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6

Holding Corporations to Account: The Chimera of Customary International Law?

SIMON BAUGHEN

1. Introduction

Eritrea is a poor country. In 2014 it was estimated to rank 164th out of the world's 194 states. Eighty per cent of its population is engaged in subsistence agriculture. Eritrea's major source of foreign currency is its Bisha mine at Asmara. Construction began in 2008 and by 2013 gold exports amounted to US$143m, almost all derived from the Bisha mine.[1] The mine is owned by the Bisha Mining Share Company (BMSC) in which a Bermudan subsidiary of a Canadian mining company, Nevsun, held a 60 per cent share.

However, all that glitters is not gold – for the Bisha mine is tainted with allegations of violations of customary international law (CIL). Eritrea has a national service programme requiring its adult citizens to serve in the military for 18 months. In 2002 this was extended to an indefinite period of service. Conscripts in the national service programme (NSP) have provided the labour for the Bisha mine. In 2014, three Eritrean refugees brought an action against Nevsun in the courts of British Columbia, Canada. They alleged that they were conscripted into the NSP and then forced to provide labour for two for-profit construction companies, Segen and Mereb, the latter allegedly owned by members of the Eritrean military. The mine was owned by an Eritrean company, BMSC, which was owned 40 per cent by the Eritrean Mining Corporation and 60 per cent by subsidiary companies of a Canadian company, Nevsun. BMSC engaged a South African company, SENET, as the engineering, procurement and construction manager for the construction of the mine. SENET entered into subcontracts on behalf of the BMSC with Mereb Construction Company, which was controlled by the Eritrean military, and Segen Construction Company, which was owned by Eritrea's only

[1] *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856 [39]–[40].

political party, the People's Front for Democracy and Justice. Mereb and Segen were among the construction companies that received conscripts from Eritrea's NSP.

The plaintiffs claimed against the Canadian mining company, Nevsun, either directly as it had a majority on the Board of BMSC, or vicariously through BMSC. As well as framing their claims under domestic tort law, the plaintiffs also brought the action against Nevsun for violations of five norms of customary international law as incorporated into Canadian law, namely: the use of forced labour; torture; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[2] In turn, Nevsun mounted a jurisdictional challenge to the claims on three grounds: *forum non conveniens*; Act of State; and denial of the existence of a cause of action based on CIL.

The Supreme Court of Canada decided on 28 February 2020[3] that: (a) by a 5:4 majority the CIL claims should not be struck out as being bound to fail and; (b) by a 7:2 majority that the Act of State doctrine was not part of the law of Canada. The claims would then proceed to trial. However, not surprisingly, this was not to happen and the case settled in October 2020.[4]

The decision raises a fundamental question about the role international law plays at the domestic level. Does it have horizontal effect on private parties? Do certain rules of customary international law, or *jus cogens* norms of international law bind companies and, if so, can they be invoked in civil proceedings in the domestic courts of dualist states, such as Canada?

In this chapter, I shall focus on how this fundamental change within public international law and public policy has played out in civil claims brought by private parties against other private parties (particularly corporations) in the courts of Canada, as well as in other jurisdictions. Canada is a particularly significant jurisdiction, as it houses a large amount of parent companies in groups of companies involved in natural resource extraction.[5] These activities raise serious concerns about their effect on human rights protection and environmental obligations.

In section 2 I shall examine the nature of customary international law. In section 3 I shall examine the role of CIL in domestic courts in Canada. In section 4 I shall examine the possible contours of a CIL action, assuming one is possible under the law of Canada. This will examine various issues as they have arisen in

[2] Before the Supreme Court the focus was on four *jus cogens* CIL norms, the prohibitions against: forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.

[3] *Nevsun Resources Ltd v Araya*, 2020 SCC 5. The *forum non conveniens* challenge was dismissed at first instance, and the decision upheld on appeal, and was not appealed to the Supreme Court.

[4] www.justsecurity.org/73659/nestle-cargill-v-doe-series-a-canadian-perspective-takeaways-from-nevsun-resources-ltd-v-araya.

[5] 90% of the World's top mining companies are claimed to be based in Canada: www.investcanada.ca/industries/mining?creative=661191364962&keyword=canadian%20mining&matchtype=p&network=g&device=c&gad=1&gclid=CjwKCAjw69moBhBgEiwAUFCx2M_rKZ_anGFx6QmgHGBmY_oofPsPURy4tNLg7UuVlH7V7AESRGVc6BoCBzQQAvD_BwE.

the voluminous suits that have been brought against transnational corporations in the US, as this is almost the only jurisdiction in which these issues of customary international law, as a cause of action in a domestic forum, have arisen. In section 5 I shall examine the possibilities of bringing a tort action based on violations of CIL in the UK, another jurisdiction that is the domicile of numerous parent companies involved in resource extraction. In section 6 I shall examine whether a CIL action has any advantages over bringing an extraterritorial human rights claim as an ordinary tort claim. Section 7 concludes the chapter.

2. Customary International Law as a Ground for Transnational Lawsuits

The concept of 'customary international law' has been heavily litigated in the claims brought before the US district courts under the Alien Tort Statute (ATS) (1789) which provides: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.'[6] The phrase 'the law of nations' has been universally interpreted by the US federal courts as referring to 'customary international law' (CIL).

Under international law there are two requirements for the recognition of a norm of customary international law: general, but not necessarily universal, state practice; and *opinio juris*, namely the belief that such practice amounts to a legal right or obligation.[7] Moreover, under international law a small number of norms may be classified as *jus cogens*. These are peremptory norms of international law, which are defined in Article 53 of the Vienna Convention of the Law of Treaties 1969 for the purposes of the treaty, as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'.[8] Among these norms are the three international crimes of war crimes, crimes against humanity and

[6] As the US is a dualist legal system, treaties are not self-executing and this aspect of the ATS has not been considered in human rights cases since *Filartiga v Pena-Irala*, 630 F.2d 876 (2d Cir 1980). However, international treaties and conventions may form part of the evidence of a norm of CIL.

[7] United Nations, International Law Commission, *Report of the International Law Commission*, 73rd Sess, Supp No 10, UN Doc A/73/10, 2018, 124; *North Sea Continental Shelf*, Judgment, ICJ Reports 1969, 3, para 71.

[8] The International Law Commission in 2022 adopted its 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), with commentaries.' Conclusion 3 defines a *jus cogens* norm as 'A peremptory norm of general international law (jus cogens) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law (jus cogens) having the same character.' https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf.

genocide, including aiding and abetting those crimes. The three international crimes provide an instance of when a non-state actor – ie a natural person – may be directly subject to these norms through the jurisdiction of an international criminal tribunal.

Filartiga v Pena-Irala is the landmark decision that saw the revival of the 'legal Lorelei' of the ATS.[9] A jurisdictional gateway to the federal courts was created in 1789 under the Alien Tort Statute.[10] This grants federal district courts original jurisdiction over any civil action where an alien sues for a tort 'committed in violation of the law of nations or of a treaty of the United States'. In *Filartiga*, the Second Circuit held that there would be jurisdiction under the ATS for the claims brought by relatives of a young Paraguayan man who was tortured and killed in police custody in Paraguay against a Paraguayan police officer, then living in Brooklyn, who was the alleged torturer. The judgment held that the phrase 'the law of nations' referred to a rule that commands the 'general assent of civilized nations' if it is to become binding upon them all.[11] This was a stringent requirement, but one that was satisfied as regards the prohibition on torture.

