

Law, Business and Human Rights:
Holding Canadian Corporations Liable for the Misconduct of Overseas Subsidiaries: Legal
and Policy Pathways.

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ABSTRACT

The globalization of business has enabled Canadian transnational corporations to expand their operations through overseas subsidiaries, resulting in complex legal and ethical challenges when misconduct occurs abroad. Recent high-profile cases, such as *Araya v. Nevsun Resources Ltd.*, have signaled a shift in Canadian jurisprudence, suggesting that parent corporations may face direct liability for the actions of their foreign subsidiaries under tort law and even for breaches of customary international law. However, these legal approaches remain contentious and have attracted significant academic debate regarding their doctrinal soundness and practical effectiveness.

This thesis systematically examines the evolving landscape of foreign direct liability litigation against Canadian corporations. It analyzes the legal principles underpinning parent-subsidiary relationships, the traditional doctrine of separate corporate personality, and the circumstances under which courts may pierce the corporate veil or recognize direct duties of care. The study also explores comparative developments in other jurisdictions, such as the United Kingdom and the European Union, where legislative and judicial innovations have expanded the scope of corporate accountability for human rights and environmental harms throughout global supply chains.

This research critically evaluates tortious, criminal, necessity-based, and contractual liability regimes. It identifies persistent barriers to accountability and highlights the urgent need for a coherent Canadian statutory framework. The thesis concludes that while recent case law has opened new avenues for holding Canadian parent companies liable for overseas misconduct, comprehensive legal reform—supported by clear legislative guidance and robust compliance mechanisms—is essential to ensure meaningful protection of human rights and responsible corporate conduct in the global economy.

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CHAPTER 1. INTRODUCTION: FOREIGN DIRECT LIABILITY LITIGATION

1. Introduction to Globalization and Transnational Corporations

Globalization refers to the increasing interconnectedness of the world's economies, cultures, and populations, driven by advances in trade, investment, and information technology.¹ It has reshaped how businesses operate, allowing them to transcend national borders and expand their operations globally.²

With this advanced phenomenon of global political and economic integration, transnational corporations, also known as multinational corporations, are on the rise.³ Transnational corporations typically operate subsidiaries in multiple countries, leveraging global supply chains and diverse markets to maximize their profits.⁴ As far as Canada is concerned, it has, for instance, a large number of mining companies that operate subsidiaries around the world.⁵ On the one hand, the forces driving globalization, such as the liberalization of trade policies and advancements in communication, have enabled businesses to operate on a global scale. On the other hand, this shift has allowed companies to exploit comparative advantages in different jurisdictions, like lower labour costs and easier access to raw materials. Therefore, through expanding their business across borders

¹ Sandu Cuterela, "Globalization: Definition, Processes and Concepts," Romanian Statistical Review Supplement, Romanian Statistical Review, 2012, vol. 60(4), pages 137-146, < https://www.revistadestatistica.ro/supplemente/2012/4/srrs4_2012a22.pdf >.

² Barbara Parker, *Introduction to Globalization and Business: Relationships and Responsibilities*. (London: SAGE Publications Ltd, 2005), p 1-26. *Sage Knowledge*, doi: <https://doi.org/10.4135/9781446215869.n1>.

³ Gwynne Skinner, et al. *Transnational Corporations and Human Rights: Overcoming Barriers to Judicial Remedy*. (Cambridge: Cambridge University Press, 2020), at 1.

⁴ According to Article 1(a) of the "*Draft United Nations Code of Conduct on Transnational Corporations*", online: <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2891/download>: "The term "transnational corporations" as used in this Code means an enterprise, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operates under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others, and, in particular, to share knowledge, resources and responsibilities with the others."

⁵ Chilenye Nwapi, "Resource Extraction in the Courtroom: The Significance of *Choc v Hudbay Minerals Inc.* for Transnational Justice in Canada" (2014), 14 *Asper Rev of Intl Bus & Trade L* 121 at 122.

by operating subsidiaries all around the world, these transnational corporations often benefit from such extraction of resources and other economic activities conducted abroad, while the profits are funneled back to the parent companies and their respective home jurisdictions. As a result, transnational corporations have become powerful entities, often surpassing the economic influence of the countries in which they operate. This is particularly true in developing countries where their investment can be crucial to the local economy.

2. Introduction to Foreign Direct Liability Litigation

As described above, overseas subsidiaries are an important component of transnational corporations.⁶ From the perspective of the law, subsidiaries of a corporation are independent legal entities established and operated based on the law of their countries where they are established or continued.⁷ This means that a subsidiary should be taking responsibility for its own business and operation activities and their consequences.⁸ Indeed, while in the course of their business, it is a recurrent fact that foreign subsidiaries make wrong behavioral choices that harm other individuals' legitimate interests or public interests.⁹ Therefore, foreign subsidiaries may also be accused of misconduct due to their wrongdoings in their operations and become parties to lawsuits.¹⁰

⁶ Katharina Kretschmer & Stefan Schmid, *Performance Evaluation of Foreign Subsidiaries*. 1. Aufl., Gabler Edition Wissenschaft, 2008, online: <<https://doi.org/10.1007/978-3-8349-9922-1>>.

⁷ "The Corporate Veil: The Corporation as a Legal Entity", in *Legal Basics for Entrepreneurs* (2012), online: Lardbucket, section 25.7.1, online: <<https://2012books.lardbucket.org/books/legal-basics-for-entrepreneurs/s28-03-the-corporate-veil-the-corpora.html>>.

⁸ *Ibid*, see Section 25.7.2 "Piercing the Corporate Veil": "It is a general principle of corporate law that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." Also see, *Salomon v. Salomon & Co*, [1897] AC 22 (HL). [*Salomon*]. See also *Chevron Corp v. Yaiguaje*, 2015 SCC 42, para. 95, in respect of the exercise by Canadian court of jurisdiction over an action for recognition and enforcement of an arbitral award.

⁹ Sajid Ullah et al, "Multinational Corporations and Human Rights Violations in Emerging Economies: Do Commitment to Social and Environmental Responsibility Matter?" (forthcoming in 2020) *Journal of Environmental Management*, online: University of Nottingham <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/academic-publications/2021/ullah-et-al-multinational-corporations-and-human-right-violations-in-emerging-economies.pdf>.

¹⁰ High-profile cases, such as the Alcoa FCPA (*Foreign Corrupt Practices Act of 1977*, 15 USC §§ 78dd-1–78dd-3 (1977).) settlement, illustrate this risk: Alcoa's foreign subsidiaries were found to have made improper payments, leading to significant penalties and legal actions against both the subsidiaries and the parent company. See Marcela E Schaefer, "Should a Parent Company Be Liable for the Misdeeds of Its Subsidiary? Agency Theories Un

As a matter of fact, it is increasingly common for domestic courts to hear cases involving international elements. To be specific, the victims of these misconducts by the overseas subsidiaries of transnational corporations sue the parent companies directly for various reasons, such as human-rights violations and environmental damages, instead of suing only the misbehaving subsidiary.¹¹ These lawsuits seek to hold the parent companies responsible in the courts of the home states where the parent company is located. This approach is sometimes called Foreign Direct Liability Litigation¹² or Transnational Litigation for Corporate Human Rights Violations.¹³ In such instances, these cases often involve international business where the activity occurs in one country, while the economic benefit of the activity flows to another.¹⁴ Moreover, a growing number of these cases focus on human rights infringements or environmental governance failures by the overseas subsidiaries of transnational corporations.¹⁵

Just like the complexity shown from its name, there are multiple issues to be resolved in foreign direct liability litigation. For example, on the one hand, the foreign nature of the litigation leads to problems, such as the right of jurisdiction and the application of domestic and international law; on the other hand, the ground of accountability is also complex between parent corporations and their subsidiaries. After all, it is common knowledge, no

der the Foreign Corrupt Practices Act" (2019) 94:6 NYUL Rev 1756.available at < <https://nyulawreview.org/wp-content/uploads/2019/12/NYULawReview-94-6-Schaefer.pdf> >

¹¹ Norton Rose Fulbright, "Canada: Cross-Border Guide to Parent Company Liability for Foreign Subsidiaries", May 2021 online: < <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/66503bda/canada-cross-border-guide-to-parent-company-liability-for-foreign-subsidiaries> >.

¹² Lucas Roorda & Daniel Leader, "Okpabi v Shell and Four Nigerian Farmers v Shell: Parent Company Liability Back in Court" (2021) 6:2 *Business and Human Rights Journal* 368, at 368.

¹³ Sharayer Rajabi, "Current Developments in Transnational Litigation for Corporate Human Rights Violations – NevSun, Vedanta, Begum and Lafarge" (1 Nov 2021),online: <<https://www.mcgill.ca/business-law/article/out-sight-not-out-mind-domestic-courts-catching-multinational-corporations-overseas-transgressions>>

¹⁴ Wang S, Chen X, Ye J, Zhong C. How diversification of overseas subsidiaries affects parent company innovation performance: evidence from China's multinationals. *Front Psychol.* 2024 May 6;15:1344816. doi: 10.3389/fpsyg.2024.1344816. PMID: 38770246; PMCID: PMC11102970.

¹⁵ Ekaterina Aristova, "New Book on Tort Litigation against Transnational Corporations" (May 13, 2024), *Oxford Business Law Blog*, online: < <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/05/new-book-tort-litigation-against-transnational-corporations>>.

matter in civil law or common law system, that a parent company, in general, is not inherently liable for the actions or inactions of its subsidiary merely due to its shareholding or its role as the parent.¹⁶ As separate entities, parent corporations and their subsidiaries are independent legal persons, which means they should take legal responsibility separately and independently for their own actions and omissions.¹⁷ In brief, therefore, questions like “Why and how would parent corporations be held liable for their subsidiary corporations’ misconduct?” need to be answered before domestic courts.

3. Overview of Updated Developments in Case Studies, Legislation & Policy

A. Case Studies

Meanwhile, there have been some cases in recent years that have explored solutions on these issues. Among these, the Supreme Court of Canada's ruling in *Nevsun Resources v Araya*¹⁸ offers a positive development, particularly when compared to the decisions made by the U.S. Supreme Court in *Kiobel*¹⁹ and *Jesner*²⁰. The latter two cases effectively limited the ability to hold multinational corporations accountable for severe human-rights violations connected to their business practices.

¹⁶ Karen Cargill, “Parent Company Liability for the Acts of Its Subsidiaries” (14 November 2023), *Marsh*, online: <https://www.marsh.com/uk/services/financial-professional-liability/insights/parent-company-liability-for-the-acts-of-its-subsidiaries.html>.

¹⁷ LexisNexis Corporate Expert, “Is a Parent Company Liable for the Acts or Omissions of Its Subsidiary?” (30 July 2018), *LexisNexis*, online: <https://www.lexisnexis.co.uk/legal/guidance/is-a-parent-company-liable-for-the-acts-or-omissions-of-its-subsidiary>. See also, Sean Adams, Emma Carr & Olivia Hookings, “ESG and Parent Company Liability: Potential Liability for the Actions of Third Party Suppliers” (22 February 2024), *Gowling WLG*, online: <https://gowlingwlg.com/en-ca/insights-resources/articles/2024/esg-and-parent-company-liability>.

¹⁸ *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun* (SCC)]. Also see, *Araya v. Nevsun Resources Ltd.*, 2019 BCCA 205 (CanLII) [*Nevsun* (BCCA)].

¹⁹ *Kiobel v Royal Dutch Petroleum Co*, 569 US 108 (2013). [*Kiobel*]

²⁰ *Jesner v Arab Bank* 138 S Ct 1386 (2018). [*Jesner*]

In *Nevsun*, Canadian courts heard the case brought by 3 Eritrean workers against a Canadian company (Nevsun) for the breaches of customary international law and for domestic torts committed by its subsidiary in Eritrea.²¹ the Supreme Court of Canada held that a claim against a Canadian parent company for breaches of customary international law committed by its overseas operations could proceed, thereby recognizing the possibility of direct liability for corporations under international law.²² This Canadian case signals a shift, contrasting with the restrictive approach taken in the U.S. decisions.

Likewise, *Nevsun* was preceded by the case of *Choc v Hudbay Minerals Inc.*²³ This was another landmark case involving allegations of human-rights abuses committed by personnel working for subsidiaries of a Canadian mining company, Hudbay Minerals Inc. The Ontario Superior Court rejected Hudbay's motion to strike a statement of claim. Hudbay argued that it could not be held liable for actions committed by its subsidiary in a foreign country.²⁴ The Court allowed the case to proceed past the pleadings stage.²⁵

In addition, in the case of *Lungowe v. Vedanta Resources plc*,²⁶ *Okpabi v Shell*²⁷ and others, the Supreme Court of the UK allowed the cases to proceed before the English courts, despite that all these cases have their alleged harm occurred outside of the UK, such as in Zambia and Nigeria, by overseas subsidiaries.²⁸ In a word, as foreign direct liability cases handling similar issues with similar situations are on the rise, courts of law, even though from different jurisdictions, are increasingly willing to hold parent companies potentially liable for the

²¹ *Nevsun (SCC)*, *supra* note 18 at paras 3-4.

²² *Ibid* at 132.

²³ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 (CanLII) [*Choc*].

²⁴ *Ibid* at para 19.

²⁵ *Ibid* at para 49.

²⁶ *Lungowe and others v. Vedanta Resources plc and another* [2019] UKSC 2 [*Vedanta*].

²⁷ *Okpabi and others v. Royal Dutch Shell Plc and another* [2021] UKSC 3 [*Okpabi*].

²⁸ *Ibid*.

wrongdoings of their subsidiaries abroad. And the scope of parent company liability has also expanded in recent cases.

In these cases, courts have made efforts to clarify jurisdiction and the grounds on which parent companies may be held accountable for the harm on third parties caused by their abroad subsidiaries. In the present study, it will start from the case of *Nevsun* to introduce the main issues in foreign direct liability litigations.

B. Legislation and Policy Development

As previously mentioned, with the multidimensional deepening of globalization trends and the rise of multinational corporations, the globalization of trade and the global integration of supply chains are inevitable. Although policies and laws tend to lag behind the development of economic activities,²⁹ they have also experienced certain innovations and developments. From the perspective of updated policies and legislations, for example, the European Commission published its long-awaited proposal for a Directive on Corporate Sustainability Due Diligence³⁰ on 23 February 2022, which envisages to impose corporate due diligence duties on large EU and third-country companies in order to address adverse human rights and environmental impacts of their own operations and those of their subsidiaries and value chains; Germany has adopted a statute on supply chain due diligence, namely the *German Supply Chain Act*³¹ (*Lieferkettengesetz*, herein "GSCA") which requires companies to assess human rights and environmental risks across their entire supply chain

²⁹ Richard L. Abel, "Law as Lag: Inertia as a Social Theory of Law" (1982) 80:4 *Michigan Law Review* 785, online: <https://repository.law.umich.edu/mlr/vol80/iss4/33>.

³⁰ EU, *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937* (February 23, 2022).

³¹ Germany, *Gesetz über die unternehmerischen Sorgfaltspflichten in Lieferketten* [*Supply Chain Due Diligence Act*], BGBl. I 2021, S. 2959.

and came into force on 1 January 2023. US regulators are also more focusing on corporate compliance³². For instance, President Joe Biden signed the *Uyghur Forced Labour Prevention Act*³³ into law on Dec. 23, 2021. This is described as aiming to penalize the Chinese government over its alleged oppression of the Uyghur people and is much-denounced within China.³⁴

These advanced developments, along with related policies and legal rules, extend the reach of the regulatory reach far beyond the boundaries of individual transnational corporate groups. These changes even require entire industry supply chains to comply with international standards for protecting human rights and the environment. The goal is to transform business practices into a proactive—rather than passive—regulatory system, in which all participants across the supply chain monitor and hold one another accountable. This trend underscores the growing importance of responsible business operations worldwide, particularly for transnational corporations.

However, the historical development of this area requires deeper exploration. This is because it will not only benefit for a deeper understanding of the background and underlying reasons for the barriers that prevent accountability and attribution between parent companies and their overseas subsidiaries, but also it will be beneficial to explore potential solutions to this key issue. Human rights protection and related liabilities have become essential components of corporate compliance management and governance. Therefore, studying and understanding the legal theories and practical mechanisms behind such cases is of great significance. It enables lawyers not only to help companies assess their legal exposure and

³² Latham & Watkins, *US Regulators Increase Focus on Corporate Compliance and Its Gatekeepers* (1 August 2022) Number 2986, online: <https://www.lw.com/admin/upload/SiteAttachments/Alert%202986.pdf>.

³³ S 65, *Uyghur Forced Labor Prevention Act*, 117th Cong, 1st sess, 2021.

³⁴ Xinjiang Uygur Autonomous Region People's Government, "Solemn Statement on the United States Signing the So-Called 'Uyghur Forced Labour Prevention Act'" Xinhua News (24 December 2021), online: < Xinhua https://www.news.cn/politics/2021-12/24/c_1128198772.htm >.

develop effective risk prevention strategies, but also to assist employees and other victims in securing meaningful rights protection.

