTIC VIOLENCE

Since neither the United States nor the Canadian legal systems are particularly friendly in practice to asylum claims made by women victims of domestic violence under their particular social group regimes, it is important that each state rethink their respective asylum legal frameworks. Domestic violence is generally considered to be a human rights issue of international concern.[40] As both states are members of the United Nations' Human Rights Council, it is not unreasonable to suggest that their asylum legal frameworks should reflect their respective commitments to upholding international human rights standards.[41]

The most profound way in which both Canada and the United States could uphold those standards and become more inclusive to women victims of domestic violence as asylum seekers is to specifically codify gender as a protected ground under their asylum laws. Recognizing gender as its own protected ground would significantly lessen the legal hoops that claimants have to jump through to establish their eligibility for asylum. For example, gender-based asylum claimants would no longer need to focus on meeting the standards set out under the particular social group frameworks in both states.[42] By eliminating such a requirement, the United States and Canada could potentially remedy the commonplace inconsistencies found in the outcomes of these types of claims under the particular social group framework.

The United Nations has backed this proposition in its CEDAW Committee General Recommendation No. 32, which "urges States to recognize sex, gender, and LGBT status as their own grounds of asylum."[43] While Canada has recognized gender as a potential protected ground within its interpretation of the particular social group category under refugee law, it has not recognized gender as its own specific protected category like it has with race, religion, nationality, or political opinion.[44] Meanwhile, the United States has yet to comprehensively recognize gender as a valid particular social group.[45] As such, despite having the freedom to expand upon the list of protected asylum grounds within their domestic legal systems, both states are only meeting the bare minimum requirements under international refugee law concerning protected grounds.[46]

Currently, there are thirty-two states, the United States and Canada not included, that have refugee laws "explicitly protect[ing] those fleeing gender-based persecution."[47] In an effort to fall in line with international human rights concerns, the United States and Canada should join these states in explicitly recognizing those fleeing gender-based persecution

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[40] Paola Garcia Rey, *Domestic Violence as a Human Rights Violation*, AM. C.L. UNION (Mar. 14, 2011), https://aclu.org/news/womens-rights/domestic-violence-human-rights-violation.

[41] *Membership of the Human Rights Council*, U.N. HUM. RTS. COUNCIL, https://www.ohchr.org/en/hrbodies/hrc/pages/membership.aspx (last visited Jan. 28, 2022).

[42] *See* Ward v. Canada, [1993] S.C.R. 689 (Can.); *In re Acosta*, 19 I&N Dec. 211 (B.I.A. 1985); *In re W-G R-*, 26 I&N Dec. 208 (B.I.A 2014) (describing the fundamental elements that asylum claimants must meet, respectively in Canada and the U.S., in order to be considered a member of a particular social group).

[43] *Particularized Social Groups*, *supra* note 18, at 568.

[44] *Refugee Law*, *supra* note 23, at 290-92.

[45] *Particularized Social Groups*, *supra* note 18, at 553.

[46] Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 137.

[47] *Gender-Based Persecution Refugee Laws*, *supra* note 8.

within their own refugee laws. Similar to the claims made about the Canadian model, Costa Rica is a state considered to be "exemplary" in its adjudication of these types of asylum claims.[48] However, the Costa Rican model has surpassed Canada's in that it is one of the few states with refugee laws that "explicitly protect those fleeing gender-based persecution"[49] Moreover, the Costa Rican model is considered exemplary because it has support systems in place for refugees that help them flourish as contributing members of society.[50] Perhaps this is the appropriate model both Canada and the United States should try to emulate in their own handling of asylum claims.

Additionally, it is important that each state recognizes domestic violence as a valid form of persecution under asylum law. While Canada has recognized domestic violence as persecution, it still maintains a relatively high evidentiary threshold for claimants to establish that their home country is unable or unwilling to protect them from acts of domestic violence.[51] In the United States, there are some existing guidelines that recognize gender-based violence as persecution for asylum claims; however, these guidelines are in no way binding on adjudicators.[52] Therefore, it is important that both states' asylum laws and policies recognize domestic violence as a guaranteed type of harm that would rise to the level of persecution to constitute a grant of asylum.

A commonplace argument that goes against recognizing gender as its own protected ground, and could presumably go against recognizing domestic violence as a generalized harm that rises to the level of persecution, is that it would "open the floodgates" to an overwhelming number of asylum claims.[53] At an ideological level, this is not necessarily a valid reason for either state's inaction because, as noted previously, both play such a significant role within global human rights issues as member states of the United Nations Human Rights Council.[54] Generally speaking, it is important for any state to align its legal frameworks with international human rights standards. Though, this proposition is especially true for states like the United States and Canada that have demonstrated a commitment to promoting human rights within the international community.