ATS suits have been brought against non-state actors, both natural and legal persons, raising the question of how norms of customary international law that proscribe the conduct of states can come to affect private actors. This has principally been through violation of *jus cogens* or international criminal law norms, or norms in which states enjoy universal jurisdiction to prosecute an offender.[12] Conduct that would justify criminal proceedings against an individual before an international tribunal, or conduct that involved a crime of universal jurisdiction, would create an analogous civil cause of action. These are the prohibitions against war crimes, genocide and crimes against humanity which have formed the basis for the criminal jurisdiction of international tribunals over individuals by the Nuremberg and Tokyo war crimes tribunals established at the end of the Second World War. The jurisdiction of international criminal tribunals and the Interational Criminal Court over individuals extends beyond agents and officials of a state to include private citizens. These natural persons may also incur secondary criminal liability in respect of aiding and abetting international crimes.

In recent decades, the US Supreme Court has substantially restricted the ambit of the ATS. In *Sosa v Alvarez-Machain*[13] in 2004 it held that while the ATS was a jurisdictional statute, the federal courts should recognise private claims under federal common law in respect of violations of those international law norms which had the same definite content and acceptance among civilised

[9] *Filartiga* (n 6).
[10] 28 USC s 1350. Up to the mid-2000s the statute was referred to as the Alien Tort Claims Act.
[11] *Filartiga* (n 6) at 881.
[12] Section 404 of the Restatement (Third) of Foreign Relations Law of the United States lists the following as crimes of universal jurisdiction: 'piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism'.
[13] 542 US 692 (2004).

nations as did the three historical paradigms at the time the ATS was enacted in 1789.[14] In *Kiobel v Royal Dutch Petroleum* in 2013, it held that the ATS had no extraterritorial ambit and that the claims had to 'touch and concern' the US.[15] In *Jesner v Arab Bank PLC* in 2018 it held that no claims could be made against foreign corporations under the ATS.[16] In *Doe v Cargill and Nestlé* in 2021, a suit involving claims against US corporations, it decided that the violation of CIL had to take place in the US and that general corporate decisions in the US did not constitute aiding and abetting of the violation of the CIL norms prohibiting forced labour alleged on cocoa farms in Mali.[17]

Of course, tort claims for human rights violations against corporate actors can still be brought before the US federal and state courts. A notable recent example is *Doe v Exxon* which involved tort claims under Indonesian law and claims under the ATS for violations of the law of nations in aiding and abetting human rights abuses by the Indonesian military who had provided protection for Exxon's gas extraction plants in Aceh. While the ATS cases were dismissed in 2019, the tort claims survived a motion for dismissal in 2022[18] and were then scheduled to go to trial. In May 2023 the parties reached an out-of-court settlement, nearly 22 years after the claims were initiated.[19]

3. Customary International Law in Canada

Under the ATS, the violation of certain *jus cogens* norms of international criminal law to which natural persons are subject has been held by some US circuits to create a civil cause of action under federal common law. In this section I will consider whether this cause of action is a phenomenon unique to the US and the jurisdictional gateway to the federal courts provided by the ATS – which as suggested above looks doomed to extinction after *Kiobel* and *Jesner* – or whether such a cause of action could subsist in other jurisdictions. Of course, claims against corporations can be brought under domestic tort law, and have been so brought in Canada,[20] where they were pleaded alongside the CIL claim in *Nevsun*, the US[21] and the UK.[22]

[14] Offences against ambassadors, violation of assurances of safe conducts and piracy.
[15] 569 US 108.
[16] 138 S Ct 1386.
[17] 141 S Ct 1931 (2021).
[18] Case 1:01-cv-01357-RCL Document 850 Filed 08/02/22.
[19] 'ExxonMobil settles decades-old torture case with Indonesian villagers', 15 May 2023. www.bbc.co.uk/news/world-asia-65601644.
[20] See two human rights violation tort claims in Canada in *Choc v Hudbay*, 2013 Carswell Ont 10514 and *Garcia v Lake Tahoe Resources Inc*, 2017 BCCA 39.
[21] *Doe v Exxon* (n 18).
[22] For example, the two pollution claims in the UK: *Vedanta v Lungowe* [2019] UKSC 20 and *Okpabi v Royal Dutch Shell* [2021] UKSC 3.

In Canada, rules of CIL pass into domestic law by adoption, in the absence of conflicting legislation.[23] 'Adoption' means that CIL is directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation, similar to the doctrine of 'incorporation' in UK cases on CIL. Before *Nevsun*, three civil claims had been brought before Canadian courts on the basis of a violation of a *jus cogens* norm. In 2002 a torture claim was brought against Iran in *Bouzari v Islamic Republic of Iran*,[24] but foundered on the rocks of the sovereign immunity defence. In *Anvil Mining Ltd v Canadian Association Against Impunity*,[25] similar proceedings sought damages for Anvil Mining's alleged complicity in war crimes and crimes against humanity committed by the Democratic Republic of Congo (DRC) military. The Court of Appeal found that the courts in Québec did not have jurisdiction because Anvil's activity in Québec had no connection with the allegations relating to the events in DRC.

In 2009 in *Bil'in (Village Council) v Green Park International Ltd*,[26] a claim was brought in Canada against a corporation, alleging complicity in war crimes and crimes against humanity in the occupied territories in Israel. It was alleged that by transferring part of its civilian population to territory it occupies in the West Bank, Israel was violating international law as well as Canadian and Québec laws, and that by constructing and selling condominiums exclusively to Israeli civilians, the corporate defendants were assisting Israel in the perpetration of war crimes in violation of Article 49(6) of the Fourth Geneva Convention dated 12 August 1949, under which it is illegal for an occupying state to 'transfer parts of its own civilian population onto the territory it occupies'. The Superior Court of Québec dismissed the proceedings on grounds of *forum non conveniens*, finding that the High Court of Jerusalem was the most appropriate forum and the authority in a better position to decide the case.[27]

It should be noted that no challenge was made in *Bil'in (Village Council) v Green Park International* to the existence of a cause of action based on CIL.[28] This was to change in *Nevsun*, with a direct jurisdictional challenge to the existence of such a novel cause of action. Nevsun argued that the CIL claims based on aiding and abetting by Nevsun of forced labour, crimes against humanity, and torture committed by members of the Eritrean military had no reasonable chance of success.

[23] The Court of Appeal for Ontario cited the doctrine of adoption in *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675, stating at para 65 that 'customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation', [2005] 1 SCR (vi).

[24] [2002] OJ No 1624; [2004] OJ No 2800 Docket No C38295.

[25] 2012 QCCA 117.

[26] 2009 QCCS 4151.