4. Thesis Objectives

Amid growing concerns surrounding these cases and issues, Canadian domestic courts are increasingly expected to hold corporations accountable for their wrongdoings. The rulings in cases like *Nevsun* raise important questions about the future liability of multinational companies for transnational offenses. Given the ongoing challenges—particularly the absence of fully recognized principles, regulations, or legal frameworks to guide the resolution of such cases--this research aims to explore effective approaches for holding parent corporations liable for the misconduct of their foreign subsidiaries. It will examine both the theoretical foundations and practical mechanisms relevant to foreign direct liability litigation. It takes the case of *Nevsun* as a starting point and aims to assess the feasibility of the approaches adopted by the courts in those cases. It will also review current legal frameworks intended to hold corporations responsible for their overseas atrocities and provide an objective analysis of these methods to evaluate their effectiveness.

In this research, the key question of how Canadian corporations be held liable for their overseas subsidiaries' misconduct will be examined mainly from several perspectives: Firstly, the application of customary international law in cases of human-rights violations by transnational corporations. For this matter, different views are considered, such as, (a) regarding the international legal context of human rights arena, under what circumstances may a parent company be responsible for human-rights violations committed abroad by its multinational subsidiary; (b) the applicability of corporations as a main body of international

law; (c) domestic legislation and litigation in the different jurisdictions regarding corporate accountability for human rights, and (d) future developments in this area.³⁵

The second aspect is to discuss the jurisdiction of the state of trial in cases of foreign direct liability litigation. Jurisdiction is the first barrier for plaintiffs to seek remedies in the country where the parent company is located and lots of theories have been discussed in existing literature. After all, in the past, domestic courts often refused to accept similar cases on the grounds of the doctrine of international comity, territorial jurisdiction, *forum non conveniens*, and separate corporate personality, among other rationales.³⁶ And the third aspect would be related to the theory of piercing corporate veils. Under the influence of human rights protection, in recent years, the United Kingdom, Netherlands, Canada and other countries have ruled in a number of cases that the parent company is liable, lifting the corporate veil and denying the principle of corporate personality. Therefore, the veil piercing and how to overcome it will also be analyzed in this paper.³⁷

³⁵ Lara Jill Blecher et al, eds, *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (Chicago: American Bar Association, 2014).

³⁶ Wang Yan, “Study on the Jurisdiction of the Respondent State in cases of Foreign Direct Liability” (2020) 22 Shanghai Legal Studies.

³⁷ Chambers, Rachel, “Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the U.K. Supreme Court” (2021).42:3 U. Pa. J. Int’l L. 519

CHAPTER 2: CASE STUDIES AND JURISPRUDENCE

In this chapter, it intends to provide an in-depth analysis of key cases that have shaped the current situation and trigger the demands of improvements on the solutions of foreign direct liability litigation.

The use of foreign direct liability litigation as a means of addressing corporate misconduct committed by subsidiaries in other jurisdictions has evolved over time, rather than appearing overnight. While the present study uses *Nevsun Resources Ltd. v. Araya*³⁸ as an initial point of reference because of its landmark significance, it is important to situate *Nevsun* within the broader historical trajectory of such cases. Early foreign direct liability lawsuits were often hindered by procedural barriers, jurisdictional challenges, and courts' reluctance to interfere in cross-border disputes.³⁹ By presenting the cases chronologically, this chapter aims to show how Canadian courts gradually moved from a technically narrow approach to a more open willingness to hold parent corporations accountable when appropriate. This progression not only highlights the shift in judicial attitudes but also illustrates the broader policy debate about balancing access to justice for victims with the legal complexities of corporate structure and cross-border governance. Tracing this development provides a clearer understanding of how principles affirmed in *Nevsun* are rooted in—and have built upon—earlier foundational decisions.

1. *Choc v. Hudbay*⁴⁰

³⁸ *Nevsun* (SCC), *supra* note 18.

³⁹ Iman Prihandono, "Barriers to transnational human rights litigation against transnational corporations (TNCs): The need for cooperation between home and host countries" (2011) 3:7 *JLCR* 89, online: Academic Journals < <http://www.academicjournals.org/JLCR> >.

⁴⁰ *Choc*, *supra* note 23.

The journey of foreign direct liability litigation in Canada begins with the groundbreaking case of *Choc v. Hudbay Minerals Inc.*, filed in 2011. This case represents a landmark moment at the intersection of corporation responsibilities and human rights. It was decided earlier than the *Nevsun* case on allowing foreign victims to proceed with their lawsuit in Canada against a Canadian parent company.

A. Case Facts

As a significant foreign direct liability case, the case of *Choc* was also concerned with the operations of transnational corporations in developing countries. It was initially filed in 2011 and is significant for its exploration of whether Canadian parent companies can be held liable for harms caused by their foreign subsidiaries.⁴¹

This case involves serious allegations of human-rights abuses against indigenous communities in Guatemala, specifically the Mayan Q'eqchi' people.⁴² To be specific, the plaintiffs were a group of Indigenous Mayan Q'eqchi' villagers from the region near the Fenix Nickel Mining Project in El Estor, Guatemala.⁴³ This Fenix nickel mining project has been a focal point of conflict between indigenous communities and mining interests.⁴⁴ The project was initially developed by Skye Resources Inc., which was subsequently acquired by Hudbay Minerals Inc.⁴⁵

The Fenix mining project and its related mine (where the alleged human-rights abuses occurred) were directly operated by a local Guatemalan company called Compania

⁴¹ Fasken, “Hudbay Minerals Defends against Claims of Negligence in the Context of Alleged Sexual Assaults” (November 2024), online: <<https://www.fasken.com/en/solution/clientwork/2024/11/hudbay-minerals-defends-a-against-claims-of-negligence-in-the-context-of-alleged-sexual-assaults>>.

⁴² *Choc*, *supra* note 23 at para 4. See also, “Press Advisory”, *Choc v Hudbay*, Official Settlement Website, online: <<https://chocversushudbay.ca>>.

⁴³ *Ibid*, *Choc* at para 4.

⁴⁴ *Ibid*.

⁴⁵ *Ibid* at para 5.

Guatemalteca de Niquel S.A. (CGN).⁴⁶ Both the Fenix project and CGN was initially owned by Skye Resources Inc. (Skye), a Canadian mining company.⁴⁷ Then Skye was purchased by Hudbay Minerals Inc (Hudbay), the defendant company, in 2008.⁴⁸ Hudbay is a Canadian company established under the *Canada Business Corporations Act*⁴⁹ and headquartered in Toronto.⁵⁰ Then, as part of Hudbay's acquisition of Skye, HMI Nickel Inc. (HMI Nickel) was created and served as an intermediate holding company which manages Hudbay's ownership and control over CGN and the Fenix project.⁵¹ HMI Nickel is also a Canadian company. As a result, it is clear that the Guatemalan company CGN became a wholly-owned subsidiary of Hudbay through HMI Nickel,⁵² and at the time of the case-related incidents, CGN, as the local operator of the Fenix mining project, was under control of Hudbay and its subsidiary HMI Nickel.⁵³ It becomes clear that, upon examining the ownership structure, Hudbay was the ultimate owner of the Fenix mining project and its associated mine.

Nevertheless, the background revealed that the Indigenous Mayan Q'eqchi' people claim ancestral rights to the land on which the mining project is situated.⁵⁴ Tensions rose when mining operations started to take over these lands.⁵⁵ This eventually led to forced evictions and violent clashes between local residents and the subsidiaries' security teams.⁵⁶

The Mayan Q'eqchi' people brought several different class actions against Hudbay and each of the two subsidiaries,⁵⁷ claiming that security personnel at the mine committed acts of violence, including murder and sexual assault, during forced evictions from their ancestral

⁴⁶ *Ibid*, at para 10.

⁴⁷ *Ibid*, at para 5.

⁴⁸ *Ibid*.

⁴⁹ *Canada Business Corporations Act*, R.S.C. 1985. c. C-44 ["CBCA"]. See *Choc*, *supra* note 40, at para 8.

⁵⁰ *Choc*, *supra* note 23, at para 8.

⁵¹ So literally Hudbay is the grandparent company of CGN. See *Choc*, *supra* note 23, at paras 8-10.

⁵² *Ibid* at paras 8-10.

⁵³ *Supra* note 42, *Choc v Hudbay*, Official Settlement Website.

⁵⁴ *Choc*, *supra* note 23, at paras 11-13.

⁵⁵ *Ibid*, at para 11-13.

⁵⁶ *Ibid*, at para 11-13.

⁵⁷ *Ibid* at para 4.

lands.⁵⁸ At the time of the alleged misconduct, Hudbay was either the only shareholder or had controlling interest in each of the two subsidiaries.⁵⁹

The case was settled in 2024, but it actually underwent multiple stages of litigation proceedings over more than a decade before the settlement.⁶⁰ Its legal journey initially started from 2011 when the Plaintiffs, Guatemalan Indigenous Mayan people, filed three related lawsuits in Ontario.⁶¹ They claimed negligence and direct liability against Hudbay for abuses committed by its subsidiaries' security personnel.⁶² In 2013, the Ontario Superior Court ruled that the case could be proceeded.⁶³ The Court rejected arguments to dismiss it based on jurisdictional or corporate separateness grounds.⁶⁴ There were subsequent legal motions and hearings taking place which include further pre-trial ruling in 2018 that the court further affirmed the procedural viability of the case, addressing legal challenges from Hudbay.⁶⁵ In 2020, in the related case of *Caal Caal v. Hudbay Minerals Inc.*, the Ontario Superior Court continued to examine claims involving similar allegations of human-rights abuses at Guatemalan operations indirectly owned by Hudbay.⁶⁶ However, the case never went to trial. It was settled in October 2024 out of court.⁶⁷ The details of the settlement were not disclosed and there was no admission of liability from Hudbay.⁶⁸ This settlement brought the case to a close.

Nevertheless, what can be learned from the case is that the court of law allowed claims of direct liability for human rights violations by Canadian corporations abroad to proceed to

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at para 8.

⁶⁰ *Supra* note 41.

⁶¹ *Choc v. Hudbay Minerals Inc.*, 2011 ONSC 4490 (CanLII).

⁶² *Ibid.*

⁶³ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 (CanLII); *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 998 (CanLII).

⁶⁴ *Ibid.*

⁶⁵ *Choc v. Hudbay Minerals Inc.*, 2018 ONSC 1288 (CanLII).

⁶⁶ *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415 (CanLII).

⁶⁷ *Supra* note 42, *Choc v Hudbay*, Official Settlement Website.

⁶⁸ *Supra* note 41.

trial which has been marked as a significant step for the handling of foreign direct liability litigation in Canada.⁶⁹

B. Arguments and Issues

a. The Plaintiffs' Claims and Arguments

The plaintiffs in this case — Angelica Choc, Margarita Caal Caal, and German Chub Choc — brought forward allegations which highlight the pattern of abuse linked directly to the mining operation.⁷⁰ They filed three related lawsuits against Hudbay Minerals and its subsidiaries, HMI and CGN. The first case centered on murder. Angelica Choc alleges that her husband was shot and killed by CGN's security personnel during a land dispute on September 27, 2009.⁷¹ Her husband was known as an advocate for Indigenous rights, and he had publicly criticized the mining practices.⁷² The second case was about an allegation of physical assault. German Chub Choc claims he was shot by security personnel during a similar land dispute on the same day as the murder of Angelica Choc's husband.⁷³ And as a result, he was paralyzed.⁷⁴ The third case was about allegations of sexual assault. In the Caal action, eleven women alleged that they were gang-raped by CGN's security forces during their forced removal from their village on January 17, 2007.⁷⁵ This was an incident that involved not only private security but also police and military personnel.⁷⁶ These allegations paint a grim picture of the human-rights situation surrounding the Fenix mining project and

⁶⁹ Jessica Mach, "Hudbay Minerals settles lawsuits alleging human rights abuses in Guatemala" (7 October 2024), online: Canadian Lawyer, <https://www.canadianlawyermag.com/practice-areas/litigation/hudbay-minerals-settles-lawsuits-alleging-human-rights-abuses-in-guatemala/388983>.

⁷⁰ *Choc*, *supra* note 23, at para 4-7.

⁷¹ *Choc v. Hudbay Minerals Inc.*, 2011 ONSC 4490 (CanLII). See *Choc*, *supra* note 23, at para 6.

⁷² *Ibid.*

⁷³ *Ibid.* *Chub v. Hudbay Minerals Inc.*, referenced in 2013 ONSC rulings of *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414 (CanLII).

⁷⁴ *Choc*, *supra* note 23, at para 7.

⁷⁵ *Supra* note 66, at para 6.

⁷⁶ *Ibid.*

raise critical questions about corporate governance and accountability for actions taken by companies and their abroad subsidiaries.

b. The defendant, Hudbay's claims and arguments.

The defendants responded with motions to strike all of the claims referenced above, on various grounds. The defendants argued that the cases should not be heard in Canada, citing the *forum non conveniens* principle.⁷⁷ Since the events happened in Guatemala which involved Guatemala citizens and a company operating in Guatemala, the Guatemalan courts would have a stronger connection to this case.⁷⁸ Besides, Hudbay argued that the evidence, like witnesses and documents related the alleged abuses, was located in Guatemala, which makes Guatemala the more appropriate forum.⁷⁹ The *forum non conveniens* principle allows a court to decline jurisdiction if there is a more appropriate forum elsewhere to adjudicate the case.⁸⁰ And the Guatemalan courts, according to assertion of Hudbay, were competent to handle the case and provide justice for the claims and it argued Guatemala should be the proper venue for this case, rather than a Canadian court.⁸¹ However, the company unexpectedly withdrew this claim just before a scheduled hearing.⁸² Therefore this claim was not argued. Another claim from the defendant was that there was “no reasonable cause of action”. The defendants argued that the claims did not disclose a reasonable cause of action under Canadian law.⁸³ They further contended that some claims were barred by the statute

⁷⁷ *Ibid*, at para 9.

⁷⁸ *Ibid*, at para 9.

⁷⁹ *Ibid*.

⁸⁰ Susana C. Mijares Peña, *Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc*, (2014) 5:1 *Western JL Stud* 203, online: CanLII Docs <https://canlii.ca/t/29np>.

⁸¹ *Supra* note 66, at para 9.

⁸² Amnesty International Canada, “Angelica Choc v. HudBay Minerals” (7 March 2017), online: Amnesty International Canada <<https://amnesty.ca/legal-brief/angelica-choc-v-hudbay-minerals/>>.

⁸³ *Choc*, *supra* note 23, at paras 47-54.

of limitations. In addition, there is also jurisdiction issues that CGN argued that the Ontario court lacked jurisdiction over it as a Guatemalan corporation.⁸⁴

Therefore, the key legal issues in this case mainly revolved around the negligence and duty of care for the parent company, corporate veil theory, and limitation period and jurisdiction issues.⁸⁵ Specifically, for instance, (i) whether Hudbay directly controlled and mismanaged its subsidiaries and led to the abuses and misconducts; (ii) whether the plaintiffs could pierce the corporate veil to hold Hudbay liable for the acts of its subsidiaries; (iii) whether Hudbay owed a duty to the Guatemalan communities impacted by its mining operations; and (iv) whether Canadian law could allow claims of negligence and human rights abuses arising outside Canada to proceed in Ontario courts.⁸⁶

C. Ratio Decidendi and Decision

On July 22, 2013, Justice C.J. Brown of the Ontario Superior Court delivered a significant ruling which allowed the plaintiffs' claims to proceed.⁸⁷ It should be noted that the facts underlying the alleged crimes or infringements were proved to be true earlier in a Guatemala court.⁸⁸ In determining whether Hudbay could be liable under Canadian law, the legal reasoning of the Ontario court can be summarized as follows:

Firstly, the court found that Hudbay could owe a duty of care to individuals affected by its operations abroad.⁸⁹ The court found that Hudbay exercised significant control over

⁸⁴ *Ibid*, at para 22.

⁸⁵ *Ibid*, at paras 17–18, 33–38, 44–45, 48–49. See also *supra* note 80, Susana C Mijares Peña.

⁸⁶ *Choc*, *supra* note 23, at paras 17, 44–45.

⁸⁷ *Choc*, *supra* note 23.

⁸⁸ In 2021, a court in Guatemala found the former security chief of the Fenix mine guilty of killing Adolfo Ich. He was also found guilty of three counts of causing harm related to the attack on Germán Chub Choc. However, it has been reported that Hudbay's advisors commented that the ruling has no impact on the ongoing litigation in Canada. See, *supra* note 69.

⁸⁹ *Choc*, *supra* note 23, at para 75. The court refused to strike the plaintiffs' claims at the pleadings stage, holding that their novel negligence claim was not plainly and obviously unsustainable.