At a more practical level, this argument does not hold merit either because other recognized protected grounds under international refugee law, such as race, religion, nationality, and political opinion, have not been subject to such concerns within either state's asylum laws.[55] Certainly, these groups could be subject to similar concerns based on the vast number of people who could fall into those categories. So, why then should this be of concern for this specific protected ground? The answer is that it should not be of concern at all because simply belonging to a protected group or demonstrating harm rising to the level of

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[48] *Particularized Social Groups*, *supra* note 18, at 533-534.; *Costa Rica gives refugees opportunities to succeed*, UNHCR UNITED STATES (Sept. 3, 2017), https://www.unhcr.org/en-us/news/latest/2017/9/59aba6784/costa-rica-gives-refugees opportunities-succeed.html.

[49] *Gender-Based Persecution Refugee Laws*, *supra* note 8.

[50] *Id.*

[51] Lee, *supra* note 44 at 539.

[52] Maddie Boyd, *Refuge from Violence? A Global Comparison of the Treatment of Domestic Violence Asylum Claims*, 29 BERKELEY LA RAZA L.J. 1, 10 (2019).

[53] *Refugee Law*, *supra* note 23, at 299.

[54] *Membership of the Human Rights Council*, *supra* note 39.

[55] *Refugee Law*, *supra* note 23, at 299.

persecution are not the only requirements that must be met to be granted asylum.[56] It follows then that even if gender or domestic violence are explicitly recognized within a state's asylum laws, it does not mean that every single case brought under that protected ground or type of persecution will hold merit. As such, any argument that an influx of asylum cases would occur if a state's asylum laws were broadened should not prevent either state from taking such action.

V. CONCLUSION

With the passage of time comes new human rights concerns.[57] It is important that refugee laws adapt to contemporary human rights concerns and be amended accordingly at both the international and domestic levels. Refugee law was ultimately designed to protect vulnerable populations across the globe who are unable to avail themselves of the protection of their countries of origin.[58] Protecting women refugees would fulfill that purpose because they are one of the most vulnerable populations globally – especially when it comes to violence.[59] Unless refugee law changes to make it less burdensome for these women to seek and obtain asylum, they will continue to be at risk of violence – the very thing from which many of them fled in the first place.

When examining the interpretation of international refugee law at the state level, at least in the cases of Canada and the United States, it is apparent that the use of the protected ground "particular social group" as a means for women victims of domestic violence to obtain asylum is not enough. When states are left to their own devices in the interpretation of "particular social group" under refugee law, it becomes astonishingly difficult for these types of asylum claims to be successful because of the high standards that are imposed upon claimants to be considered a member of that group. According to the UNHCR, "the refugee definition, properly interpreted, covers gender related claims."[60] Therefore, states like Canada and the United States that are inconsistent in recognizing gender-related asylum claims directly conflict with international refugee law. As a result, these states must amend their asylum laws to ensure adherence to the intent and purpose behind international refugee law and specifically include gender as a protected group that is eligible for asylum.

Another way in which these states could amend their asylum laws to be more inclusive to gender-based violence asylum claims specifically would be to explicitly recognize domestic violence as a form of persecution. However, doing so likely would not be enough on its own to make the drastic systemic changes necessary to achieve true inclusivity of

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[56] Refugee Convention, 1951, *supra* note 14.

[57] *See generally* PATRICIA BRANDER ET AL., COMPASS: MANUAL FOR HUMAN RIGHTS EDUCATION WITH YOUNG PEOPLE, 397 –402 (Patricia Brander, et al. eds., 2nd ed. 2020), https://rm.coe.int/compass-eng-rev-2020-web/1680a08e40.

[58] *See generally* FRANCES NICHOLSON & JUDITH KUMIN, INTER-PARLIAMENTARY UNION & U.N. HIGH COMM'R FOR REFUGEES, HANDBOOK FOR PARLIAMENTARIANS NO. 27, A GUIDE TO INTERNATIONAL REFUGEE PROTECTION AND BUILDING STATE ASYLUM SYSTEMS 15-19 (2017), https://www.unhcr.org/3d4aba564.pdf (discussing the purpose and context of international refugee law).

[59] *Id.* at 36–37; *The World's Biggest Minority? Refugee Women and Girls in the Global Compact on Refugees*, THE FORCED MIGRATION RESEARCH NETWORK, UNIVERSITY OF NEW SOUTNO H WALES (AUSTRALIA), 1 https://www.unhcr.org/59e5bcb77.pdf (last visited Feb. 18, 2022).

[60] Nicholson & Kumin, *supra* note 56, at 136.

these types of claims. Although there are numerous changes that must be made for the Canadian and United States legal systems to be adequately inclusive to gender-based violence asylum claims under international standards, the most effective first step would be to include gender as its own protected group within their refugee laws.[61]

[61] *Particularized Social Groups*, *supra* note 18, at 569.