[27] Subsequently affirmed by the Court of Appeal [2010] CA 1455 (Can Que), and by the Supreme Court [2011] 1 SCR vi (Can).

[28] The same is true of two UK actions discussed later in the chapter: *Al Adsani v Govt of Kuwait* (No 2) (CA) (1996) 107 ILR 536; *Jones v Kingdom of Saudi Arabia* [2006] UKHL 26.

Nevsun applied to strike out the tort and CIL claims on grounds that they disclosed no reasonable cause of action.[29] Moreover, they argued that in any event, by reference to some ATS decisions on this point, corporations were not directly recognised as actors in international law. Abrioux J refused to dismiss the CIL claims on the ground that it was not plain and obvious that they were bound to fail. His decision was upheld by the Court of Appeal for British Colombia. Newbury JA stated:

> There is no doubt that in pursuing claims under CIL, the plaintiffs face significant legal obstacles, including states' legitimate concerns about comity and equality and the role of the judiciary as opposed to that of the legislature. It is not necessarily the case, however, that the recognition of a CIL norm against torture as the basis for some type of private law remedy in this instance would bring the entire system of international law crashing down … If, as the Court suggested, the development of the law in this area should be gradual, it may be that an incremental first step would be appropriate in this instance.[30]

Nevsun appealed the refusal to strike out the CIL claims, and on 28 February 2020 the Supreme Court released its judgment.[31] By a 5:4 majority the Supreme Court held that the CIL claims should not be struck out as it was not plain and obvious that they were bound to fail.[32] Abella J, giving the opinion of the majority, identified two ways in which the claims had been put by the plaintiffs.

Abella J reasoned that customary international law had evolved over the last 70 years from the state-to-state template.[33] CIL contained a subset of *jus cogens* norms from which no derogation is permitted. The four norms pleaded in *Nevsun* fell within this subset. Canada automatically incorporated CIL into domestic law via the doctrine of adoption, without any need for legislative action, so that it became part of the common law. Abella J noted:

> The claims may well be allowed to proceed based on the recognition of new nominate torts, but this is not necessarily the only possible route to resolving the Eritrean workers' claims. A compelling argument can also be made, based on their pleadings, for a direct approach recognizing that since customary international law is part of Canadian common law, a breach by a Canadian company can theoretically be directly remedied based on a breach of customary international law.[34]

[29] They also applied to strike out all the claims on grounds of *forum non conveniens* and also under the Act of State doctrine.

[30] 2017 BCCA 401 [196].

[31] By the time the appeal was heard in 2019 Nevsun had sold its interest in the Bisha Mine to a Chinese mining company. Another Canadian company, Talisman, had previously sold its interest in a Sudanese oil field during the course of proceedings against it in the US under the ATS in respect of alleged complicity in CIL violations.

[32] By a 7:2 majority the Supreme Court found that the claims would not be struck out by reason of the Act of State doctrine.

[33] *Nevsun* (n 3) [107].

[34] The law to be applied in a tort action throughout Canada is the law of the place where the tortious act occurred. In the *Nevsun* strike-out proceedings it was the law of Canada that was applied, rather than the law of Eritrea.

Crucially, international human rights norms were routinely applied to private actors and it was not plain and obvious that corporate actors were excluded from direct liability for violating obligatory, definable and universal norms of international law. There was no reason, in principle, why any norm affecting 'private actors' should be limited to natural persons and exclude corporations.

The majority then observed that the public nature and importance of the violation of these rights required a different and stronger response than typical tort claims. Hence for the purposes of the strike-out application, it would be enough to conclude that the breaches of customary international law relied on by the Eritrean workers, might well apply to Nevsun.

In contrast, in their minority opinion, Brown and Rowe JJ concluded that the doctrine of adoption did not transform a prohibitive CIL rule into a civil liability rule. For a CIL prohibition to create a civil liability rule there would have to be widespread state practice that did not currently exist.[35] Even if that were the case, it was plain and obvious that corporations were excluded from direct liability under customary international law as corporate liability for human rights violations had not been recognised under customary international law.[36] At most the position was equivocal, and CIL could not be binding if equivocal.

Brown and Rowe JJ then went on to consider whether potentially the Canadian courts could recognise four new nominate torts inspired by CIL: use of forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity. However, the presence of international criminal liability rules in itself did not make necessary the creation of domestic torts;[37] a difference merely of damages or the extent of harm would not suffice to ground a new tort. Although the proposed torts of slavery and use of forced labour would pass the test for recognising a new nominate tort, setting out a novel tort in the exceptional circumstance of a foreign state's law being held by the court to be so repugnant to Canadian morality would be an intrusion into the executive's dominion over foreign relations.[38]

The Canadian Supreme Court's decision did not decide that there was a viable civil action based on a violation of norms of CIL, but rather that it was not plain and obvious that there was not such an action. The decision as to the existence and character of such an action would be for the trial judge to decide. However, there was to be no such decision as in October 2020 the claimants and Nevsun concluded an out-of-court settlement. In section 4 below, I move on to examine the contours of a potential CIL claim of the type raised in *Nevsun*.

[35] *Nevsun* (n 3) [203].
[36] ibid [190].
[37] ibid [244]–[246].
[38] ibid [259].

4. The Contours of a CIL Claim

Had *Nevsun* not been settled in October 2020, a trial judge would have had to decide whether there was a civil action for violations of norms of CIL by a non-state actor. It is perfectly plausible that when the case had come to trial, the judge could have decided that there was no such civil action according to Canadian law, for the reasons set out by the minority of the Supreme Court.[39] Alternatively, the trial judge could have decided that there was such an action. That being so, the trial judge would then have had to be decide what would be the basis of such an action. This would have been far from straightforward, as illustrated by ATS cases in the US federal courts which show various problematic areas about the nature of civil CIL claims. To date, the US ATS decisions provide the only guidance as to the possible contours of an action based on a violation of a CIL norm.

4.1. Aiding and Abetting: What are the Norms of CIL?

In *Nevsun* the plaintiffs pleaded that Nevsun had aided and abetted violations of *jus cogens* norms of CIL. For the purposes of the strike-out application this civil claim was not bound to fail. In some US ATS cases it has been held that there could be civil liability of a non-state actor for aiding and abetting a violation of any norm of CIL, even though the international law norms invoked by the plaintiffs placed no direct liability on a private party.[40]

4.2. What Constitutes Aiding and Abetting under International Criminal Law?

In ATS claims in the US, federal courts have largely adopted the definition of the *actus reus* for aiding and abetting under international criminal law as set out by the ICTY Tribunal in *Prosecutor v Furundzija* as 'practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the

[39] Another Canadian case in which CIL violations have been pleaded in tandem with ordinary torts is that of *Matiko John v Barrick Gold Corporation*, 2024 ONSC 6240. However, the case was dismissed for lack of jurisdiction coupled with a finding that had there been jurisdiction the case would have been stayed on grounds of *forum non conveniens*.