CGN's operations, particularly security practices at the Fenix mining project.⁹⁰ In addition, the evidence indicated Hudbay's involvement in setting policies and monitoring security personnel's actions, leading to potential direct negligence.⁹¹ If Hudbay actually failed to properly train and supervise the security personnel hired by its subsidiaries, as alleged by the victims, then there was the potential that it could be held liable for this kind of negligence. The court noted that this duty extended from Hudbay's active involvement in operations that created foreseeable harm to local communities and it reasoned that if proven at trial, the facts could establish that the harm suffered by the plaintiffs was a foreseeable consequence of Hudbay's conduct.⁹² In a word, Hudbay's potential responsibility for direct negligence was based on its alleged direct control over CGN, which, if proven, could impose on it a duty of care for the victims of its subsidiaries' actions.⁹³

Here it can be seen that the key factors in establishing duty of care include, firstly, the control over operations. On this point, the court emphasized Hudbay's significant control over security practices at the Fenix mining project.⁹⁴ The plaintiffs argued that Hudbay retained ultimate responsibility for security policies and practices.⁹⁵ Secondly, the public representations of Hudbay were important. Hudbay had made public commitments regarding its relationship with local communities and respect for human rights.⁹⁶ These representations could lead to serious expectations among local populations about the way they would be treated.⁹⁷ Thirdly, there was a proximate relationship between the defendants and plaintiffs. The court noted that the plaintiffs' interests were "clearly engaged" when Hudbay and its subsidiaries initiated the mining project near their communities and requested the forced

⁹⁰ *Ibid*, at paras 61-65.

⁹¹ *Ibid*.

⁹² *Ibid*.

⁹³ *Ibid*, at paras 60-69.

⁹⁴ *Ibid*, at paras 26, 67-70.

⁹⁵ *Ibid*, at para 64.

⁹⁶ *Ibid*, at para 68.

⁹⁷ *Ibid*.

eviction of the plaintiffs from their villages. The pleadings alleged that Hudbay's actions—including direct involvement in security policy and ultimate control over the forced removals—brought it into close contact with the plaintiffs and their interests.⁹⁸ Thus, the court found that Hudbay's actions brought it into proximity with the plaintiffs' interests, thereby establishing a potential duty of care.⁹⁹

As well, the court acknowledged the general principle of separate legal personality of each corporation, but emphasized that it does not shield a parent company from direct liability for its own negligent actions.¹⁰⁰ Traditionally, parent companies have sought to distance themselves from actions taken by their subsidiaries.¹⁰¹ However, *Choc* challenges that notion by suggesting that corporations may have a duty to ensure that their operations do not contribute to human-rights violations.¹⁰² This is because, as analyzed above, since Hudbay had been exerting direct control onto CGN, or since CGN was acting as Hudbay's agent, and supposed to take direct responsibility for its negligence on regulating the conduct of its subsidiaries, the consequences of its subsidiaries' related misconducts were in fact a result of the parent company's own negligent actions.¹⁰³ It noted that the corporate veil is not absolute and does not cover all situations raised in the business operations of corporations.¹⁰⁴

In addition, with respect to the limitations defence raised by Hudbay, the court applied s. 10 of Ontario's *Limitations Act, 2002*.¹⁰⁵ The section provides exceptions from the otherwise-applicable limitation period for claims based on sexual assault or assault.¹⁰⁶ This

⁹⁸ *Ibid*, at para 66-70.

⁹⁹ *Ibid*.

¹⁰⁰ *Ibid*, at para 44-47.

¹⁰¹ *Ibid*.

¹⁰² *Ibid*, at para 24-26.

¹⁰³ *Ibid*, at para 49.

¹⁰⁴ *Ibid*, at para 45.

¹⁰⁵ *Limitations Act, 2002*, SO 2002, c 24, Sch B, ss 4, 5 (as am), 10(1), (3).

Basic limitation period: 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

¹⁰⁶ *Ibid*. Assaults and sexual assaults: 10. (1) The limitation period established by section 4 does not run in respect

allowed the plaintiffs in the *Caal* action to pursue their claims despite not filing within the standard two-year limitation period.¹⁰⁷

As for the issue of jurisdiction over CGN, since Hudbay's motion failed, jurisdiction over CGN was not an issue at this stage.¹⁰⁸ The Ontario Superior Court of Justice rejected Hudbay's *forum non conveniens* argument, finding that the plaintiffs, as Guatemalan villagers, faced significant obstacles to accessing justice in their own country. It was because of the potential bias or inefficiency in the Guatemalan legal system.¹⁰⁹ And as mentioned above, given the potential involvement of Hudbay's management in decisions related to its subsidiary's operations, as long as Canadian courts had jurisdiction over Hudbay, a Canadian corporation, it was consequently appropriate to hear the case in Canada.¹¹⁰

D. Significance

The ruling by the Ontario Superior Court of Justice in the case of *Choc* indicates that, for the first time, a Canadian court appears willing to take on a regulatory function in addressing and preventing human-rights abuses perpetrated abroad by Canadian companies.¹¹¹ Indeed, from the view of timeline, the *Choc* case marked one of the first major

of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.

Presumption: (2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

Same: (3) Unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Choc*, *supra* note 23, at para 86.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, at para 85.

¹¹¹ Lexpert, *Ontario Superior Court Decision in Choc v Hudbay Minerals paves way for defining responsibility of Canadian companies with foreign operations* (1 November 2013), online: Lexpert <https://www.lexpert.ca/archive/ontario-superior-court-decision-in-choc-v-hudbay-minerals-paves-way-for-defining-responsibility-of-canadian-companies-with-foreign-operations/348931>>. Also see, *supra* note 80, Susana C. Mijares Peña.

Canadian decision allowing such lawsuits, while the *Nevsun* case expanded the precedent to include violations of customary international law.

The *Choc* case is groundbreaking for different reasons. On the one hand, the case directly reflects and underscores ongoing struggles faced by Indigenous communities in asserting their Indigenous rights, such as their land rights, against powerful transnational corporations or their project that involved powerful local governmental actions. It actually reiterated the human-rights implications through illustrating the struggles and challenges faced by Indigenous peoples in claiming their rights. On the other hand, it also broadened the implications for publicly announced corporate practices and exerted pressured on transnational corporations to follow through on such commitments.

To be more specific, the allegations in the case against Hudbay highlighted broader issues regarding corporate responsibility in relation to human rights. It raises critical questions on corporate accountability about how corporations can be held accountable for actions taken in foreign jurisdictions where they operate, illustrated how corporate responsibility is changing with an increasingly interconnection with the world where business practices can have profound implications for human dignity and justice.¹¹² The case can also be seen as challenging long-standing principles of corporate law, including the separate corporate personality of parent and subsidiary companies.¹¹³ It also raises important questions regarding corporate negligence and liability for human-rights abuses committed by subsidiaries or contractors abroad.¹¹⁴ All in all, it opened the door for victims of human-rights abuses in foreign countries to seek justice against Canadian corporations in Canadian courts,¹¹⁵ and this could set an important precedent for corporate accountability in global

¹¹² *Supra* note 37.

¹¹³ *Supra* note 111, Lexpert.

¹¹⁴ *Supra* note 82.

¹¹⁵ *Ibid.*

operations, which emphasized the duty of care owed by parent companies for the actions of their subsidiaries.¹¹⁶

At this point, it is believed in this paper that commercial entities, especially multinational corporations, should make more efforts in risk management in at least several ways. The first of these is to enhance due diligence. Corporations may need to implement more robust due diligence processes to assess potential human-rights risks associated with their and their subsidiaries' operations.¹¹⁷ The second is training and supervision. There may be increased pressure on companies to ensure proper training and supervision of security personnel to prevent abuses.¹¹⁸ The third is improved transparency and reporting, because corporations will likely face demands for greater transparency regarding their operations in developing countries, including how they engage with local communities.¹¹⁹ These are some basic measures taken to avoid the occurrence of similar cases like the *Choc* and *Nevsun* and the resulting legal liabilities.

Additionally, the case aligns with international standards and frameworks on human rights protection, such as the *United Nations Guiding Principles on Business and Human Rights*,¹²⁰ which emphasize corporate responsibility to respect human rights throughout their operations.¹²¹ The outcome will likely influence future legal frameworks governing corporate conduct internationally while highlighting the need for greater protections for

¹¹⁶ *Supra* note 37.

¹¹⁷ Valerie Crystal, Shin Imai & Bernadette Maheandiran, "Access to Justice and Corporate Accountability: A Legal Case Study of Hudbay in Guatemala" (2014) *Osgoode Legal Studies Research Paper* No 73, online: <https://digitalcommons.osgoode.yorku.ca/olsrps/73>.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ United Nations Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc HR/PUB/11/04 (2011). International law, including the *UN Guiding Principles on Business and Human Rights*, requires companies in conflict zones or high-risk areas to assess how security forces affect human rights. Companies should check and train their security staff. They also need to set clear rules about how security forces can use force.

¹²¹ *Supra* note 82.

vulnerable communities facing exploitation from powerful entities operating within their territories.

All in all, this precedent opened the door for future claimants to argue that a Canadian parent company may owe a duty of care for actions taken abroad by its subsidiaries.

2. *Garcia v. Tahoe Resources in British Columbia*.¹²²

Following the *Choc* decision, *Garcia v. Tahoe Resources Inc.* tested similar principles in British Columbia. However, different from the case of *Choc*, in the case of *Garcia v. Tahoe Resources Inc.*, the defendant decided to concentrate its argument on the challenge of jurisdiction.¹²³

This case involves seven Guatemalan residents who sued Tahoe Resources Inc. (Tahoe), a mining company headquartered in Canada, over alleged human-rights abuses at its Escobal mine in Guatemala.¹²⁴ The plaintiffs alleged that Tahoe was negligent in its oversight of security operations and failed to prevent the harm caused by its security personnel.¹²⁵ They sought to hold the company accountable in Canada. Tahoe sought to have the case dismissed by means of a jurisdictional argument. It argued that Guatemala was the proper forum for the lawsuit under the principle of *forum non conveniens*.¹²⁶ Thus, there were three key issues in the case. Firstly, did the British Columbia court have jurisdiction *simpliciter* to hear the

¹²² *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39. [*Tahoe*] see, < <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcc39/2017bcc39.html> >

¹²³ Jennifer Brown, “B.C. mining company latest to be challenged in Canada for alleged actions abroad” (1 June 2015), *Canadian Lawyer*, online: <https://www.canadianlawyermag.com/news/general/bc-mining-company-latest-to-be-challenged-in-canada-for-alleged-actions-abroad/269817>. “This is the first case where jurisdiction of the Canadian court is being challenged and the court has heard the application.”

¹²⁴ *Tahoe*, *supra* note 122, at para 9. In 2013, private security personnel employed by the mine used rubber bullets and tear gas to disperse a peaceful protest against the mining project which injured the plaintiffs.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, at para 1, 28.

case? The second concern is about the application of the *forum non conveniens* principle, that is, whether Guatemala is a more appropriate forum to adjudicate the claims. Finally, there is an issue of corporate responsibility, that is, whether a Canadian parent company can be held liable for the actions of its subsidiaries and contractors abroad.

In this case, the defendant acknowledged that the court had jurisdiction *simpliciter*, given that Tahoe is a registered company in British Columbia.¹²⁷ However, it believed that the court should decline to exercise such jurisdiction. It claimed that Tahoe has only minimal connections to B.C. by pointing out that the company does not conduct business in B.C., lacks a business office in Canada despite being listed on the Toronto Stock Exchange,¹²⁸ and has its headquarters in Reno, Nevada.¹²⁹ Although three of its directors reside in Canada, the lawyer for the defendant asserted that these factors are insufficient to justify the case proceeding in B.C.¹³⁰ Instead, counsel emphasizes that the Guatemalan subsidiary, Minera San Rafael, is the entity responsible for the mine's operations. Minera San Rafael is a distinct and independent entity with around 800 employees, a general manager, and direct control over the workers and contracts involved in the dispute.¹³¹ The defendant's argument appeared to shift focus away from Tahoe's overarching control, relying on technical distinctions between the parent company and its subsidiary, in order to downplay Tahoe's involvement and challenge the relevance of B.C.'s jurisdiction.¹³²

The "existing Canadian law on the issue",¹³³ on which the defendant's submission was based, refer to the test for jurisdiction and the principles governing when a Canadian court should decline to exercise jurisdiction despite the. It likely refers to the framework

¹²⁷ *Ibid*, at para 51.

¹²⁸ *Garcia v. Tahoe Resources Inc.*, 2015 BCSC 2045 (CanLII), at para 10-15.

¹²⁹ *Ibid*.

¹³⁰ *Ibid*. See also, *Supra* note 123.

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ *Supra* note 123, Jennifer Brown.

established in cases like *Club Resorts Ltd. v. Van Breda* (*Van Breda*).¹³⁴ In *Van Breda*, the Supreme Court of Canada sets out the principles of jurisdiction *simpliciter* and *forum non conveniens* in Canadian law.¹³⁵ The jurisdiction *simpliciter* refers to whether a court has the authority to hear a case.¹³⁶ It provides the establishment of jurisdiction, and in view of the later principle, *forum non conveniens*, it states that even if a court has jurisdiction *simpliciter*, it may decline to exercise jurisdiction if there is a more appropriate forum elsewhere to hear the case,¹³⁷ so it concerns the appropriateness of courts where jurisdiction has already been established.

The British Columbia Court of Appeal dismissed Tahoe's motion to stay the proceedings and allowed the case to proceed in Canada.¹³⁸ To be specific, the Court held that it had jurisdiction over the case because Tahoe's corporate headquarters and decision-making were based in British Columbia. It means the plaintiffs' claims were related to policies and actions that originated in Canada.¹³⁹ Besides, the Court determined that British Columbia was the appropriate forum for the case, primarily for the following reasons: on the one hand, evidence showed that Guatemala's judicial system was corrupt and ineffective, especially in cases involving human rights violations; on the other hand, the plaintiffs faced significant risks to their safety if they pursued the case in Guatemala, and it was more likely for the plaintiffs to receive a fair trial in Canada.¹⁴⁰ In addition, the Court's ruling indicated that a Canadian parent company could be held responsible for harm caused by its foreign subsidiaries if there was evidence of control or negligence in oversight.¹⁴¹

¹³⁴ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572. [*“Van Breda”*]. It is a leading decision from the Supreme Court of Canada on the principles of jurisdiction *simpliciter* and *forum non conveniens*.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Tahoe*, *supra* note 122, at para 52.

¹³⁸ *Ibid.*, at para 132.

¹³⁹ *Ibid.*, at para 26.

¹⁴⁰ *Ibid.*, at para 99-100, 109.

¹⁴¹ *Ibid.*, the court did not explicitly rule on the merits of the liability claims but accepted the plaintiffs' pleadings that Tahoe could owe a direct duty of care to foreign plaintiffs if it exercised substantial control over its Guatemala

The ruling in *Garcia* further solidified Canadian courts' willingness to ensure access to justice when local forums fail to provide a fair trial. It expanded the potential for Canadian courts to hear cases involving alleged human rights abuses and environmental harms caused by Canadian corporations abroad.¹⁴² It underscored the importance of access to a fair trial, particularly when systemic challenges exist in the plaintiffs' home jurisdiction and reinforced the responsibility of Canadian corporations to ensure ethical and lawful conduct in their worldwide operations.¹⁴³

3. *Nevsun Resources Ltd. v. Araya*¹⁴⁴

Building on these foundational cases, the landmark Supreme Court of Canada decision in *Nevsun* took foreign direct litigation jurisprudence a step further.

A. Case Overview

The Supreme Court of Canada case of *Nevsun Resources Ltd. v Araya*¹⁴⁵ involved a significant legal issue concerning corporate accountability for human-rights violations in a foreign country.¹⁴⁶ *Nevsun Resources Ltd.*, a Canadian mining company (hereinafter "Nevsun"), was sued by Eritrean workers who alleged severe human-rights abuses at the Bisha mine in Eritrea,¹⁴⁷ which Nevsun partially owned.¹⁴⁸ The workers claimed they were subjected to forced labour, slavery, torture, and other violations of international law and

lan subsidiary's operations.

¹⁴² Clarke Hunter, *The Long Reach of Canadian Civil Liability for Human Rights Impacts of Foreign Operations* (March 2017), online: Norton Rose Fulbright <https://www.nortonrosefulbright.com/en-ke/knowledge/publications/6c936808/the-long-reach-of-canadian-civil-liability-for-human-rights-impacts-of-foreign-operations>.

¹⁴³ *Tahoe*, *supra* note 122, at para s 76–80, 93, 97, 99–100; see also *supra* note 120, UNHRC.

¹⁴⁴ *Nevsun* (SCC), *supra* note 18.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at para 3.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid* at para 7.

domestic torts.¹⁴⁹ The case was initially filed in the British Columbia Supreme Court.¹⁵⁰ The plaintiffs sought to hold Nevsun accountable under Canadian law for actions conducted by its subsidiary in Eritrea.¹⁵¹ Ultimately, the Supreme Court of Canada issued a ruling in 2020 that permitted the case to proceed to trial in Canada.¹⁵² This ruling makes the case mark the first instance in Canadian legal system where Canadian courts allowed a lawsuit against a Canadian parent corporation for alleged violations of customary international law by its overseas subsidiary.¹⁵³ Filed in 2014, the lawsuit went through multiple appeals seeking dismissal of the plaintiffs' claim, prior to the Supreme Court ruling. To avoid any confusion and to provide a clear structural overview of all trial stages of the case, before delve into the case details, it will start from a briefly summary the following three levels of court proceedings that the *Nevsun* case went through in Canada:

a. Trial Court (The Supreme Court of British Columbia):

The case was first heard in the Supreme Court of British Columbia. The plaintiffs, including Araya, alleged that Nevsun was responsible for forced labour and human-rights abuses they endured at a mine in Eritrea. The trial court ruled that the case could proceed.¹⁵⁴

b. Court of Appeal (British Columbia Court of Appeal):

Nevsun appealed the trial court's decision. The British Columbia Court of Appeal upheld the lower court's ruling, agreeing that Canadian courts had jurisdiction to hear the case, even though the alleged abuses occurred abroad.¹⁵⁵

¹⁴⁹ *Ibid* at para 4.

¹⁵⁰ *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856, [*Nevsun* (BCSC)].

¹⁵¹ *Ibid* at para 1.

¹⁵² *Nevsun* (SCC), *supra* note 18 at 132.

¹⁵³ CBC News, "Amnesty urges Supreme Court to hear case of Eritrean workers allegedly used as slaves at B.C.-based company's mine" (23 October 2020), online: < <https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910>>.

¹⁵⁴ *Nevsun* (BCSC), *supra* note 150.

¹⁵⁵ *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 401, [*Nevsun* (BCCA)].

c. Supreme Court of Canada:

Nevsun further appealed to the Supreme Court of Canada. In March 2020, the Supreme Court made its final ruling, holding that, in certain cases, foreign plaintiffs could bring lawsuits against Canadian companies based on international law. This decision was significant as it marked the first time that foreign workers employed by a subsidiary abroad were allowed to pursue claims under international human-rights law against the subsidiary's Canadian parent company.¹⁵⁶

In brief, the *Nevsun* case went through three levels of court proceedings, with the Supreme Court of Canada ultimately allowing the case to be heard in Canadian courts. In the next step, this paper will more specifically summarize and analyze the content of this case, and the key issues of foreign direct liability litigation contained therein.

B. Facts

The case was initially filed to the Supreme Court of British Columbia by 3 Eritrean workers (Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle), initially representing over one thousand individuals who were facing similar situations.¹⁵⁷ They filed the case seeking damages for “breaches of domestic torts including conversion, battery, “unlawful confinement” (false imprisonment), conspiracy and negligence”¹⁵⁸ and “breaches of customary international law prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity”¹⁵⁹ against Nevsun.

¹⁵⁶ *Supra* note 150.

¹⁵⁷ The status of a representative action of the proceeding was denied by the Chamber Judge, see *Nevsun* (SCC), *supra* note 18 at para 17.

¹⁵⁸ *Nevsun* (SCC), *supra* note 18 at para 4.

¹⁵⁹ *Ibid.*

The plaintiffs had worked at the Bisha mine since as early as 2008.¹⁶⁰ The Bisha mine, which is also called the Bisha copper-zinc mine, is currently Eritrea's largest zinc production site, capable of mining 2.4 million tonnes each year.¹⁶¹ It serves as a significant revenue source for Eritrea's economy.¹⁶² It is located in Gash-Barka, Eritrea.¹⁶³ Since its construction, it has been operated by the Bisha Mining Share Company (hereinafter referred to as BMSC), an Eritrean corporation, which was a joint venture owned by the Eritrean National Mining Corporation (hereinafter referred to as ENAMCO) and Nevsun.¹⁶⁴ Before 2019 (when Chinese company Zijin Mining Group Co. Ltd. completed its acquisition of Nevsun, which brought it a 60% interest in the Bisha mine),¹⁶⁵ and during the period when the alleged events in *Nevsun* took place, the Bisha mine was primarily 40 percent owned by the ENAMCO, and Nevsun held the remaining 60 percent through subsidiaries.

With regard to the ownership and governance of the BMSC and the background of the two shareholders, Nevsun was a publicly traded Canadian mining company incorporated under *British Columbia's Business Corporations Act*.¹⁶⁶ While ENAMCO represented the state interests of Eritrea in the mining sector. It played the role of intermediary for the Eritrean government to engage into the operation of the Bisha mine.¹⁶⁷ To be more specific, BMSC subcontracted the mine construction project to two companies, one of them was an

¹⁶⁰ *Ibid.*

¹⁶¹ Zijin Mining Group Co Ltd, *Bisha Copper-Zinc Mine*, online: < <https://www.zijinmining.com/global/program-detail-71760.htm>>.

¹⁶² *Nevsun* (SCC), *supra* note 18 at para 7.

¹⁶³ *Supra* note 150, at para 33.

¹⁶⁴ Nevsun Resources Ltd, *Human Rights Impact Assessment of the Bisha Mine in Eritrea* (April 2014), online: Business & Human Rights Resource Centre <https://media.business-humanrights.org/media/documents/files/documents/Nevsun_HRIA_Full_Report_April_2014.pdf>.

¹⁶⁵ *Supra* note 161. Zijin Mining completed the acquisition of a 60% interest in the Bisha copper-zinc mine in 2019. Currently, it holds a 55% interest in the project, while the Eritrean National Mining Corporation (ENAMCO) holds the remaining 45%." Also see, Zijin Mining Group Co., *Zijin Mining Succeeds in Bid for Nevsun Resources and Announces Mandatory Extension of Tender Period*, (17 Dec 2018), online: < <https://www.prnewswire.com/news-releases/zijin-mining-succeeds-in-bid-for-nevsun-resources-and-announces-mandatory-extension-of-tender-period-300771371.html>>.

¹⁶⁶ *British Columbia's Business Corporations Act*, S.B.C. 2002, c. 57. See, *Nevsun* para [7].

¹⁶⁷ Human Rights Watch, *Hear No Evil: Forced Labour and Corporate Responsibility in Eritrea's Mining Sector* (2013), online: <<https://www.hrw.org/report/2013/01/15/hear-no-evil/forced-labour-and-corporate-responsibility-eritreas-mining-sector>>.

Eritrean military-controlled company and another one was owned by the sole political party of Eritrea. Both of these two companies were participants in Eritrea's National Service Program, receiving conscripts under the program to participate in the construction of public works to fulfill their military-service obligations required by the Eritrean State. Due to this program, the plaintiffs were sent to work at the Bisha mine to work starting in approximately 2008.¹⁶⁸

The plaintiffs alleged that they had been treated inhumanly during their conscriptions at the Bisha mine.¹⁶⁹ They claimed they were forcibly recruited to work on the mine.¹⁷⁰ They argue that this conscription constituted forced labour and slavery, along with serious human-rights violations.¹⁷¹ Allegedly, they endured inhumane working conditions, such as "long working hours, inadequate pay, and unsafe and overcrowded housing"¹⁷² due to an agreement between Nevsun and the Eritrean government.¹⁷³ Consequently, they initiated the lawsuit against Nevsun. Nevsun moved to reject and strike all the claims of mistreatment and filed several motions to have the lawsuit dismissed. The company submitted an application to the British Columbia Supreme Court to eliminate the plaintiffs' claims on the grounds that they did not present a valid cause of action, arguing that they were bound to fail because of several legal principles such as act of state Doctrine and the non-applicability of customary international law in Canadian courts.¹⁷⁴ The following part will specifically break down and describe the claims and supporting arguments of both parties.

¹⁶⁸ *Nevsun* (SCC), *supra* note 18 at paras 8-15.

¹⁶⁹ *Ibid.*, at paras 3, 4.

¹⁷⁰ *Ibid.*

¹⁷¹ *Ibid.*

¹⁷² *Ibid.* at para 12-15. See also, Laetitia Bader, "Canadian Firm Can Be Sued for Alleged Eritrea Abuses" (5 March 2020), *Human Rights Watch*, online: <https://www.hrw.org/news/2020/03/05/canadian-firm-can-be-sued-alleged-eritrea-abuses>.

¹⁷³ *Ibid.* Also see, Bernise Carolino, "Nevsun settles with Eritrean plaintiffs in relation to landmark Supreme Court of Canada case" (5 November 2020), *Canadian Lawyer*, online: <https://www.canadianlawyermag.com/practice-areas/litigation/nevsun-settles-with-eritrean-plaintiffs-in-relation-to-landmark-supreme-court-of-canada-case/334916>.

¹⁷⁴ *Ibid.*, at para 5.

C. Arguments and Issues

a. Nevsun, the defendant's claims and arguments.

Firstly, Nevsun claims that the case should be dismissed according to the principle of *forum non conveniens*.¹⁷⁵ For this claim, Nevsun argues that, according to the *forum non conveniens* principle, the Canadian court is not the appropriate forum for this case since the events occurred in Eritrea. Nevsun contends that key evidence and witnesses are located in Eritrea, making it logistically challenging and costly to hold the trial in Canada.¹⁷⁶ Besides, Nevsun also claims that Eritrean courts are the most suitable venue,¹⁷⁷ because the case involves Eritrean laws and state actions.¹⁷⁸ Based on all these points, Nevsun argued that Canadian courts lack the direct jurisdiction over the alleged issue.

Secondly, Nevsun claims that the doctrine of act of state applies to this case which means the case should be barred.¹⁷⁹ For this argument, Nevsun's claim is based on the ownership and governance of the Bisha mine. As it described earlier, the Bisha mine was operated by BMSC, which was jointly owned and controlled by Nevsun and Eritrea's government, through a company named ENAMCO. In addition to the fact that ENAMCO

¹⁷⁵ *Nevsun (SCC)*, *supra* note 18 at para 16.

¹⁷⁶ Ann Watterworth, *The Supreme Court of Canada Allows Domestic Civil Proceedings Relating to Foreign Breaches of International Law* (3 October 2020), *Cassels*, online: <https://cassels.com/insights/the-supreme-court-of-canada-allows-domestic-civil-proceedings-relating-to-foreign-breaches-of-international-law/>. Also see, Pearl Eliadis, "Case Comment: Forum Non Conveniens and Liability for Alleged Human Rights Violations – The Nevsun Resources Ltd. Case" (31 July 2017), *Global Justice Journal*, online: <<https://globaljustice.queenslaw.ca/news/case-comment-forum-non-conveniens-and-liability-for-alleged-human-rights-violations-the-nevsun-resources-ltd-case>>.

¹⁷⁷ Amnesty International Canada & International Commission of Jurists, *Nevsun Resources Ltd v Gize Yebeyo Araya, et al* (legal brief, 18 January 2018), online: *Amnesty International Canada* <https://amnesty.ca/legal-brief/nevsun-resources-ltd-v-gize-yebeyo-araya-et-al/>

¹⁷⁸ *Ibid.* Also see Jolane T Lauzon, "ARAYA V. NEVSUN RESOURCES: Remedies for Victims of Human Rights Violations Committed by Canadian Mining Companies Abroad" (2018) 31:1 RQDI 143. And, James Yap, "Nevsun Resources Ltd. v. Araya: What the Canadian Supreme Court decision means in holding Canadian companies accountable for human rights abuses abroad", *Business & Human Rights Resource Centre Blog* (16 March 2020), online: <<https://www.business-humanrights.org/en/blog/nevsun-resources-ltd-v-araya-what-the-canadian-supreme-court-decision-means-in-holding-canadian-companies-accountable-for-human-rights-abuses-abroad/>>

¹⁷⁹ *Ibid.*, para 27.

was a state-owned company, the management and actual operation of the mine was also, to a large extent, depended on decisions of the Eritrean government, including the fact that the state-owned or ruling party-controlled nature of the two subcontractors, and their participants into its national conscription program and the employment, management and use of workers.¹⁸⁰ Thus, the alleged wrongdoings are tied to actions taken by the Eritrean government, particularly regarding its national conscription program and the conditions under which the workers were employed at the Bisha mine. Therefore, Nevsun argues that Canadian courts should respect the act of state doctrine, which Nevsun alleges prohibits those courts from adjudicating the actions of foreign states and their governments.¹⁸¹ The doctrine was said to arise from two aspects: the respect for foreign sovereignty, and precedents and applicability in Canadian law. Nevsun contends that, on the one hand, the act of state doctrine is grounded in mutual respect for sovereign states, meaning that one country's courts should not rule on the lawfulness of the acts of another country's government. Nevsun believes that the workers' allegations of forced labour and human-rights abuses are intertwined with actions taken by the Eritrean government, so Canadian courts lack jurisdiction over these issues.¹⁸² On the other hand, although Canadian courts have rarely applied the act-of-state doctrine, Nevsun argues that it has roots in English law, which Canadian common law long ago inherited.¹⁸³ Therefore, Nevsun believes the doctrine should apply to this case involving actions of entities related to a foreign sovereign.¹⁸⁴

¹⁸⁰ American Bar Association Rule of Law Initiative, *Case Study: Eritrea – Human Trafficking Risk Factors in the Eritrean Mining Sector* (August 2017) at 1, online: < <https://verite.org/wp-content/uploads/2017/12/ABA-ROLI-Case-Study-Eritrea-Aug-2017.pdf> >.

¹⁸¹ *Nevsun* (SCC), *supra* note 18 at paras 5, 16.

¹⁸² *Ibid*, at para 16.

¹⁸³ *Ibid*, at para 19, 22.

¹⁸⁴ *Ibid*, at para 44.

The third claim was about the argument that customary international law cannot be applied in Canadian courts against a company. Nevsun contends that, even if customary international law includes principles against forced labour, slavery, and crimes against humanity, these principles are typically applied between states, not in private claims against companies.¹⁸⁵ On the one hand, it is due to the lack of private liability under customary international law. Nevsun argues that international customary law primarily governs relationships and obligations between states, and Canadian courts should not extend this to companies.¹⁸⁶ On the other hand, it is because the analogy to state immunity. Nevsun points to Canada's *State Immunity Act*¹⁸⁷, which provides immunity to foreign states. While customary international law is not strictly barred, it should not apply to private lawsuits, especially against non-state actors like corporations.¹⁸⁸

b. Eritrean Workers: the Plaintiffs' Claims and Arguments

The plaintiffs, of course, put forward different opinions. Firstly, they claim that the *forum non conveniens* doctrine should not apply to this case. The Eritrean workers argue that Canadian courts are the proper venue for this case, because Eritrea's judicial system is not independent and lacks guarantees of a fair trial.¹⁸⁹ They argued that if the case were transferred to Eritrea, they would not be able to receive a fair trial. And from the perspective of the corporate accountability in Canada, since Nevsun is a Canadian-registered company, the workers believe that Canadian courts have the responsibility to adjudicate its actions.¹⁹⁰ This makes Canada an appropriate venue for the case. Besides,

¹⁸⁵ *Ibid.*, at para 21, 27.

¹⁸⁶ *Supra* note 154 at para 443.

¹⁸⁷ *State Immunity Act*, RSC 1985, c S-18.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Supra* note 154, at para 24.

¹⁹⁰ *Nevsun* (SCC), *supra* note 18 at para 4, 115. The plaintiffs filed their claim in British Columbia, arguing that

due to the limitations and possible bias of the Eritrean judicial system, the workers argue that they would face significant challenges in obtaining a fair trial in Eritrea. In contrast to that, they believe Canadian courts offer a fairer platform for their case.¹⁹¹

The second claim made by the plaintiffs is that the act of state doctrine should not become a barrier to block this case. The workers argue that their claims do not directly challenge the validity of Eritrean law or government actions but rather focus on Nevsun's role as a company in supporting human-rights abuses.¹⁹² Therefore, the case is about corporate accountability, not state conduct.¹⁹³ In detail, the workers contend that their case is about Nevsun's commercial conduct, alleging that it collaboured with the Eritrean government in ways that violated human rights.¹⁹⁴ They argue that even though Eritrean state actions are involved, the focus and key issue of the lawsuit is on corporate behavior, not state actions.¹⁹⁵ Further, they argue that this case is an exception to the act-of-state doctrine. Even if the act-of-state doctrine were to apply, the workers argue that exceptions exist, especially in cases involving serious human-rights violations.¹⁹⁶ They believe that such exceptions allow for accountability if the allegations include forced labour and crimes against humanity.¹⁹⁷

The third claim of the Eritrean workers is that customary international law is supposed to be able to ground a claim in Canadian courts. In this regard, the workers present the following arguments: first of all, on account of the universality of customary international

Nevsun, as a company incorporated and headquartered in Canada, should be held accountable in Canadian courts for its alleged involvement in serious human rights abuses committed through its operations in Eritrea. In paragraph 115, the majority judgment notes that Canadian government policies support the idea that Canadian companies operating abroad can face legal action in Canadian courts for alleged wrongdoing, which affirms the plaintiffs' position.

¹⁹¹ *Supra* note 189.

¹⁹² *Nevsun* (SCC), *supra* note 18 at para 22.

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*, at para 311.

¹⁹⁵ *Ibid.*, at para 22.

¹⁹⁶ *Ibid.* Also see *Supra* note 154 at para 405.