[40] *In re South African Apartheid Litig*, 617 F Supp 2d 228, 269–70 (SDNY 2009). Judge Schiendlin held that companies that had aided and abetted apartheid, a crime that could be committed only by a state, could be liable under the ATS for violating the laws of nations.

crime'.[41] In *In re South African Apartheid Litig*[42] Judge Schiendlin adopted this standard and noted that merely doing business in a state which was committing violations of CIL would not be sufficient to constitute the *actus reus* of aiding and abetting. The alleged assistance needed to have had a 'substantial effect' on the commission of the crime, and guidance could be obtained from a comparison of the two decisions in the Ministries Case in the Nuremberg trials in which individuals who owned companies were charged with aiding and abetting international crimes. In one of the decisions, *Rasche*, the owner of the company which had supplied loans to the SS was found not guilty,[43] while in the other, *Tesch*, the owner of the company which had supplied poison gas to death camps was found guilty.[44] The two cases could be distinguished by reference to the quality of the assistance provided to the primary violator. In the *S African Apartheid Litig* case,[45] the presence of assistance could be made out in the claims concerning the selling of specialised military vehicles to the South African Government (as well as components of the 'Casspir' and 'Buffer' vehicles that were allegedly used by the internal security forces to patrol the townships); and the sale of computers to the South African Government and to the Bantustans for use in the registration of individuals, which led to them being stripped of their South African citizenship, and segregated in particular areas of South Africa. But the banks' link with the primary violation was not established by the banks' provision of loans and purchase of South African defence forces bonds. To supply a violator of the law of nations with funds – even funds that could not have been obtained but for those loans – was not sufficiently connected to the primary violation.

As for the *mens rea* requirement, both judicial and scholarly opinion is divided as to whether 'knowing' assistance or 'purposive' assistance is required. Most of the Nuremberg decisions[46] and those of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) would point to knowing assistance. However, the Rome Statute of 1998 establishing the International Criminal Court (ICC) would appear in Article 25 to point towards purposive assistance. Sub-section 3(c) provides that a person, meaning a natural person,[47] 'shall be criminally responsible and liable for punishment for a crime' if that person 'For *the purpose* of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission

[41] *Prosecutor v Furundzija*, Case No IT-95-17/1, Judgment, 195–225, 236–40 (Int'l Trib for the Prosecution of Pers Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Former Yugoslavia since 1991, 10 December 1998) (reviewing the case law). The Rome Statute of 1998 does not define the *actus reus* of aiding and abetting.

[42] *In Re South African Litig* (n 40).

[43] *United States v Von Weizsacker* ('The Ministries Case'), in 14 Trials of War Criminals before the Nuernberg Military Tribunals, 622, 851-2 (1950).

[44] *Trial of Bruno Tesch and Two Others* ('The Zyklon B Case'), in 1 Law Reports of Trials of War Criminals 93-103 (1947).

[45] *In Re South African Litig* (n 40).

[46] Such as proceedings against Tesch and Puhl in the Ministries Case (n 44) 92–103 and 621–22 respectively.

[47] Article 25(1).

or its attempted commission, including providing the means for its commission' (emphasis added).[48] In 2009, the US Second Circuit in *Presbyterian Church of Sudan v Talisman Energy Incorporated* adopted purposive assistance as the international law test for the mental element necessary to impose liability on a party as an aider and abetter.[49] The position of other US circuits on this question has been mixed,[50] as had been the case with two decisions in international criminal tribunals in 2013. In *Prosecutor v Perišić*,[51] the ICTY held that it had to be established that the defendant's assistance was 'specifically directed' to aiding the commission of the offence, whereas in *Prosecutor v Taylor*,[52] the Special Court of Sierra Leone Appeals Chamber held that the *mens rea* of aiding and abetting was knowledge. On 23 January 2014 the discrepancy between these decisions was addressed in *Prosecutor v Nikola Šainović*[53] in which the Appeals Chamber of the ICTY concluded that 'specific direction' is not an element of aiding and abetting liability. Subsequently, in 2021 in criminal proceedings in France against the French parent corporation Lafarge in respect of payments made by its subsidiary in Syria of aiding and abetting crimes against humanity, the Cour de Cassation held that knowingly transferring millions of dollars to ISIS, an organisation whose sole purpose was criminal, was enough to characterise complicity.[54]

4.3. Can Corporations Incur Liability under Customary International Law?

In the US federal courts, up to 2010, it had been assumed that corporations, as well as natural persons, could incur liability under the ATS.[55] This would change

[48] Rome Statute of the International Criminal Court Art 25, 17 July 1998, 2187 UNTS 90. However, Article 30(1) of the Rome Statute goes on to state: 'Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the [c]ourt only if the material elements are committed with intent and knowledge.' Paragraph two then provides that a person has intent where: '(a) In relation to conduct, that person means to engage in the conduct; [and] (b) In relation to a consequence, that person means to cause that consequence *or is aware* that it will occur in the ordinary course of events' (emphasis added).

[49] *Presbyterian Church of Sudan v Talisman Energy*, 582 F.3d 244, 259–60 (2d Cir 2009).

[50] Knowledge was held to be the *mens rea* requirement for aiding and abetting under the ATS in *Sarei v Rio Tinto, PLC*, 671 F.3d 736, 765–66 (9th Cir 2011) and *Doe v Exxon Mobil Corp*, 654 F.3d 11, 37 (DC Cir 2011).

[51] *Prosecutor v Perišić*, IT-04-81-A (Int'l Crim Trib for the Former Yugoslavia, 28 February 2013).

[52] *Prosecutor v Taylor*, SCSL-03-01-A (10766-11114) (Special Court for Sierra Leone, 26 September 2013).

[53] ICTY, Judgment (Appeals Chamber) (Case No IT-05-87-A), 23 January 2014.

[54] Cass.crim, 7 September 2021, n°19-87.367. Following reconsideration of the complicity charges in line with this interpretation, on 18 May 2022 the Investigative Chamber of the Paris Court of Appeal considered that 'there is serious and corroborating evidence of [Lafarge's] participation as an accomplice in these crimes against humanity' because by financing ISIS, the company had in effect assisted and facilitated the group's crimes. http://opiniojuris.org/2022/11/15/multinational-lafarge-facing-unprecedented-charges-for-international-crimes-insights-into-the-french-court-decisions.