¹⁹⁷ *Ibid.*

law, the workers argue that Canadian courts can recognize customary international law, particularly for cases involving severe human-rights abuses.¹⁹⁸ The workers contend that customary international law principles, such as prohibitions against forced labour, slavery, and crimes against humanity, apply universally and should extend to companies.¹⁹⁹ They believed that Canadian courts should embrace these principles and allow them to support private claims. Moreover, the workers argue that Canadian legal principles are compatible with the adoption of international law, particularly in cases involving egregious human-rights abuses. They maintain that Canada's legal tradition permits the application of customary international law, which supports their private lawsuit.²⁰⁰

All in all, in this case, Nevsun sought to have the case dismissed by invoking the *forum non conveniens* and act of state doctrines, arguing that customary international law should not apply to private companies. The Eritrean workers, however, assert that Canadian courts have jurisdiction, argue that exceptions to the act of state doctrine apply, and claim that customary international law should indeed be used to hold Nevsun accountable for alleged human-rights abuses.²⁰¹

It can be seen from two parties' claims and arguments that the case raised three primary legal questions. The first is the application of the *forum non conveniens* principle. Under the *forum non conveniens* principle, the court of law must determine whether there is a more clearly appropriate forum for hearing the case. That is to say the court had to decide if Eritrea should be preferred as the forum for this case. The second key issue is about the act-of-state doctrine: Whether Canadian courts could adjudicate claims involving the sovereign acts of a foreign state, which traditionally falls under the act of state doctrine. The third question is the potential application of customary international law: Could the

¹⁹⁸ *Supra* note 154 at para 4 and 427.

¹⁹⁹ *Nevsun* (SCC), *supra* note 18 at para 4.

²⁰⁰ *Supra* note 154, at para 4.

²⁰¹ *Nevsun* (SCC), *supra* note 18 at para 60.

workers could claim damages based on breaches of customary international law norms, which include prohibitions against forced labour, slavery, and torture? Consequently, the Canadian court had to decide whether the Act of State doctrine bars the case, and whether customary international law principles can be applied in Canadian courts to impose liability on private corporations.

D. Ratio Decidendi and Decision

The British Columbia courts previously rejected Nevsun's application for dismissal on the ground of the *forum non conveniens* principle. It concluded that Nevsun did not adequately demonstrate that Eritrea was a more appropriate venue and took into account that a fair trial might not be possible in Eritrea.²⁰² And the British Columbia Court of Appeal upheld this decision.²⁰³ Nevsun did not contest the Court of Appeal's ruling regarding the issue of *forum non conveniens*.²⁰⁴ In addition, even though Nevsun did not appeal the lower court's rulings on the issue of appropriate forum in its appeal to the Supreme Court of Canada, the Supreme Court of Canada did not directly decide on *forum non conveniens*, but upheld the lower court's decision to allow the case to proceed in Canada. It affirmed that the British Columbia courts were the appropriate venue for hearing the case.²⁰⁵

Furthermore, with respect to the other two key issues, the courts made their decision holding similar positions, by allowing the case to be proceed in Canada. The Supreme Court, in a landmark judgment, eventually dismissed Nevsun's appeal, allowing the workers' claims to proceed. The significant decision was specifically illustrated as below:

²⁰² *Nevsun* (SCC), *supra* note 18 at para 18.

²⁰³ *Ibid*, para 22.

²⁰⁴ *Ibid*, para 26.

²⁰⁵ *Ibid*.

Firstly, with regard to the act of state doctrine, the Court held that the act-of-state doctrine, which could preclude domestic courts from examining the validity of public acts performed by a foreign sovereign within its own territory, does not bar the workers' claims.²⁰⁶ The doctrine does not have a rigid application in Canadian law and must be balanced against the principle that serious human-rights violations should not be left without a remedy.²⁰⁷ Secondly, as far as customary international law is concerned, the Court recognized that customary international law is part of Canadian common law. This includes prohibitions against serious human-rights abuses such as forced labour, slavery, and torture.²⁰⁸ The Court allowed these norms to form the basis of a private law cause of action for damages, meaning the Eritrean workers could potentially hold Nevsun liable under Canadian law for these international-law violations.²⁰⁹

Thirdly, with respect to corporate liability for violations of international law, the decision underscores that corporations could be held accountable for complicity in human-rights abuses. This marked a pivotal step in expanding corporate liability for international human-rights violations. It reflects an evolving understanding of the role of businesses in respecting human rights globally.

E. Significance

The case of *Nevsun* represents a landmark case in the realm of corporate accountability for human-rights violations.²¹⁰ The Supreme Court's ruling has profound implications for international human-rights law and corporate accountability.²¹¹ The judgment sets a

²⁰⁶ *Ibid.*, para 19, 22.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.*, para 20.

²⁰⁹ *Ibid.*, para 20, 25.

²¹⁰ Eva Monteiro, “*Mining for Legal Luxuries: The Pitfalls and Potential of Nevsun Resources Ltd v Araya*” (2021) 58 *Can YB Intl L* 331, online: <http://dx.doi.org/10.1017/cyl.2021.2>.

²¹¹ See *Nevsun*. See also, McCarthy Tétrault LLP, “Supreme Court of Canada Cracks Open the Door to

precedent for future cases where victims of human-rights abuses in foreign countries can seek justice in Canadian courts against Canadian corporations. The Supreme Court of Canada's decision to allow the claims of Eritrean workers to proceed, and has set a significant legal precedent, affirming that serious human-rights abuses cannot be shielded by doctrines like the act of state doctrine,²¹² and that corporations do not enjoy blanket immunity under customary international law.²¹³ By recognizing the applicability of customary international law within Canadian domestic law, the Court has opened the door for greater protection and enforcement of human rights. This choice enhances access to justice for individuals who might otherwise have no effective remedy, ensuring that victims of egregious abuses have a forum for seeking justice and remedy.²¹⁴ In addition, it underlined the integration of international law into domestic law. By affirming the application of customary international law within Canadian common law, the Court reinforced the integration of international human-rights norms into domestic legal systems.²¹⁵ This decision strengthens the enforcement of international human-rights standards at the national level, and underscores the evolving legal landscape where corporations' actions are scrutinized not just by domestic standards but also by universally-recognized human-rights norms.²¹⁶ In other words, the ruling imposed a greater obligation on multinational corporations to ensure that their operations and those of their subsidiaries comply with international legal norms, such as international human-rights standards. It

International Human Rights Tort Claims: *Nevsun Resources Ltd. v. Araya*" (2 March 2020), online: McCarthy Tétrault <https://www.mccarthy.ca/en/insights/blogs/mining-prospects/supreme-court-canada-cracks-open-door-international-human-rights-tort-claims-nevsun-resources-ltd-v-araya>.

²¹² *Nevsun* (SCC), *supra* note 18, para 37.

²¹³ *Ibid*, para 122, 132, 247.

²¹⁴ Rae Lindsay, "A Step Towards Corporate Liability in Domestic Courts for Violations of International Law?" Clifford Chance. (8 April 2020), online: Clifford Chance <https://www.cliffordchance.com/insights/resources/blog/s/business-and-human-rights-insights/2020/04/a-step-towards-corporate-liability-in-domestic-courts-for-violations-of-international-law.html>.

²¹⁵ *Western Journal of Legal Studies*, "A Hard Case Makes New Law: The Adoption of Customary International Law into Canadian Common Law" (3 August 2021), online: <https://ojs.lib.uwo.ca/index.php/uwojls/announcement/view/158>.

²¹⁶ *Nevsun* (SCC), *supra* note 18, para 122, 132.

signals a shift towards greater accountability and responsibility for human-rights impacts within transnational corporations and their global business practices.²¹⁷ In a manner of speaking, the *Nevsun* decision is a milestone in holding multinational corporations accountable for their global operations and reaffirms Canada's commitment to upholding international human-rights standards.²¹⁸

Through judgements of cases like *Nevsun*, it is getting explicit that the courts are willing to hold parent corporates liable for their subsidiaries' misconduct by evaluating the impact of corporate actions on victims of human rights violations.²¹⁹

Nevertheless, it is important to note that despite the Supreme Court of Canada's landmark ruling in *Nevsun*, the case never actually proceeded to trial on the merits. Following the Supreme Court's decision to dismiss the motion to strike the pleadings, the parties ultimately reached a settlement out of court.²²⁰ This means that the principles set out by the Court, particularly its recognition that customary international law can ground a private law cause of action against a corporation, have not yet been tested or developed through a full trial and factual findings. While this may suggest to some that the defendant had no credible defence on the merits, the reality is that we can only speculate how these new rules would have played out in practice. This also indicates that there remains much to be examined in how Canadian courts will apply these doctrines in future cases. Until a trial court tests these principles on a fully established factual record, continued academic commentary will remain essential in refining and guiding the evolution of foreign direct liability jurisprudence in Canada.

²¹⁷ Amnesty International, "Amnesty International Applauds Settlement in Landmark *Nevsun* Resources Mining Case" (23 October 2020), Amnesty International Canada, online: <https://amnesty.ca/human-rights-news/amnesty-international-applauds-settlement-in-landmark-nevsun-resources-mining-case/>.

²¹⁸ *Ibid.*

²¹⁹ *Supra* note 2.

²²⁰ *Supra* note 217.

The *Nevsun* decision stands as both a meaningful step forward and a point of doctrinal ambiguity in Canadian corporate liability law. On the one hand, by allowing claims grounded in breaches of customary international law to proceed against a Canadian corporation, the Supreme Court of Canada significantly broadened the legal possibilities for holding parent companies accountable for overseas human rights violations. Its refusal to apply the act of state doctrine further reinforced the willingness of Canadian courts to recognize corporate responsibility in a transnational context, reflecting a more progressive alignment with international human rights principle.

However, the case also left key issues unresolved. Because it was ultimately settled before reaching trial, no guidance emerged regarding how Canadian courts would assess evidence, apply liability standards, or define the scope of corporate duties in such contexts. The decision thus opened the door conceptually but left its practical framework undefined. While *Nevsun* affirms the potential for parent company liability under both domestic and international legal norms, its doctrinal and procedural implications remain underdeveloped. Future litigation and legislative developments will be necessary to determine how — and how far — Canadian law is willing to go in enforcing corporate accountability for extraterritorial misconduct.

4. *Vedanta*²²¹ and *Okpabi*²²²

In addition to these landmark cases, there are more cases that have helped shaping foreign direct litigation by expanding access to justice for victims and refining the legal criteria for

²²¹ *Vedanta*, *supra* note 26.

²²² *Okpabi*, *supra* note 27.

holding transnational corporations accountable for overseas misconduct committed by their foreign subsidiaries. One example is the UK case of *Lungowe v. Vedanta Resources plc*,²²³ in which Zambian villagers sued UK-based Vedanta Resources and its Zambian subsidiary Konkola Copper Mines (KCM). The plaintiffs alleged that copper mining activities caused severe environmental pollution, damaging their land, water sources, and health.²²⁴ The plaintiffs argued that Vedanta Resources plc, as the parent company, should be held accountable for its subsidiary's negligence. As a foreign direct litigation case, the case showed certain possibility of holding a parent company liable for the actions of its foreign subsidiary: it provide the victims with a viable legal pathway by admitting the possibility that British courts could exercise jurisdiction over both the parent companies and foreign subsidiaries of transnational corporations at the same time. The UK courts asserted jurisdiction by emphasizing Vedanta's control over KCM's operations and its UK registration.²²⁵ What's more, the court established that a parent company could be liable if it exercises significant control over its subsidiary's operations.²²⁶ This case provided a foundation for foreign direct litigation claims, broadening access to justice for foreign plaintiffs.

Also, in the case of *Okpabi v. Shell*,²²⁷ Nigerian communities sued the UK-based company Royal Dutch Shell Plc and its Nigerian subsidiary over oil spills. The plaintiffs alleged that it polluted their environment and harmed their livelihoods.²²⁸ They sought to hold the UK parent company responsible for its subsidiary's actions.²²⁹ Initially, the lower court dismissed the case because of insufficient evidence of Shell's direct involvement.²³⁰ However, the UK

²²³ *Vedanta*, *supra* note 26.

²²⁴ *Ibid*, at para 1.

²²⁵ *Ibid*, at paras 15-20.

²²⁶ *Ibid*, at paras 49-54.

²²⁷ *Okpabi*, *supra* note 222.

²²⁸ *Ibid*, at para 4.

²²⁹ *Ibid*, at para 7.

²³⁰ *Ibid*, at para 81.

Supreme Court overturned the decision, calling for a deeper investigation into the relationships between the parent company and the subsidiary company. The connection or contribution of this case put on its foreign direct liability nature is that it highlighted the challenges plaintiffs face in proving a parent company's liability for its subsidiary's misconduct. It underscored the need for substantial evidence to establish jurisdiction and liability in foreign direct liability cases. The Supreme Court emphasized that courts must thoroughly analyze the degree of control and involvement of the parent company,²³¹ rather than relying solely on documentary evidence. This case refined the evidentiary standards required for foreign direct liability claims and clarified the framework for assessing parent company liability.

In a word, the UK courts developed a parallel but complementary line of reasoning in *Vedanta*, which reinforced the idea that parent companies' public representations and practical control can form the basis for a duty of care. And the UK Supreme Court further refined these principles in *Okpabi*. Its decision clarified that claimants must present detailed evidence of real control, setting a higher bar for both plaintiffs and corporate defendants.

5. Comparative Analysis

Based on the aforementioned cases, different jurisdictions especially Canada, and the UK, have developed complementary but distinct approaches to foreign direct liability cases. In Canada, decisions like *Choc*, *Tahoe* and *Nevsun* show a clear progression from procedural openings to substantive recognition that parent companies may owe a duty of care for overseas harms — even incorporating principles of international law. In the UK, cases like

²³¹ *Ibid*, at para 147.

*Vedanta*²³² and *Okpabi*²³³ illustrate the courts' readiness to accept foreign direct liability claims, particularly when the parent company has significant control over its subsidiary; however, they emphasize stringent evidentiary requirements.

These cases reveal various strengths and weaknesses in judicial reasoning concerning jurisdiction and parent-subsidiary liability distribution. In summary, Canada seems likely to offer a broad human-rights perspective, but has limited case law due to ongoing development;²³⁴ cases from the UK provide a clear legal framework for foreign direct liability cases but impose strict evidentiary standards.²³⁵ Overall, these cases reflect the evolving judicial approaches to foreign direct liability litigation across different jurisdictions and certain highlight key principles. The first is about the jurisdiction. Courts prioritize establishing sufficient connections between claims and the parent company's home country.²³⁶ Secondly, the control and involvement: parent company liability often hinges on the level of control exercised over its subsidiary. The third point is about the evidentiary standards which indicate that, generally, plaintiffs are required to present strong evidence to prove liability.²³⁷ Collectively, the cases introduced previously in this chapter have shaped foreign direct liability litigation by their efforts to providing access or standards of access to justice for victims and refining criteria for holding transnational corporations accountable for misconduct committed by their subsidiaries abroad.

²³² *Vedanta*, *Supra* note 26.

²³³ *Okpabi*, *supra* note 222.

²³⁴ *Supra* note 11.

²³⁵ Norton Rose Fulbright, "United Kingdom – Cross-border guide to parent company liability for foreign subsidiaries", 28 April 2021, online: <<https://www.nortonrosefulbright.com/fr-ca/centre-du-savoir/publications/8832960f/united-kingdom-cross-border-guide-to-parent-company-liability-for-foreign-subsidiaries>>

²³⁶ *Ibid.*

²³⁷ Liesbeth F.H. Enneking, *Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability* (The Hague: Eleven International Publishing, 2012) at 244.

CHAPTER 3: LEGAL FRAMEWORKS AND DOCTRINES

As introduced earlier, as well as illustrated the precedents referred to in the earlier chapters, it is obvious that foreign direct liability litigation presents a complex landscape for legal accountability, especially as multinational corporations expand their influence across jurisdictions. Courts increasingly face cases in which plaintiffs seek to hold parent companies liable for the actions of their subsidiaries abroad. Simply speaking, there are mainly three primary legal challenges that arise in these cases: jurisdiction, corporate separateness and the application of customary international law. Nevertheless, these challenges are not new topics. In fact, there have been certain legal provisions or regulations focusing on dealing with liabilities in these cases. This chapter will explore the foundational doctrines and legal principles governing foreign direct liability litigation, particularly focusing on jurisdiction standards, customary international law and the veil of corporations. This chapter will also consider issues like the act of state doctrine, and how they shape the applicability of foreign direct liability claims in domestic courts.

1. Jurisdiction in Foreign Direct Liability Litigation

In light of the complexity of the structure of transnational corporations and the complexity of the cases themselves, the jurisdiction, accountability and the application of law in the cases of foreign direct liability litigation have become difficult problems for the courts of the accused parent companies' countries. Among them, jurisdiction is the key to start legal proceeding.²³⁸ It is also usually the first difficulty that the court of the forum chosen by the plaintiff will be required to confront. This is because, if the forum does not have jurisdiction, it cannot hear the case.²³⁹ Even the court of the forum jurisdiction may technically have some

²³⁸ *Supra* note 39.