[55] *Presbyterian Church of Sudan v Talisman Energy, Incorporated*, 244 F Supp. 2d 289, 318–19 (SDNY 2003) per Judge Schwarz and 374 F Supp. 2d 331, 333 (SDNY 2005) per Judge Cote.

when the question was raised by the Second Circuit *sua sponte* in *Kiobel v Royal Dutch Petroleum*.[56] In 2010, the majority held that there was no jurisdiction under the ATS to hear a claim against a corporation for an alleged violation of a norm of customary international law.[57] The ATS tort jurisdiction extended to those individuals who had committed international crimes, and it therefore followed that it could not extend to corporations, although individual perpetrators in a corporation could still incur liability.[58] The counter-argument is that customary international law provides the prohibitive norms and it is then left to each state to determine how to apply them within their domestic legal order. Domestic law would then determine the issue of corporate liability. This is the approach taken by Judge Leval, dissenting, in *Kiobel*[59] and a year later in the 7th Circuit by Judge Possner in *Flomo v Firestone Natural Rubber Co.*[60] Although it has never been possible to bring criminal proceedings against a corporation before an international tribunal, that does not necessarily mean that the prohibition against conduct is limited to natural persons. Thus, international criminal proceedings against individuals evidence the prohibition of international law that binds all persons, natural or juridical, even though no international tribunals have been established with power to hear criminal cases against non-natural persons, let alone to hear civil claims arising out of the commission of an international crime. In *Presbyterian Church of Sudan v Talisman Energy* Judge Schwarz noted that the International Military Tribunal in the *Farben* and *Krupp* cases spoke of the corporations as having violated international law, even though the proceedings were against their individual executives.[61] A circuit split subsequently opened up, with three circuits subsequently holding that claims against corporations for violations of the law of nations can be made under the ATS.[62]

In 2018 the issue returned to the US Supreme Court in *Jesner* where it held that as a matter of statutory construction the ATS did not permit suits against foreign corporations.[63] However, the decision was based on the construction of a US statute and not on the scope of any rule of customary international law. In 2021 in *Nestlé*, although the majority opinion did not address the question

[56] *Kiobel v Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir 2010).

[57] ibid 145–47.

[58] ibid.

[59] ibid 173–76.

[60] 643 F.3d 1013, 1020-21 (7th Cir 2011).

[61] 244 F Supp 2d 289, 315–316 (SDNY 2003), referencing *United States v Krauch* in relation to offences against property in German occupied territories by Farben. 8 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10, 1081, 1140 (1952). The IMT used similar language in *United States v Krupp* regarding a violation of Art 43 of the Hague Regulations in respect of the confiscation of a tractor plant ownerd by the Rothschilds and its subsequent detention by Krupp. 9 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No 10, 1327, 1352–53 (1950).

[62] *Flomo v Firestone Natural Rubber Co*, *LLC*, 643 F.3d 1013 (7th Cir 2011); *Sarei v Rio Tinto Plc* 671 F.3d 736 (9th Cir 2011); *Doe v Exxon Mobil Corp* 654 F.3d 11 (DC Cir 2011).

[63] 138 S Ct 1386.

of corporate liability, five justices expressed views to the effect that there is no immunity from liability for corporations under civil claims for violations of CIL.[64]

4.4. CIL and Parent Corporation Liability?

Most US ATS cases were brought against parent corporations whose subsidiaries are alleged to have aided and abetted state violations of *jus cogens* norms. But what law do we use to determine the responsibility of a parent corporation for the acts or omissions of its subsidiary? There is, not surprisingly, little guidance in international criminal law on this point, as corporations have never been the subjects of international criminal law.[65] In 2009, in *South African Apartheid Litigation*, Judge Schiendlin held that although the ATS requires the application of CIL whenever possible, it was necessary to rely on federal common law in limited instances in order to fill gaps.[66] However, as the international law of agency had not developed precise standards in the civil context, federal common law principles concerning agency should be applied.[67]

There is also the issue of the third order linkage between the parent, the subsidiary and a sub-contractor engaged on behalf of the subsidiary.[68] Peter Muchlinski comments on this in light of Nevsun's averment that it was BMSC – and not Nevsun – that was party to the agreements with the state of Eritrea and the Eritrean National Mining Corporation that entitled it to operate the mine. He notes that:

> These questions of fact will ultimately determine the case, and the majority decision offers no indication as to how these issues should be determined even though they remain central to any principle of corporate liability for complicity in human rights violations. In effect the majority failed to outline the contours of the proposed liability principle that they say is not plainly and obviously unarguable, nor did it indicate the evidence that would be relevant.[69]

[64] Justice Gorsuch wrote: 'The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding.' Justice Alito added in dissent that 'corporate status does not justify special immunity.' And Justice Sotomayor (joined by Justices Breyer and Kagan) agreed (n 4). www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality.

[65] See s 3(1) as to what constitutes norms of CIL for the purposes of a civil action against a legal or natural person.

[66] *In Re South African Litig* (n 40) at 271.

[67] ibid at 271. In *Kiobel v Royal Dutch Petroleum Company*, 621 F.3d 111, 191–96 (2d Cir 2010), Judge Leval dissented on the corporate liability point but agreed that the claim should be dismissed. One of his reasons was on the facts alleged: the plaintiffs had failed to plead a basis for a claim of agency or alter ego liability so as to make the parent corporation liable for the defaults of its subsidiary.

[68] A similar linkage is evidenced in the English decision in *Kalma v African Minerals Ltd* [2020] EWCA Civ 144.

[69] Peter Muchlinski, 'Corporate liability for breaches of fundamental human rights in Canadian Law: *Nevsun Resources Limited v Araya*' (2020) 1 *Amicus Curiae* 505, 524.

In summary, while the theoretical possibility of bringing a claim based in CIL before domestic courts exists, many questions remain.

5. CIL as a Cause of Action in the UK

The UK is home to a significant number of companies involved in resource extraction, and this section will now examine whether CIL claims of the kind pleaded in *Nevsun* could be made in future actions against such companies. Tort claims have been made in respect of pollution which have reached the highest level of the English legal system in the House of Lords in *Lubbe v Cape Plc*[70] and in the Supreme Court in *Lungowe v Vedanta Resources plc*,[71] and in *Okpabi v Royal Dutch Shell*.[72] Such claims could not be made on the basis of a violation of a CIL norm, given that there is no CIL norm prohibiting intra-national pollution. However, a CIL claim potentially could be raised in cases involving corporate complicity in violations of human rights. Such cases have been pursued as ordinary tort claims in two cases involving violent suppression by local police of protests outside mines operated by an overseas subsidiary company of a UK parent company, in *Guerrero v Monterrico Metals plc and Rio Blanco SA*[73] and in *Kalma* v *African Minerals Ltd*.[74] Could future similar claims be brought before UK courts as claims for violations of CIL, as well as claims in respect of ordinary torts, as now may be possible in Canada after *Nevsun*?

There are two doctrines on how the UK courts have dealt with the relationship between international law and domestic law. The first is the doctrine of incorporation under which the rules of CIL are incorporated into UK law automatically and considered to be part of UK law unless they are in conflict with an Act of Parliament. The second is the doctrine of transformation under which the rules of international law are not to be considered as part of UK law except in so far as they have been already adopted and made part of UK law by the decisions of the judges, or by an Act of Parliament, or long established custom.