²³⁹ *Ibid* at 90.

jurisdiction in the matter, the second question is whether the forum court should accept jurisdiction. The latter determination, as discussed earlier, is referred to as the doctrine of *forum non conveniens*. This whether there is potentially a more convenient court that the parties should select. Since these two matters are both connection to the jurisdiction of the forum court, they are most often argued together.²⁴⁰ The determination of jurisdiction is crucial to the settlement of such cases. In the existing extraterritorial judicial practice, based on different legal provisions, theories as well as practices, some courts find that they do not to have jurisdiction over such cases, while other courts support jurisdiction over such disputes.²⁴¹

In this context, courts in any country may face foreign direct liability cases brought by victims in host countries. While the determination of jurisdiction is a threshold question, the broader policy implications of allowing or restricting foreign direct liability litigation are far from straightforward. On the one hand, countries like Canada aspire to be recognized as leaders in the protection of human rights.²⁴² Allowing victims from host countries to seek justice in Canadian courts when harmed by the overseas activities of Canadian corporations reinforces this international image and supports global accountability standards.²⁴³ Such openness signals a commitment to remedying human rights abuses, even when they occur beyond national borders. Besides, there is a strong public and governmental interest in ensuring that domestic corporations do not exploit weaker regulatory environments abroad.²⁴⁴ By opening national courts to foreign direct liability claims, the legal system can

²⁴⁰ *Ibid*, at 91.

²⁴¹ *Ibid* at 92–93.

²⁴² Halina Ward, *Foreign Direct Liability: A New Weapon in the Environment and Development Arsenal?* (London: Royal Institute of International Affairs, 2000), online: https://www.chathamhouse.org/sites/default/files/public/Research/Energy,%20Environment%20and%20Development/fdl_a_new_weapon_ward_2000.pdf.

²⁴³ Global Affairs Canada, *Responsible Business Conduct Abroad: Canada's Strategy for the Future* (2022), online: <<https://www.international.gc.ca/trade-commerce/rbc-cre/strategy-2022-strategie.aspx?lang=eng>>.

²⁴⁴ *Supra* note 242.

deter Canadian companies from engaging in or facilitating harmful practices overseas, thereby promoting ethical conduct and aligning corporate behavior with Canadian values.²⁴⁵

However, there are also significant pulls in the opposite direction. The Canadian legal system already faces considerable pressures in managing domestic caseloads.²⁴⁶ Expanding access to foreign claimants could place additional strain on courts, potentially leading to delays and resource shortages that affect both foreign and domestic litigants.²⁴⁷ Furthermore, there are economic and competitive considerations. Imposing expansive extraterritorial duties on Canadian parent companies may create a competitive disadvantage. For example, if regulatory or litigation burdens become excessive, companies might consider relocating their headquarters to jurisdictions with more favorable legal environments, resulting in potential economic loss and diminished influence for Canada, such as potentially eroding Canada's tax base and job market.²⁴⁸ Beyond that, applying Canadian legal standards to conduct occurring in other countries may create uncertainty for businesses, especially when those standards conflict with local laws or practices.²⁴⁹ This could undermine the principle of legal certainty and make it difficult for companies to plan their operations.²⁵⁰

These “pushes and pulls” illustrate that the issue of jurisdiction in foreign direct liability litigation is not merely a procedural question but a complex policy challenge. Courts and lawmakers must carefully weigh the broader consequences of extending access to justice for foreign claimants against the potential domestic impacts on judicial capacity, economic interests, and corporate behaviour. As this area of law continues to evolve, ongoing dialogue

²⁴⁵ *Supra* note 237.

²⁴⁶ Action Committee on Court Operations in Response to COVID-19, *Orienting Principles: Reducing Court Backlog and Delays* (2021), Office of the Commissioner for Federal Judicial Affairs Canada, online: <https://www.fja.gc.ca/COVID-19/Orienting-Principles-Reducing-Backlog-and-Delays-Principes-d-orientation-reduire-les-engorgements-et-delaix-eng.html>.

²⁴⁷ Ekaterina Aristova, “Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction” (2018) 14:2 *Utrecht Law Review* 6, online: <https://doi.org/10.18352/ulr.444>.

²⁴⁸ *Supra* note 237.

²⁴⁹ Allan E. Gotlieb, “Extraterritoriality: A Canadian Perspective” 5 *Nw. J. Int'l L. & Bus.* 449 (1983-1984).

²⁵⁰ *Ibid.*

within the legal community is essential to develop frameworks that balance these competing imperatives in a manner consistent with both international norms and domestic priorities. Accordingly, the judicial community should actively consider countermeasures, aiming to remove procedural barriers for victims to achieve justice while ensuring that the legitimate interests of their own nationals remain unharmed.

In addition, it has been observed that foreign direct liability litigations often involve transnational corporations that expand their operations into less-developed countries in order to take advantage of local economic resources and weaker environmental and human rights protections.²⁵¹ Since the host countries are usually developing countries with comparatively low level of protection, and that the countries would often further lower their standards on environmental protection or human right protection to attract foreign investment,²⁵² there is a high probability that the victims may not get adequate remedies if they sue the subsidiaries of a transnational corporation based in the state that welcomed in the transnational corporation in the first place.²⁵³ In contrast, the home country of the transnational corporation often has the advantages of allowing the victims to obtain high compensation and more improved procedures, so many victims choose to go to the home-country court of the transnational corporation to file their cases.²⁵⁴ Under this circumstances, the civil procedure rules of the state where the case is filed will determine whether and to what extent the courts of the state will accept such foreign direct liability cases. Therefore, it is necessary

²⁵¹ *Supra*, note 2. Also see, United Nations Conference on Trade and Development & Sustainable Business Institute at the European Business School, *Making FDI Work for Sustainable Development* (New York and Geneva: United Nations, 2004), online: https://unctad.org/system/files/official-document/ditcted9_en.pdf.

²⁵² *Ibid.*

²⁵³ Hassan M Ahmad, “*The Jurisdictional Vacuum: Transnational Corporate Human Rights Claims in Common Law Home States*” (2022) 70:2 *American Journal of Comparative Law* 227, online: <https://doi.org/10.1093/ajcl/avac036>.

²⁵⁴ *Ibid.*

to study the legislation and precedents of the countries where such cases have occurred, so as to provide suggestions for our courts to deal with the case of foreign direct liability.

A. Jurisdiction of the U.S.

In cases involving foreign direct liability, courts in the home country of the parent company may be unwilling or unable to exercise jurisdiction because the tortious act and the subsidiary were both located in the host country.

The United States, for instance, with its strong economic power and a global network of domestic companies' subsidiaries, often becomes a preferred jurisdiction for filing foreign direct liability lawsuits, especially given the frequent environmental pollution incidents in host countries and the U.S.'s relatively well-established legal system.²⁵⁵ However, for U.S. courts to establish jurisdiction over foreign direct liability cases, both personal jurisdiction and subject-matter jurisdiction must be satisfied.²⁵⁶ Personal jurisdiction refers to a court's authority over the parties involved in a case. While U.S. courts typically require that a defendant have "minimum contacts"²⁵⁷ with the forum state to satisfy personal jurisdiction

²⁵⁵ Many high-profile Foreign Direct Liability cases, especially those related to environmental harm or human rights violations, have been brought in U.S. courts. See, for example:

(1) *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [*Sosa*] discussed the scope of claims permissible under the ATS, requiring a high threshold for recognition of international norms;

(2) *Arab Bank, PLC*, No. 16-499, 584 U.S. 241 (2018): This decision held that foreign corporations cannot be sued under the ATS, further restricting its applicability in foreign direct liability cases;

(3) *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) and *Daimler AG v. Bauman*, 571 U.S. 117 (2014) [*Daimler*] which will be discussed further below.

²⁵⁶ Specifically, Rule 12(b) (2) of *Federal Rules of Civil Procedure*, Rule, 28 USC app (2023), allows the defendant to raise a plea of lack of personal jurisdiction in the reply. If the court finds a lack of personal jurisdiction, it may dismiss the case. And Rule 4(k) allows federal courts to assert personal jurisdiction in accordance with the laws of the state where they sit, effectively allowing them to "borrow" the long-arm statutes of that state. While subject matter jurisdiction is generally discussed in Rule 12(h) (3), which states that if a court lacks subject matter jurisdiction, it must dismiss the action. This rule emphasizes that subject matter jurisdiction cannot be waived and is a prerequisite for a court to hear a case. While there is no single provision that explicitly states that subject matter jurisdiction is required to hear a case, the *Federal Rules of Civil Procedure* and relevant statutory provisions clearly establish its necessity within the U.S. judicial system. Any case must first confirm that the court has appropriate subject-matter jurisdiction; otherwise, it cannot proceed. See Michael G. Congiu et al., "U.S. Supreme Court Forecloses Liability of Foreign Corporations under the Alien Tort Statute," Littler Mendelson P.C., May 10, 2018, online: <https://www.littler.com/news-analysis/asap/us-supreme-court-forecloses-liability-foreign-corporations-under-alien-tort>.

²⁵⁷ *Ibid*, also see *International Shoe Co v Washington*, 326 US 310 (1945). This landmark case established the "minimum contacts" standard for determining personal jurisdiction, stating that a court may exercise jurisdiction over a defendant if they have established sufficient connections with the forum state.

under constitutional due process,²⁵⁸ in cases under the ATS, courts also assess whether the claim sufficiently “touches and concerns” the United States, as established in *Kiobel v. Royal Dutch Petroleum Co.*²⁵⁹

Subject matter jurisdiction, on the other hand, pertains to a court's authority to hear a specific type of case based on its subject matter.²⁶⁰ A court must have subject matter jurisdiction to adjudicate a case, which is typically established by federal or state statutes that define the types of cases courts can hear.²⁶¹ Both types of jurisdiction are essential. Without personal jurisdiction, a court cannot compel a defendant to appear before it, while without subject matter jurisdiction, the court lacks the authority to decide the issues at stake in the case. Thus, for U.S. courts to hear cases involving foreign entities or direct liability claims, they must satisfy both requirements.

More precisely, regarding personal jurisdiction, as previously mentioned, the United States adheres to the “minimum contacts principle”. This means that, even if a defendant is only present in the U.S., jurisdiction can be exercised over them. A typical example is the famous case of *Filártiga v. Peña-Irala*,²⁶² a landmark decision by the U.S. Court of Appeals for the Second Circuit which was a pivotal case in both U.S. and international law. It addressed whether a foreign national could sue an official of a foreign government in U.S. courts for violations of international law. In this case, the tragic events began on March 29, 1976, when Joelito Filártiga, a seventeen-year-old boy in Paraguay, was kidnapped and brutally tortured to death by Américo Norberto Peña-Irala, the Inspector General of Police.²⁶³

²⁵⁸ *Supra* note 122. Also see *Walden v. Fiore*, 571 U.S. 277 (2014): This case further clarified the requirements for personal jurisdiction, emphasizing that a defendant's connections to the forum must be substantial and not merely random or fortuitous.

²⁵⁹ *Kiobel*, *supra* note 19.

²⁶⁰ *Supra* note 122.

²⁶¹ *Ibid.*

²⁶² *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

²⁶³ *Ibid.*

This act was allegedly in retaliation for the political beliefs of Joelito's father, Dr. Joel Filártiga, a vocal opponent of the Paraguayan government led by Alfredo Stroessner.²⁶⁴ Following the murder, Dr. Filártiga attempted to seek justice in Paraguay by filing murder charges against Peña and the police.²⁶⁵ However, his efforts were met with significant obstacles,²⁶⁶ even his attorney faced threats, imprisonment, and was ultimately disbarred without cause.²⁶⁷ The case stalled in the Paraguayan legal system.

In 1978, both Dolly Filártiga (Joelito's sister) and Peña entered the United States. Upon discovering Peña's presence in the U.S., Dolly reported him to the immigration authorities. This led to his arrest and deportation proceedings. While awaiting deportation, Dolly filed a civil lawsuit against Peña in U.S. federal court for wrongful death due to torture and sought 10 million dollars in damages.²⁶⁸ The case was initially dismissed by the U.S. District Court for the Eastern District of New York because of that limited international law's application to state relations,²⁶⁹ and then the case was appealed.²⁷⁰ The appellate court reversed this decision, recognizing that freedom from torture is protected under customary international law.²⁷¹ The Second Circuit stated that torturers are considered "enemies of all mankind," thus granting jurisdiction under the *Alien Tort Statute* (ATS)²⁷² for claims involving violations of international law. Ultimately, the court ruled in favor of the Filártigas, awarding them approximately \$10.4 million.²⁷³

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Alien Tort Statute*, 28 U.S.C. § 1350 (1948). ("ATS").

²⁷³ *Supra* note 227. See also, Roy R. Loya, "Federal Jurisdiction of Alleged Torturer Under the Alien Tort Statute: *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)" (1981) 6 *Md J Int'l L* 289, online: <https://digitalcommons.law.umaryland.edu/mjil/vol6/iss2/11>.

In this case, the United States Court of Appeals for the Second Circuit established the principle that even if the act occurred abroad and the perpetrator was not a U.S. citizen, as long as the victim could locate the perpetrator within U.S. territory, a lawsuit could be brought in U.S. courts. This case marked a significant expansion of human-rights law in the United States and established a precedent allowing U.S. federal courts to hold non-American citizens accountable for wrongful acts committed abroad that violate international law or treaties to which the U.S. is a signatory.

As far as corporations, especially multinational corporations are concerned, is it still the case?

In the case of *Daimler AG v. Bauman*, the key issue concerned the limits of personal jurisdiction over foreign corporations in the United States.²⁷⁴ The Argentinian plaintiffs in this case alleged that the Argentinian subsidiary of the German corporation, Daimler AG, was complicit in human rights abuses during Argentina's "Dirty War" from 1976 to 1983.²⁷⁵ They filed the case in the U.S., arguing that Daimler could be sued in California based on the activities of its U.S. subsidiary, Mercedes-Benz USA (MBUSA), which distributed vehicles in California.²⁷⁶ The District Court initially granted Daimler's motion to dismiss for lack of jurisdiction, then the Ninth Circuit Court first affirmed the dismissal, but later reversed this decision, asserting that MBUSA acted as Daimler's agent for jurisdictional purposes.²⁷⁷ Eventually, the U.S. Supreme Court reversed the Ninth Circuit's decision, ruling that California could not exercise personal jurisdiction over Daimler based solely on the activities of MBUSA.²⁷⁸

²⁷⁴ *Daimler*, *supra* note 255.

²⁷⁵ *Ibid* at 123-24.

²⁷⁶ *Ibid* at 123.

²⁷⁷ *Bauman v DaimlerChrysler Corp.*, 644 F Supp (2d) 1094 (ND Cal 2009), rev'd *Bauman v DaimlerChrysler AG*, 644 F3d 909 (9th Cir 2011).

²⁷⁸ *Daimler*, *supra* note 255 at 139-40.

The key issue here in this case was whether a U.S. court can exercise general jurisdiction over a foreign corporation simply because its subsidiary has business activities in the forum state. The ruling of the Supreme Court in this case limited the ability to bring such kind of cases from coming forward.²⁷⁹ The Supreme Court held that due process constraints prevent exercising jurisdiction over Daimler in California due to insufficient connections to the state.²⁸⁰ The Court emphasized that a corporation must be "essentially at home" in the forum state for general jurisdiction to apply.²⁸¹ Thus, the distinction between (i) general jurisdiction where a corporation can be sued for any claim, on the one hand, and (ii) specific jurisdiction, where claims must arise from activities within the forum state, was clarified.²⁸² The Court found that Daimler's affiliations with California were not sufficiently substantial to warrant general jurisdiction.²⁸³ The Court rejected the notion that MBUSA's activities could be imputed to Daimler so far to establish personal jurisdiction.²⁸⁴ It noted that even if MBUSA had sufficient contacts with California, those did not extend to Daimler itself.²⁸⁵ The case also raised considerations on corporate structure: the ruling underscored the importance of clear jurisdictional rules that allow corporations to understand where they may be subject to lawsuits.²⁸⁶ Some commentators argue that the ruling favoured large multinational

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid* at 126–27. “Due process constraints” means that courts must satisfy the requirements of procedural fairness when exercising jurisdiction, particularly in matters of personal jurisdiction. This requires ensuring the defendant has sufficient connections or “minimum contacts” with the forum state; otherwise, exercising jurisdiction would violate due process. In *Daimler*, *supra* note 255, the Supreme Court held that due process constraints prevent general jurisdiction over a foreign parent company merely because its subsidiary conducts business in California, as such contacts lack the necessary “continuous and systematic” affiliation to render the parent “essentially at home” in the forum state.

²⁸¹ *Ibid* at 137.

²⁸² *Ibid* at 126–27. See also, Leeann Littlejohn & Lisa A Decker. “Corporate Personal Jurisdictional Protections Derailed?” (2024) 38:3 *Nat Resources & Env’t* 52 at 52.

²⁸³ *Daimler*, *supra* note 255 at 139.

²⁸⁴ *Ibid* at 759–61.

²⁸⁵ *Ibid.*

²⁸⁶ Comment, “*Daimler AG v Bauman*” (2014) 128 Harv L Rev 311.

corporations by limiting their exposure to litigation in states where they have limited operations.²⁸⁷

The decision in *Daimler AG v. Bauman* has profound implications for corporate liability and human-rights litigation in the U.S., particularly regarding foreign companies. It established a higher threshold for asserting general jurisdiction based on subsidiary contacts: a foreign company cannot be subject to general jurisdiction because of the business activities of its subsidiary in the U.S.;²⁸⁸ and general jurisdiction can only be exercised in the company's "home" territory, such as its place of incorporation or principal place of business.²⁸⁹ This potentially shields multinational corporations from lawsuits in jurisdictions where they have minimal direct presence or involvement.²⁹⁰

In the case of *Jesner v. Arab Bank*,²⁹¹ the same Court considered the eligibility of corporations as defendants for violations of international law. It found no clear precedent or consensus in international law supporting the liability of corporations, as opposed to natural persons, for violations of international norms.²⁹² However, it also argued by Justice Sotomayor in the same case that this was only because "states' collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants".²⁹³ And since "it may seem necessary and natural that corporate entities are liable for violations of international law under the ATS", ultimately the Court did not ban corporations being sued as defendants under ATS²⁹⁴ although the ruling did place certain restrictions on this potential availability of the use of the norms of international law.²⁹⁵ And

²⁸⁷ *Ibid.*

²⁸⁸ *Daimler*, *supra* note 255.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Jesner*, *supra* note 20.

²⁹² *Ibid* at 1400.

²⁹³ *Ibid* at 1423.

²⁹⁴ ATS, *supra* note 272. The law states: "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."

²⁹⁵ *Jesner*, *supra* note 20 at 1402.

in addition to these considerations for the establishment of personal jurisdiction with regard to cases of foreign direct liability, subject matter jurisdiction, on the other hand, is not lack of considerations and restrictions in the United States. The uncertainty around the legal basis for subject-matter jurisdiction in foreign direct liability cases may also arise from the application of the ATS,²⁹⁶ which has seen evolving interpretations in recent U.S. Supreme Court decisions.

As far as Alien Tort Statute is concerned,²⁹⁷ which is also known as the Alien Tort Claims Act, it is a significant piece of legislation in U.S. law. It was created as part of the *Judiciary Act of 1789*.²⁹⁸ It allows federal courts to hear civil cases brought by non-U.S. citizens, who are called aliens, for wrongdoings that violate international law or U.S. treaties”.²⁹⁹ Therefore, ATS was designed to help foreign nationals seek justice in U.S. courts for violations of international norms. It aims to prevent conflicts between countries by providing a legal mechanism for foreigners to address grievances against U.S. citizens, thereby hopefully promoting harmony in international relations.³⁰⁰ The key points of the statutes include four essential elements: firstly, the ATS is only for civil lawsuits rather than criminal cases; secondly, only non-U.S. citizens can file claims under it; the claims must be about torts; and lastly, the torts must break international laws or treaties.³⁰¹ Although the ATS has been part of U.S. law since 1789, it was not used much until the 1980s. After then, it began to be invoked more frequently in human-rights cases.³⁰²

²⁹⁶ ATS, *supra* note 272. The law states: "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."

²⁹⁷ *Ibid.*

²⁹⁸ "Alien Tort Statute", *Wex: Legal Encyclopedia*, Cornell Law School, online: Cornell Law School < https://www.law.cornell.edu/wex/alien_tort_statute >.

²⁹⁹ *Ibid.*

³⁰⁰ Congressional Research Service, *The Alien Tort Statute: A Primer* (Report R44947, updated Jan 11 2022) at 3, online (pdf): FAS-SGP <https://sgp.fas.org/crs/misc/R44947.pdf>.

³⁰¹ *Ibid.*

³⁰² *Ibid.*

Over the years, various court rulings have clarified the interpretation and application of the ATS, such as the case of *Sosa v. Alvarez-Machain*,³⁰³ in which the Supreme Court said that only serious violations that are “specific, universal, and obligatory” of international law can be claimed under the ATS, which establishing a high threshold for what constitutes actionable norms under international law;³⁰⁴ and in *Kiobel*,³⁰⁵ the Court ruled that the ATS usually does not apply to actions outside the U.S., unless there is a strong link to the country.³⁰⁶ Speaking of *Kiobel*, as a U.S. Supreme Court case regarding extraterritorial application and corporate liability, it presents an intriguing contrast with the *Nevsun* case. It is clear that *Nevsun* is a Canadian company subject to Canadian laws and jurisdiction. This is obviously distinct from U.S. cases such as *Kiobel*, involving foreign corporations as defendants.

In *Kiobel*, the plaintiffs filed a class action lawsuit on behalf of Nigerian residents against Shell’s Dutch and British parent companies.³⁰⁷ It was filed under the ATS since the statute allows foreigners to sue in U.S. courts for international law violations. These residents protested environmental degradation caused by Shell’s operations.³⁰⁸ They claimed that Shell collabourated with the Nigerian military to suppress these protests, leading to torture and executions of their activists.³⁰⁹ The case had been processed through United States District Court for the Southern District of New York, to the Second Circuit Court of Appeals.³¹⁰ The Second Circuit dismissed their claims entirely based on a lack of justification for extra-territorial application of the ATS.³¹¹ The case ultimately reached the

³⁰³ *Sosa*, *supra* note 255.

³⁰⁴ *Supra*, note 263.

³⁰⁵ *Kiobel* *supra* note 19.

³⁰⁶ *Ibid.*

³⁰⁷ *Ibid.*, page 108.

³⁰⁸ *Ibid.*, page 113.

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

U.S. Supreme Court to address whether corporations can be held liable for human-rights violations, and if U.S. federal courts have jurisdiction over claims related to such abuses occurring outside the United States under the ATS.³¹² The Supreme Court ruled in 2013 that the presumption against extraterritoriality applies to claims under the ATS, meaning that such claims must "touch and concern" the territory of the United States with sufficient force to overcome this presumption.³¹³ The Court found that Shell's actions did not meet this standard, effectively dismissing the plaintiffs' claims.³¹⁴ The ruling in *Kiobel* limited the extraterritorial application of the ATS, requiring claims to "touch and concern" the U.S. with sufficient force to overcome the principle of the presumption against extraterritoriality.³¹⁵

In addition to the *Kiobel* case, as introduced earlier, the U.S. Supreme Court case of *Jesner v. Arab Bank*³¹⁶ has restricted the scope of the ATS further. Based on the need to preserve United States' institutional foundations or foreign relations, the ruling in *Jesner* held that foreign corporations cannot be sued under the ATS.³¹⁷ Thus, it restricted its applicability in foreign direct liability cases by only providing the possibility of suing U.S. corporations under the ATS, although these cases face other challenges, such as proving the required connection to the U.S. or identifying actionable violations of international law.

In summary, the ATS is an important tool for addressing international human-rights violations in U.S. courts. It allows courts to hear cases based on existing international laws. But it has specific rules about when it can be used. In addition to the limitation of its application to claims involving a clear and universally accepted international-law violation,

³¹² *Ibid*, page 108.

³¹³ *Ibid*, page 125.

³¹⁴ *Ibid*.

³¹⁵ *Supra* note 136.

³¹⁶ *Jesner*, *supra* note 20. See also, Beth Stephens, "The Curious History of the Alien Tort Statute" (2014) 89 *Notre Dame Law Review* 1467, online: SSRN <https://ssrn.com/abstract=2437120>.

³¹⁷ *Jesner*, *supra* note 20. The majority opinion, written by Justice Kennedy, emphasized that creating a new cause of action allowing foreign corporations to be sued under the ATS would intrude on the separation of powers and risk diplomatic tensions, as foreign policy issues are primarily within the purview of Congress and the executive branch.

as far as jurisdiction is concerned, these specific limitations can be summarized as: (1) the claimed conduct has a substantial connection to the United States; (2) the defendant is not a foreign corporation; (3) the presumption against extraterritoriality is overcome by showing the case sufficiently “touches and concerns” the U.S..

Therefore, if the defendant is a corporation, U.S. courts may be able to exercise jurisdiction if the company has substantial business activities or relationships in the U.S. Therefore, applied to foreign direct litigation cases, as long as transnational corporations have activities or connections in the U.S., which is often quite common, theoretically, it is possible and reasonable for the U.S. courts to assert jurisdiction over these corporate defendant. Thus, if the parent company is an American company, establishing jurisdiction over the parent under U.S. law should not be difficult. As for the further allocation of responsibility, whether the parent company should bear the consequences and corresponding liabilities caused by its overseas subsidiary will be left for discussion in the context of the responsibility allocation between the parent and subsidiary companies.

However, a further question arises here: how does the court in the parent company’s home state establish jurisdiction over the subsidiary? In other words, in cases where the parent company is based in the United States and its overseas subsidiary causes harm to nationals of the host country, can U.S. courts hear lawsuits against either the parent or the subsidiary for actions of the subsidiary in a foreign jurisdiction? Based on the previous analysis and discussion, we know that foreign companies have lost their standing as defendants under the ATS, so the ATS cannot be used to address or resolve this issue. So, are there any other theories or cases that support the ability of victims of foreign companies' wrongful acts to seek judicial relief in the United States?

The precedent for this issue is the *Goodyear* case³¹⁸. In this case, the U.S. Supreme Court established that courts can only exercise general jurisdiction over a foreign subsidiary if the subsidiary has “continuous and systematic affiliations” with the forum state, such that the subsidiary is essentially “at home” there.³¹⁹ This typically requires the subsidiary to have its principal place of business or headquarters in the U.S. So, when the case is unrelated to any actions of the subsidiary in the forum state, general jurisdiction over the overseas subsidiary can only be exercised if the subsidiary has continuous and systematic connections with the forum state, to the extent that it is essentially considered a company of the forum state. Specifically, in the *Goodyear* case, the plaintiffs were residents of North Carolina, whose relatives were killed in a bus accident in France. The vehicle involved in the accident used tires manufactured by Goodyear's European subsidiaries. The plaintiffs filed a lawsuit in North Carolina, seeking to hold Goodyear and its subsidiaries in Luxembourg, Turkey, and France liable for the defective tires. Because the tire manufactured by a Goodyear subsidiary in Turkey was a contributing factor in the bus accident outside Paris, France, which resulted in the deaths of two 13-year-old boys from North Carolina.³²⁰ The key issue of the case revolved around the argument of Goodyear's foreign subsidiaries. They argued that the North Carolina court lacked general jurisdiction over them since their activities were not sufficiently connected to the state.³²¹ Indeed, the Court found that the subsidiaries’ activities in the U.S. (e.g., limited sales) were insufficient to establish continuous and systematic ties.³²² Since the connection between the subsidiary and the forum state in this case was insufficient to establish jurisdiction, the Supreme Court ruled that the North Carolina courts lacked general jurisdiction over the foreign subsidiary.³²³

³¹⁸ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

³¹⁹ *Ibid.*

³²⁰ *Ibid.*, page 915.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ *Ibid.*

The *Goodyear* decision set a high bar for establishing general jurisdiction over foreign subsidiaries. This significantly limits the ability to bring cases against subsidiaries of U.S.-based multinational corporations in U.S. courts, particularly in cases involving harm to host-country nationals, such as environmental damages. The key limitations include (i) the “minimum contacts” principle that plaintiffs must show a direct and substantial connection between the subsidiary’s activities and the forum state; and (ii) their scope of business activities, because limited sales or activities within the U.S. are generally insufficient to establish general jurisdiction. Therefore, in the absence of general jurisdiction based on such limitations, the *Goodyear* case reduces the likelihood of suing subsidiaries causing environmental damage in host countries in U.S. courts.

This case led to the thinking that to sue a subsidiary in a U.S. court, plaintiffs must demonstrate strong connections between the subsidiary and the forum state.³²⁴ Moreover, cases like *Daimler AG v. Bauman*³²⁵ also significantly narrowed the scope of general personal jurisdiction, emphasizing the need for strong ties between the defendant and the forum state.³²⁶ Nevertheless, although these precedents restrict general jurisdiction, these limitations also provide certain standards for both U.S. companies and foreign companies to be sued in the U.S. for certain misconduct against international law.

Furthermore, for cases involving transnational harms, there are alternative legal strategies to pursue claims. One such strategy is exploring specific jurisdiction.³²⁷ If a direct link can be established between the subsidiary’s conduct and the harm alleged in the case — for example, contracts signed or decisions made in the U.S. — the court may exercise specific

³²⁴ *Ibid*, page 919.

³²⁵ *Supra* note 239.

³²⁶ *Ibid*.

³²⁷ *Daimler*, *supra* note 255 at 127

jurisdiction over the case.³²⁸ Piercing the corporate veil is another approach. If the parent company exercises significant control over the subsidiary, treating the subsidiary as merely an extension of the parent, courts may allow jurisdiction based on the parent company's connections to the forum state.³²⁹ Finally, parties may seek international legal cooperation.³³⁰ Some of these potential and viable pathways will be further discussed in this paper later in the following content.

To sum up, in the United States, the jurisdiction over foreign direct liability cases is analyzed through two primary lenses: personal jurisdiction and subject matter jurisdiction. Personal jurisdiction refers to a court's authority over the parties involved in a lawsuit, particularly the defendant. In assessing personal jurisdiction, courts scrutinize the relationship between a parent company and its subsidiary. If the connection between the subsidiary and the forum state is insufficiently strong, the court may determine that it lacks personal jurisdiction over the subsidiary. Factors such as: (i) the subsidiary's business activities within the state and (ii) its operational ties to the parent company, are critical in this evaluation. Subject-matter jurisdiction involves whether a court has the authority to hear a particular type of case. In cases where plaintiffs invoke the ATS as a basis for subject matter jurisdiction, they may encounter challenges due to the application of theories like anti-extraterritoriality. This principle can prevent courts from asserting jurisdiction over claims that do not sufficiently connect to U.S. territory or interests, particularly when actions take place outside U.S. borders.³³¹ Even when both personal and subject-matter jurisdiction are

³²⁸ According to Rule 4(k) (2) of the *Federal Rules of Civil Procedure*, *supra* note 256, a federal court may also establish jurisdiction over a foreign defendant as long as the conduct has a significant impact on the United States. There are also cases helped establishing the standard for specific jurisdiction, such as *International Shoe Co. v. Washington* *supra* note 257, *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 US __ (2017), etc.

³²⁹ *Chevron*, *supra* note 8 at para 77.

³³⁰ Plaintiffs may consider filing lawsuits in the host country where the harm occurred and explore international legal frameworks for enforcement. However, this issue falls outside the scope of the current thesis and may be explored in future studies.

³³¹ Michael G Congiu et al, "U.S. Supreme Court Forecloses Liability of Foreign Corporations under the Alien Tort Statute," *Littler Mendelson* (10 May 2018), online: <<https://www.littler.com/news-analysis/asap/us-supreme->

established, defendants may raise a *forum non conveniens* defense, arguing that litigation in the U.S. court would be unnecessarily inconvenient for them, when compared to another jurisdiction.³³² U.S. courts often consider such defenses seriously and may dismiss cases on these grounds if they find that another forum would be more appropriate for resolving the dispute.³³³ Overall, there is a tightening trend regarding U.S. jurisdiction over foreign direct liability cases.³³⁴ The likelihood of victims successfully bringing lawsuits in U.S. courts has been diminishing, particularly as recent Supreme Court decisions limit the applicability of the ATS to foreign corporations, thus complicating avenues for redress against multinational companies for human rights violations abroad.³³⁵

U.S. jurisdiction over foreign direct liability cases is tightening, and the likelihood of victims' claims being successfully accepted in U.S. courts is declining.³³⁶ While in terms of Canada, compared to the United States, the situation is not entirely the same.

B. Jurisdiction in some European countries.

In recent years, some countries have supported jurisdiction over foreign direct liability cases in judicial practice in a more straightforward way. The first instance is the Dutch case

court-forecloses-liability-foreign-corporations-under-alien-tort>. And also see, Steve Nickelsburg, “Renewed Fight in US Supreme Court Over Corporate Liability for Alleged International Human Rights Violations” (7 July 2020), *Business & Human Rights Insights* (Clifford Chance), online: < <https://www.cliffordchance.com/insights/resources/blogs/business-and-human-rights-insights/2020/07/renewed-fight-in-us-supreme-court-over-corporate-liability.html> >.

³³² Gary B Born & David Westin, *International Civil Litigation in United States Courts*, 2nd ed (Boston: Kluwer Law International, 1994) at 275, cited in U.S. Department of State, “U.S. Annex C” (n.d.), online: https://1997-2001.state.gov/global/legal_affairs/us_annex-c.html.

³³³ Ryan Micalief, “Liability Laundering and Denial of Justice: Conflicts between the Alien Tort Statute and the Government Contractor Defense”, (2006) 71 *Brook L Rev* 1049, online: <https://brooklynworks.brooklaw.edu/blr/vol71/iss3/6> . See also, Thomas J. Ellis, “The Rise, Fall, and Resurrection of the Alien Tort Statute” (2024) 57 *U ICL REV* 863.

³³⁴ *Supra* note 292.