Early decisions, such as that of Lord Mansfield in *Triquet v Bath*,[75] held that customary international law simply formed part of the common law, through incorporation. This was the view taken by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria*.[76] However, when it comes to the relationship between CIL and international criminal law, the position is different. In *R v Jones (Margaret)*[77]

[70] [2000] UKHL 41.
[71] *Vedanta* (n 22).
[72] *Okpabi* (n 22).
[73] [2009] EWHC (2475).
[74] *Kalma* (n 68).
[75] (1764) 3 Burr 1478, 1481.
[76] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529.
[77] *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136.

it was held that international law cannot create new common law criminal offences and therefore the defendants could not advance a defence in criminal proceedings that their conduct had been directed at preventing an international crime. Historically, the English and Welsh courts may have recognised breaches of international law, such as piracy, violations of safe conduct assurances and infringement of the rights of ambassadors, as creating domestic crimes. However, since *DPP v Knuller*[78] the courts had refused to create any new criminal offences. That was entirely a matter for Parliament. The fact that conduct had achieved the level of a crime under international law did not mean that the same conduct would be a crime under domestic law. However, their Lordships in *R v Jones (Margaret)* stressed that they were making no finding as regards the potential role of customary international law in civil proceedings. In *R (on the application of Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* the Court of Appeal was of the view that the better view is that customary international law is a source of common law rules, but will only be received into the common law if such reception is compatible with general principles of domestic constitutional law.[79] On this basis there would be no reason for non-admission of a norm of CIL for civil liability of private parties for participation in international crimes involving violations of *jus cogens* norms.

Indeed, there have been two cases before the English courts in which the claimants based their claims not only on conventional intentional torts, but also on a violation of the international prohibition against torture. The first was *Al Adsani v Govt of Kuwait*[80] in which the Court of Appeal held that section 1 of the State Immunity Act 1978 precluded a civil suit being brought against a foreign state for breach of the norm prohibiting torture notwithstanding the fact that the prohibition against torture is recognised as a *jus cogens* norm of customary international law, and that the 1984 UN Convention against Torture and Other Cruel, Inhuman and Degrading Punishment,[81] a widely ratified treaty, expressly grants domestic courts universal criminal jurisdiction against torturers.

The second was *Jones v Govt of Saudi Arabia*[82] where leave was sought to serve a civil claim out of the jurisdiction in respect of torture against both the Kingdom of Saudi Arabia and an individual state official, Colonel Aziz. Saudi Arabia claimed sovereign immunity both for itself and for Colonel Aziz. The Court of Appeal held the claim against the Kingdom of Saudi Arabia should be dismissed under

[78] [1973] AC 435.

[79] [2018] EWCA Civ 1719. Adopting obiter comments of Lord Mance *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, [144]–[146] and [150]. 'Speaking generally, in my opinion, the presumption when considering any such policy issue is that [customary international law], once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration.'

[80] *Al Adsani v Govt of Kuwait* (No 2) (CA) (1996) 107 ILR 536.

[81] Adopted 10 December 1984 by General Assembly resolution 39/46.

[82] *Jones v Govt of Saudi Arabia* [2004] EWCA Civ 1394, [2006] UKHL 26.

section 1 of the 1978 State Immunity Act, but not the claim against Colonel Aziz as torture could not be treated as the exercise of a state function so as to attract immunity in either criminal or civil proceedings against individuals. However, the House of Lords overruled the Court of Appeal decision, on the grounds that the 1984 UN Convention against Torture provides no exception to the principle of sovereign immunity in relation to civil proceedings. Although the 1984 Convention established universal criminal jurisdiction in respect of torture,[83] this did not translate into universal civil jurisdiction[84] and accordingly sovereign immunity could still be invoked in respect of civil claims against individuals who had committed torture. Both decisions were subsequently upheld in the European Court of Human Rights.[85]

The decisions in *Al Adsani* and *Jones* rule out any civil claims against a state or its officials where the state claims immunity, but have no effect on claims against private parties. Corporations who collude in international crimes committed by officials of foreign host states are unlikely to be regarded as agents and the foreign state in question will, therefore, be unable to claim sovereign immunity on their behalf.

As regards the substance of a CIL claim, discussed in the previous section, were one to come before an English judge, various legal questions would have to be determined, including whether the norms of CIL would have to be *jus cogens* norms; whether the *actus reus* of aiding and abetting would be as stated in *Furundzija*; whether the *mens rea* would be knowing, or purposive assistance; whether attribution of liability to the parent company would be on the basis of the tort law of either the forum or the place of the harm, depending on how the judge decided the question of the application of Rome II to a CIL claim.

Outside the three common law jurisdictions (Canada, the US and the UK) discussed in this chapter, there is very little evidence as to the possibility of civil claims for breaches of CIL elsewhere. In Ireland in 1995 in *The Toledo*[86] a claim against the Irish state was made in respect of a violation of an international law obligation on a state to admit vessels in distress to a place of refuge within its domestic waters. Barr J held that where there is a long-standing generally accepted practice or custom in international law, then, subject to established limitations thereon, it is part of Irish domestic law, provided that it is not in conflict with the Constitution or an enactment of the legislature or a rule of the common law. By contrast, in March 2013 in *Association France-Palestine Solidarité 'AFPS' vs Société*

[83] *Pinochet 3* [2000] 1 AC 147.

[84] The term 'universal civil jurisdiction' is a reference to mandatory universal civil jurisdiction which would require state parties to UNCAT to allow a civil remedy in respect of torture committed in the jurisdiction of any state party, in the same way that UNCAT mandates state parties to bring criminal proceedings in respect of torture wherever it is committed.

[85] *Al Adsani v UK* (2002) 34 EHRR 11; *Jones and Others v the United Kingdom*, App Nos 34356/06 and 40528/06, Judgment 14 January 2014 [Section IV]. The ICJ held in *Jurisdictional Immunities of the State, Germany v Italy*, Judgment, ICGJ 434 (ICJ 2012), 3 February 2012, that States may claim sovereign immunity in respect of claims against them in respect of violations of *jus cogens* norms.

[86] (1995) 3 IR406, 422–27, 431–34.

Alstom Transport SA, the Versailles Court of Appeal in France addressed the place of international law in the French domestic legal order and held that there was no norm of customary international law under which corporations would be subject to obligations in respect of *jus cogens* norms.[87]

In some countries human rights treaties and constitutional rights may have horizontal effect, grounding a civil claim by one private party against another. For example, in proceedings in the Netherlands,[88] against various companies in the Shell group, the parties agreed that the claims were governed by Nigerian law. The claimants relied on the violation of various fundamental rights of their deceased husbands and of themselves, as laid down in the African Charter on Human and Peoples' Rights (ACHPR) and the Nigerian Constitution of 1979 (NGW (1979)), which had horizontal effect under Nigerian law and may be invoked against companies.

6. Why Bring CIL Claims?

Before considering the nature of a cause of action based on a violation of CIL, based on the ATS jurisprudence, one should pause to consider why such suits are being brought. Violations of international law can involve tortious conduct. Torture, for example, will constitute trespass to the person. Why, then, would victims of such violations choose to sue on the basis of a violation of CIL?

First, in so far as CIL claims are concerned, the substantive law of liability is determined by international law, as developed through the jurisprudence of the international (criminal) tribunals, rather than by reference to the law of the state in which the violations occurred.[89] However, a barrier for making such claim in the UK on this basis would be the Rome II Regulation, which is now part of 'assimilated EU law' post-Brexit.[90] The basic rule relating to the proper law of torts is to be found in Article 4(1) of the Regulation:

> [T]he law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

This would mandate the application of the law of the state in which the forced labour or another international crime had occurred. This would then require an evaluation of how far international law was incorporated into the domestic civil law of the country in question.

[87] 52 ILM 1157 (2013).

[88] ECLI:NL:RBDHA:2019:6670. The claims were the same as those made in the US in *Kiobel*.

[89] In *Nevsun* (n 3) the decision regarding the CIL claims was made on the basis of domestic Canadian law.

[90] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations.

Second, there is arguably the greater adverse publicity for a corporation in being held liable for complicity in a breach of customary international law (particularly concerning the alleged commission of or complicity in international crimes), as opposed to incurring liability for a 'garden variety municipal tort'.[91]

Third, the attribution link between the corporate defendant and the state agents committing the violations of *jus cogens* norms may be easier to establish with a claim based on CIL. Under English law a cause of action based on CIL may yield a substantive advantage over a straightforward tort claim; and that is because the CIL claim may rely on the argument that the defendant aided and abetted an international crime whereas under English law a party who knowingly facilitates a wrong committed by another will not be jointly liable.[92] As regards aiding and abetting an international crime it is likely that the *mens rea* is 'knowing assistance' rather than 'intentional assistance'. This is illustrated by Nevsun's factum before the Canadian Supreme Court commenting on the problems involved in operating a cause of action based on CIL such as 'Whether to apply the common law joint or concerted action test or the international criminal law standards of complicity and aiding and abetting liability. The latter are relied on by the plaintiffs here.'[93] By contrast, a conventional tort claim on the basis of secondary liability of another party has to be on the basis that the secondary party is a joint tortfeasor: 'the defendant must either procure the wrongful act or act in furtherance of a common design or be party to a conspiracy'.[94] In *Sea Shepherd UK v Fish & Fish Ltd*, Lord Sumption summarised the test as having these elements.[95] The defendant must have assisted the commission of the tort by another person with an act being done which is tortious, or which turns out to so; and the defendant must have provided the assistance pursuant to a common design.[96]

Claims based on CIL, though, will still need to have a connection with domestic law. Assuming jurisdiction can be established, there are then the grounds for staying proceedings such as *forum non conveniens* and Act of State. A significant part of the Canadian Supreme Court's decision in *Nevsun* is its rejection of the doctrine of Act of State and its refusal to strike out the claims on this ground. Similarly in the UK there is the Supreme Court's decision in

[91] Unocal III, 2002 U.S. App. LEXIS 19263, at I I (quoting Xuncax v Gramajo, 886 F Supp. 162, 183 (D. Mass. 1995), SI 2019 No 834.

[92] 'Mere facilitation of the commission of a tort by another does not make the defendant a joint tortfeasor and there is no tort of "knowing assistance" nor any direct counterpart of the criminal law concept of aiding and abetting.' William VH Rogers, *Winfield and Jolowicz on Tort*, 18th edn (Sweet & Maxwell, 2010) 21.3 at 993.

[93] Factum of the Appellant Nevsun Resources Ltd, FM 010 at [82], www.scc-csc.ca/cases-dossiers/search-recherche/37919.

[94] Rogers (n 92).

[95] [2015] UKSC 10.

[96] The application of these principles was extensively considered in *Kalma v African Minerals Ltd* (n 68) in which both the parent company and its subsidiaries were found to have owed no duty of care in tort as regards injuries to protestors sustained at the hands of the local police that had been called in to protect the companies' mines in Sierra Leone. See further Lee McConnell's ch 2 in this volume.

Belhaj v Straw[97] that the Act of State doctrine did not bar a tort claim brought against the former Home Secretary, Jack Straw, for alleged complicity in unlawful detention of the claimants and mistreatment overseas at the hands of foreign state officials from the US and Libya. If the Act of State did cover torts involving acts against the person it would be subject to a public policy exception, which would permit the allegations of complicity in torture, unlawful detention and enforced rendition alleged in the case.

Then there is the issue of attributing liability to a parent company, assuming the subsidiary can be treated either as joint torfeasor or as an aider and abetter under the CIL claim. Domestic law rules must apply in this context. In the UK piercing the corporate veil would be difficult to achieve in the absence of fraud,[98] but the finding of a direct duty of care on the part of the parent towards those affected by the operations of its overseas subsidiary may offer a ground for corporate liability. Concerning the duty of care of parent companies, the significant Canadian decisions are those in *Choc v Hudbay*[99] and *Garcia v Tahoe*,[100] while in the UK there have been two 'anchor defendant' cases[101] decisions of the Supreme Court in *Lungowe v Vedanta Resources plc*,[102] and in *Okpabi v Royal Dutch Shell*,[103] in which the court found that there was an arguable case that there was a direct duty of care on the part of the parent.[104] Evidence of a sufficient level of intervention by the parent company in the conduct of its subsidiary's operations which have given rise to the claimant's losses will be enough to show an arguable case for a duty of care being incurred by the parent. The consequence of the findings is that the foreign subsidiary can be brought into the English proceedings against an English parent company, if the court gives permission to serve the subsidiary

[97] *Belhaj v Straw* and *Rahmatullah (No 1) (Respondent) v Ministry of Defence* [2017] UKSC 3. The Supreme Court held that the Act of State doctrine did not bar a tort claim brought against the former Home Secretary, Jack Straw, for alleged complicity in unlawful detention of the claimants and mistreatment overseas at the hands of foreign state officials from the US and Libya. If the Act of State did cover torts involving acts against the person it would be subject to a public policy exception which would permit the allegations of complicity in torture, unlawful detention and enforced rendition alleged in the case.

[98] *Adams v Cape Industries* [1990] Ch 433 (CA). *Prest v Petrodel Resources Ltd* [2013] UKSC 34. Lord Sumption stated at [35]: 'I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality.'

[99] *Choc* (n 20). The case settled in October 2024.

[100] *Garcia* (n 20). The case settled in 2019.

[101] These are cases where the English parent company has been sued in England and the claimants thern seek permission to serve the foreign subsidiary out of the jurisdiction on the basis that it is a 'necessary and proper party' to the proceedings against the parent company.

[102] *Vedanta* (n 22).

[103] *Okpabi* (n 22).

[104] In a similar case, *AAA v Unilever* [2018] EWCA Civ 1532, the Court of Appeal found there was no arguable case for a direct duty of care by the parent company, but permission to appeal to the Supreme Court was denied.

out of the jurisdiction as a necessary and proper party to the proceedings against the parent company.[105]

Looking at *Nevsun v Araya*, the workers' pleaded case was somewhat uncertain both on whether Nevsun aided and abetted the violation of *jus cogens* norms and CIL by its subsidiary's Eritrean state partner in the Bisha mine, and on whether the subsidiary's conduct can be attributed to the Canadian parent. Araya's factum to the Canadian Supreme Court states:

> The respondents assert that Nevsun had a duty to prevent the use of forced labour at the Bisha Mine. The duty is grounded in the control which Nevsun exercises over the construction and operation of the Bisha Mine, its *knowledge* of the risks of forced labour and human rights abuses present in Eritrea, and its corporate social responsibility policies which place the responsibility for compliance with labour and human rights standards on the highest levels of the company in Vancouver (emphasis added).[106]

Araya's factum asserted that the CIL claims added nothing extra to the tort ones,[107] but Nevsun argued to the contrary that a CIL claim would raise difficult questions such as whether to apply the common law joint or concerted action test, or alternatively the international criminal law standards of complicity and aiding and abetting liability (on which the plaintiffs relied).[108] Nevsun's position on its responsibility in respect of the operation of the Bisha Mine is set out in the first instance decision as follows:

> Nevsun denies that Bisha Mine is its asset, stating instead that BMSC and not Nevsun is party to the agreements with the State of Eritrea and the Eritrean National Mining Corporation ('ENAMCO') that entitle it to operate the mine. Nevsun claims that operational decisions at the material times, including selecting SENET, were made by BMSC's management.
>
> Nevsun also claims that BMSC required SENET to agree not to employ forced labour and ensure any subcontractors it engaged did likewise. Nevsun further asserts that SENET and all subcontractors providing services to BMSC in connection with the Bisha Mine were required to refrain from violence, crime or abuse and to comply with BMSC's corporate policies prohibiting such conduct.[109]

Even though the Supreme Court's judgment made no reference to these arguments, had the case proceeded to trial, Nevsun's responsibility would have been an important issue for the judge to decide on.

[105] It would be possible at trial for the judge to find that the parent company did not owe a duty of care, but that the subsidiary did and would be liable to the claimants. *Vedanta* has settled, while *Okpabi* is currently proceeding towards a trial (n 22).

[106] Factum of the Respondent Araya, Fshazion and Tekle FM 020 [10], www.scc-csc.ca/cases-dossiers/search-recherche/37919.

[107] ibid [139]: 'The mere existence of a tort should not upset the separation of powers or impinge on the conduct of foreign relations. As explained above, the underlying conduct is already tortious and civil claims can already be filed based on existing torts. The recognition of these new claims will not create litigation in Canada that would not otherwise be available.'

[108] Factum of the Appellant Nevsun Resources Ltd (n 93) [82].

[109] *Araya v Nevsun* (n 1) [54]–[55].

Another issue for the trial judge to decide on would have been whether the allegations in paragraph 10 of Araya's factum[110] would have been enough to support the existence of a direct duty of care by the Canadian parent company, Nevsun. These allegations would have fallen short of what was alleged in *Choc v Hudbay Minerals Inc.* In that case, Carole J Brown J in the Ontario Superior Court of Justice denied the defendant's motion to strike out the action based on tort claims against the Canadian parent company. She allowed the claim to proceed on the basis that the subsidiary, Skye, had acted as the agent of the parent company, Hudbay, and on the basis of the parent company owing a direct duty of care to the plaintiffs. The plaintiffs' pleadings showed numerous expectations and representations on the part of Hudbay/Skye and the plaintiffs, such as public representations by Hudbay concerning its relationship with local communities and its commitment to respecting human rights.[111]

However, this falls short of what was alleged by the claimants in *Vedanta* and *Okpabi* in the English courts.[112] There is also doubt as to whether the conduct alleged in *Nevsun* would have been sufficient to constitute the *actus reus* of aiding and abetting an international crime. Rather it could be seen as more akin to the claims against banks in *South African Apartheid Litigation*[113] based on their provision of loans and purchase of South African defence forces bonds. As was discussed above, in that case Schiendlin J held that to supply a violator of 'the law of nations' with funds was not sufficiently connected to the primary violation by the South African state so as to constitute aiding and abetting of that violation.

7. Conclusion

Upendra Baxi's 2020 article, 'Nevsun: A Ray of Hope in a Darkening Landscape?', hails the decision of the Canadian Supreme Court in *Nevsun* for its rejection of the idea that corporate bodies can be immune to civil liability for violations of CIL, stating:

> Surely, corporate complicity in what would amount to crimes against humanity by state officials is not precluded by all the corporate social responsibility, whether at international or national level. However, efficient corporate governance is still in 2020 equated with forms of denialism of human rights by MNCs, with the result that while business may claim all the benefits of human rights entitlements, it may as a non-state actor not be bound by any obligations under international customary or treaty law.[114]

[110] Factum of the Respondent Araya, Fshazion and Tekle (n 106).

[111] *Choc* (n 20) [69].

[112] In these two cases evidence of a sufficient level of intervention by the parent company in the conduct of its subsidiary's operations which have given rise to the claimant's losses was held to be sufficient to show an arguable case for a direct duty of care being incurred by the parent (n 22).

[113] 617 F Supp 2d 228 (SDNY 2009).

[114] Upendra Baxi, 'Nevsun: A Ray of Hope in a Darkening Landscape?' (2020) 5 *Business and Human Rights Journal* 241, 242.

Baxi locates the Nevsun decision against the background of increasing national[115] and international initiatives to control or oversee the overseas activities of TNCs. A recent instance of this development is the EU's Corporate Sustainability Due Diligence Directive, 2024/1760 which entered into force on on 25 July 2024, and must be transposed by the Member States by 26 July 2027. This will impose due diligence obligations throughout the value chain on very large companies in the EU, or non-EU companies with a large turnover in the EU, in respect of human rights and environmental matters. The Directive provides for both regulatory sanctions and for civil liability in the event of non-compliance with those obligations.

It is important to remember that the decision in *Nevsun* was made in a strike-out application. The Supreme Court of Canada by a narrow majority found that an action based on corporate participation in violations of norms of CIL was not bound to fail. Whether there was such an action, and, if so, whether the Canadian parent company could have been found liable in respect of complicity in the operation of the mine in which its subsidiary companies held a 60 per cent holding would be a matter for the trial judge – an outcome precluded by the subsequent settlement of the case. Even if the CIL claims had proceeded to trial and to a finding of liability on the part of Nevsun, CIL might have proven to be a legal chimera from the point of view of successfully obtaining an award of damages. From a practical litigation perspective, CIL probably offers no advantages over an action in tort. Richard Meeran has noted that:

> A further frequently expressed criticism about the use of tort law in MNC human rights cases is that the language of negligence does not adequately reflect the gravity of harm or conduct involved. Precisely this point was made in the landmark judgment of the Supreme Court of Canada in Nevsun …
>
> An additional point is that MNCs and their investors are likely to take greater heed of alleged human rights abus than alleged negligence. These criticisms have force and validity, but overlook important factors. The key objective of claimants is usually to win their case and obtain redress. Given that these cases are complex and hard fought on any basis, claimants opt for the easiest route to success. Creating unnecessary legal hurdles will significantly reduce the prospects of success, which is not in victims' best interests. Serious environmental cases for example are properly recognized as human rights cases; however, pleading them as such would be very risky.[116]

However, symbolically, an action based on CIL does have a greater impact than a mere claim in tort. And this is perhaps what these CIL claims are really all about.

[115] Such as the French 'Loi de Vigilance' of 2017 and the Dutch and German supply chain legislation. Internationally there is the ongoing development in the UN of the Legally Binding Instrument on Business and Human Rights.

[116] Richard Meeran, 'Multinational Human Rights Litigation in the UK: A Retrospective' (2021) 6 *Business and Human Rights Journal* 255.