³³⁵ *Ibid*, also see, Jessica Lin, “Pitfalls and Promises of the Alien Tort Statute: In Pursuit of Corporate Accountability” (22 January 2020), *Columbia Undergraduate Law Review*, online: <https://www.culawreview.org/journal/pitfalls-and-promises-of-the-alien-tort-statute-in-pursuit-of-corporate-accountability>.

³³⁶ *Supra* note 292.

of *Akpan v. Royal Dutch Shell*,³³⁷ which was adjudicated by the District Court of The Hague in 2013.³³⁸ This case provides significant insights into the jurisdictional challenges in foreign direct liability litigation. It concerned oil spills that occurred near a village in Nigeria.³³⁹ The defendants were a Dutch company Royal Dutch Shell (RDS) and its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC).³⁴⁰

The case is notable for discussing whether a home country court can exercise jurisdiction over a multinational corporation's foreign subsidiary for alleged overseas environmental harm.³⁴¹ The court first examined its jurisdiction over the parent company and its subsidiary.³⁴² This determination was relatively straightforward. The court held that it had jurisdiction under Section 7 of the *Dutch Code of Civil Procedure* (DCCP),³⁴³ which allows Dutch courts to hear claims against a domestic defendant as well as closely connected claims against a foreign co-defendant.³⁴⁴ Since the headquarters of the parent company RDS was located in the Netherlands, RDS could be sued in its domicile in the Netherlands. Hence, the Dutch court had clear jurisdiction over the parent company.³⁴⁵ With regard to the jurisdiction over SPDC, the Nigerian subsidiary, the court found that there was a sufficient connection between the claims against RDS and SPDC to justify joint litigation.³⁴⁶ Under Article 7(1) of the DCCP, Dutch courts can exercise jurisdiction over a foreign co-defendant if the case against the domestic defendant (RDS) is closely connected to the claims against the foreign

³³⁷ *Akpan et al. v. Royal Dutch Shell plc and Shell Petroleum Development Company of Nigeria Ltd*, District Court of The Hague, 30 January 2013, Case No. C/09/337050 / HA ZA 09-1580.

Also see Cedric Ryngaert, "Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the *Akpan v Shell* Litigation in the Netherlands", (2013) 8:2 *McGill JL Sustainable Dev* 245, 2013 *CanLIIDocs* 138, online: <https://canlii.ca/t/281n>.

³³⁸ *Ibid.*

³³⁹ *Ibid* at para 2.1.

³⁴⁰ *Ibid* at para 2.2.

³⁴¹ *Ibid* at para 2.1-2.4.

³⁴² *Ibid* at para 4.1-4.7.

³⁴³ *Wetboek van Burgerlijke Rechtsvordering* (Dutch Code of Civil Procedure), Rv, online: <http://www.dutchcivillaw.com/civilprocedureleg.htm>.

³⁴⁴ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.1

³⁴⁵ *Ibid.*

³⁴⁶ *Ibid* at para 4.1-4.7.

entity.³⁴⁷ As a result, in this case, the parent company was used as an “anchor defendant” to help exert jurisdiction on its abroad subsidiary company.³⁴⁸ The “anchor defendant” theory allows jurisdiction over a foreign subsidiary when it is closely linked to the claims against the parent company.³⁴⁹ The reasoning was that if the Dutch court had jurisdiction over RDS, it could extend jurisdiction to SPDC under the principle of joint litigation, provided that the claims were sufficiently connected.³⁵⁰ The court determined that since both RDS and SPDC were alleged to have failed to prevent environmental harm, the claims against them were interlinked and should be adjudicated together.³⁵¹ In fact, the European Union currently has a binding instrument for determining jurisdiction and the recognition and enforcement of judgments in most civil and commercial matters within the EU — the *Brussels I Regulation (recast)*.³⁵² Its Article 4(1) grants jurisdiction over entities domiciled in a Member State, while Article 63(1) defines how a company’s domicile is determined.³⁵³ However, since the *Brussels I Regulation* only applies to companies domiciled within the EU, and according to

³⁴⁷ DCCP, *supra* note 343. Article 7 “Jurisdiction over counter actions, joinders and interventions”:

- 1. If legal proceedings are to be initiated by a writ of summons and a Dutch court has jurisdiction with respect to one of the defendants, then it has jurisdiction as well with respect to the other defendants who are called to the same proceedings, provided that the rights of action against the different defendants are connected with each other in such a way that a joint consideration is justified for reasons of efficiency.

³⁴⁸ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.1-4.7

³⁴⁹ In Article 8(1) of *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, [2012] OJ L 351/1, it provides that a defendant domiciled in a Member State may also be sued “where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments.” Although *Akpan* referred to Section 7 of the DCCP, it is essentially consistent with *Brussels’* anchor rule.

³⁵⁰ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.5.

³⁵¹ *Ibid.*, at para 4.5.

³⁵² *Supra* note 349, *Brussels I Regulation (recast)* art 4, formerly Article 2 of the original *Brussels I Regulation*, *i. e.* Council Regulation (EC) No 44/2001. This regulation was replaced by Regulation (EU) No 1215/2012 which has been in effect since January 10, 2015. Online: < <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215> >.

³⁵³ Article 4 (1). Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Article 63 (1). For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business.

Article 6(1) of the *Regulation*, jurisdiction over foreign subsidiaries must be established based on the law of that Member State.³⁵⁴

The court also addressed arguments related to procedural fairness and predictability. SPDC contended that it could not have reasonably foreseen being sued in the Netherlands.³⁵⁵ It relied on case law from the European Court of Justice (ECJ) in *Painer*³⁵⁶ to argue that the legal bases for claims against the parent and subsidiary were not sufficiently aligned.³⁵⁷ However, the court rejected this argument.³⁵⁸ The court emphasized that:

- (a) firstly, holding parent companies accountable for the acts of their foreign subsidiaries has become an increasingly accepted approach in international case law,³⁵⁹
- (b) secondly, the environmental harm caused by oil spills was widely known and had been subject to previous litigation, making it foreseeable that SPDC could be sued in the Netherlands,³⁶⁰
- (c) thirdly, Nigerian tort law recognized the possibility of parent company liability, supporting the legitimacy of hearing the case in a Dutch court.³⁶¹ So the claims against the parent and subsidiary companies were closely related in several ways: their corporate structures, the consistency of the claims against them, the fact that the lawsuit was based on the same oil spill incident, their responsibilities on taking

³⁵⁴ *Brussels I Regulation (recast)*, Article 6 (1). If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State.

³⁵⁵ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.4.

³⁵⁶ *Eva-Maria Painer v Standard Verlags GmbH and Others* (2011), Case C-145/10, ECLI:EU:C:2011:798 (ECJ). The *Painer* case is significant because it helped define jurisdictional rules in EU litigation, particularly regarding where a lawsuit can be filed in cases involving multiple defendants. While Shell used *Painer* to argue against the Dutch court's jurisdiction over its Nigerian subsidiary, the court ultimately rejected this argument by emphasizing the close connection between the parent and subsidiary's responsibilities.

³⁵⁷ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.4.

³⁵⁸ *Ibid* at para 4.5.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid*.

³⁶¹ *Ibid* at para 4.3.

preventive and remedial measures, and the need for further investigations, which were best conducted by a single court.³⁶²

The *Akpan* decision is an important precedent for jurisdiction over foreign subsidiaries. From the judgments of this case, it is clear that the Dutch courts confirmed their jurisdiction over the subsidiary through analyses of connection, predictability, and the reasonableness of joint litigation.³⁶³ On the one hand, it emphasizes the importance of procedural fairness.³⁶⁴ Courts of law must balance the interests of predictability for foreign defendants with the broader goal of ensuring access to justice for claimants in transnational tort cases.³⁶⁵ On the other hand, it increases accountability of multinational corporations. Its ruling aligns with a global trend toward holding parent companies accountable for environmental and human rights abuses occurring in foreign jurisdictions.³⁶⁶ What's more, it is worth noting that the decision in the case supports the idea that home forum courts can extend jurisdiction over foreign subsidiaries when the claims against them are closely linked to the claims against the parent company.³⁶⁷ The parent company in this case serves solely as an "anchor defendant".³⁶⁸ It generally means that if a Dutch court has jurisdiction over the parent company, then according to the rule of joint litigation in the DCCP, the Dutch court also obtains extended jurisdiction over the co-defendant subsidiary, regardless of whether the parent company actually owes a duty of care to the subsidiary.³⁶⁹ In other words, the court's

³⁶² *Ibid* at para 2.2-2.6, 4.1-4.5.

³⁶³ *Ibid* at para 4.1-4.7.

³⁶⁴ *Ibid*

³⁶⁵ *Supra* note 237, at 314.

³⁶⁶ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.5.

³⁶⁷ *Ibid*.

³⁶⁸ Piyush Agrawal & Shivangi Thard, "Strategic battlefields: navigating jurisdictions in international commercial disputes" (4 April 2025), International Bar Association, online: <https://www.ibanet.org/strategic-battlefields-navigating-jurisdictions>.

³⁶⁹ *Akpan v. Royal Dutch Shell*, *supra* note 337 at para 4.1.

jurisdiction over the subsidiary derives from its jurisdiction over the parent company rather than based on the subsidiary itself.³⁷⁰

Under this theory, establishing jurisdiction over the parent company is crucial for establishing jurisdiction over the subsidiary, as jurisdiction over the parent company is a prerequisite for obtaining jurisdiction over the subsidiary. And even if the claim against the parent company was dismissed — meaning the anchor lawsuit failed — the court still ruled that it should not decline jurisdiction over the case based on the *forum non conveniens* principle. The international jurisdiction over the subsidiary was not based on the success of the lawsuit against its parent company.³⁷¹

The UK courts also have increasingly recognized such parent company anchor defendant theory as a viable mechanism for asserting jurisdiction in foreign direct liability cases. Several landmark cases, including *Lungowe v Vedanta* (2019)³⁷² and *Okpabi v Shell* (2021)³⁷³, illustrate how UK courts have approached jurisdictional questions and refined the legal reasoning behind holding parent companies accountable. There are some key judicial reasoning in UK cases. To be more specific, firstly, there should be a real triable issue against the parent company: the UK courts have emphasized that a parent company can owe a duty of care to third parties affected by the operations of its subsidiary if it exercises a sufficient degree of control over the subsidiary's activities.³⁷⁴ For instance, in *Lungowe v Vedanta*, the UK Supreme Court found that Vedanta had published environmental and corporate responsibility policies and actively intervened in the management of Konkola Copper Mines.³⁷⁵ This created a real issue to be tried regarding Vedanta's liability.³⁷⁶ Secondly, there

³⁷⁰ *Ibid.*

³⁷¹ *Ibid* at para 4.6.

³⁷² *Vedanta*, *supra* note 26.

³⁷³ *Okpabi*, *supra* note 27.

³⁷⁴ *Vedanta*, *supra* note 26 at para 49.

³⁷⁵ *Ibid* at paras 53–61.

³⁷⁶ *Ibid.*

is a risk of denial of substantive justice in the host country.³⁷⁷ The courts have considered whether claimants would receive effective justice in the subsidiary's home jurisdiction.³⁷⁸ In the case, the Supreme Court noted that there were serious obstacles to accessing justice in Zambia, such as legal and financial barriers, which justified allowing the case to proceed in the UK.³⁷⁹ Similarly, in *Okpabi v Shell*, the UK Supreme Court recognized that procedural difficulties in Nigeria could prevent claimants from obtaining a fair trial, reinforcing the necessity of adjudicating the case in the UK.³⁸⁰ Thirdly, the relationship between the parent and subsidiary is also a key matter to be considered by the court.³⁸¹ The courts have rejected a "formalistic approach" that looks at the legal structure or form of the companies, assuming that the parent company and its subsidiaries are completely independent from each other just because they are legally separate entities.³⁸² Instead, they apply a functional test, which looks beyond just the legal structure and examines how the parent company interacts with its subsidiary, to assess whether the parent company had substantive control over decision-making and operations of the subsidiary.³⁸³ In *Okpabi v Shell*, the court emphasized that corporate structure alone does not prevent a parent company from being liable; rather, the degree of practical control and involvement is what determines their potential liability.³⁸⁴

The UK courts' approach in these cases provides a clear legal framework for establishing jurisdiction in foreign direct liability cases:

- (a) the parent company's involvement in the subsidiary's operations creates a justiciable issue, allowing UK courts to exercise jurisdiction;³⁸⁵

³⁷⁷ *Ibid* at paras 88–89.

³⁷⁸ *Ibid*.

³⁷⁹ *Ibid*.

³⁸⁰ *Okpabi*, *supra* note 27 at paras 148–149.

³⁸¹ *Vedanta*, *supra* note 26 at para 49.

³⁸² *Ibid*.

³⁸³ *Okpabi*, *supra* note 27 at paras 143–144.

³⁸⁴ *Ibid* at para 147.

³⁸⁵ *Vedanta*, *supra* note 26 at para 44; *Okpabi*, *supra* note 27 at paras 29–31.

- (b) a denial of justice in the host country strengthens the justification for adjudicating the case in the UK, ensuring effective remedies for claimants;³⁸⁶ and,
- (c) corporate control and responsibility shall be assessed based on actual influence rather than mere legal separation on structures, which makes it harder for transnational corporations to evade liability through complicated corporate structures.³⁸⁷

Indeed, a key challenge in holding transnational corporations accountable is the artificial separation they create within corporate groups.³⁸⁸ Often, since the parent company does not directly carry out certain activities, it channels them through subsidiaries, which function as separate legal entities in form but not necessarily in substance.³⁸⁹ The strategic use of subsidiaries allows parent companies to benefit financially, while attempting to shield themselves from liability for harmful activities carried out at the operational level.³⁹⁰ However, as recognized in *Smith, Stone & Knight Ltd v Birmingham Corporation*, courts may disregard this formal separation where the parent exercises effective control and derives economic benefit, thereby looking through the corporate structure to reflect the true nature of the relationship.³⁹¹ This reinforces the principle that corporate control and responsibility should be assessed based on actual influence and benefit rather than mere legal structures, making it more difficult for transnational corporations to evade liability through complex corporate arrangements.³⁹²

³⁸⁶ *Vedanta*, *ibid* at para 88-90.

³⁸⁷ *Ibid*, at para 49-51.

³⁸⁸ C Harrington Johnston, “Book Review of *the Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* by Phillip I Blumberg” (1994) 21 CanLIIDocs 21.

³⁸⁹ *Ibid*.

³⁹⁰ Peter Muchlinski, *Multinational Enterprises and the Law*. 3rd ed (Oxford University Press, 2021) at 8.

³⁹¹ *Smith, Stone & Knight Ltd v Birmingham Corporation*, [1939] 4 All ER 116 (KB).

³⁹² Andrew Sanger, “Crossing the Corporate Veil: The Duty of Care Owed by a Parent Company to the Employees of its Subsidiary” (2012) 71:3 Cambridge LJ 478 at 478–481, online: JSTOR <https://www.jstor.org/stable/41819920>.

All in all, these rulings set significant precedents for holding transnational corporations accountable for the actions of their foreign subsidiaries. They also highlight the increasing judicial willingness to expand access to justice in transnational corporation liability cases.

C. Jurisdiction in Canada.

When it comes to cases involving foreign direct litigation, different judicial practice provides different cases and legal tools to help resolve this type of cases. As mentioned earlier, the U.S. courts rely more on federal statutes, such as the *Alien Tort Statute* (ATS), to establish jurisdiction, although ATS claims against foreign corporations have been limited since ATS litigation in the U.S. has declined after Supreme Court rulings such as *Kiobel v. Royal Dutch Petroleum*³⁹³ and *Jesner v. Arab Bank*.³⁹⁴ Unlike the ATS in the U.S., Canada lacks a specific statute allowing foreign plaintiffs to sue corporations for human rights abuses abroad.³⁹⁵ Canadian courts rely on principles extracted from its legal practices and laws, such as corporate law, tort law, and international law.³⁹⁶ Regarding jurisdiction over foreign direct liability case, key factors that impact Canadian courts' determination on it generally include the following considerations:

First, the “real and substantial connection” doctrine – this is a key principle in Canadian conflict of laws which is used to determine whether a Canadian court has jurisdiction over a case, particularly when the dispute involves foreign parties or events that occurred outside of Canada.³⁹⁷ It ensures that Canadian courts can exercise jurisdiction if there is a real and

³⁹³ *Kiobel*, *supra* note 19.

³⁹⁴ *Jesner*, *supra* note 20.

³⁹⁵ *Supra* note 80, Susana C. Mijares Peña.

³⁹⁶ Joost Blom, "Recent Developments in Canadian Law: Conflict of Laws" (1988) 20:2 Ottawa L Rev 415, online: CanLII Docs <https://www.canlii.org/en/commentary/doc/1988CanLIIDocs6>.

³⁹⁷ Jean-Gabriel Castel, “The Uncertainty Factor in Canadian Private International Law” (2007) 52:3 McGill LJ 555, online: <https://lawjournal.mcgill.ca/wp-content/uploads/pdf/154980-52.3.Castel.pdf>.

substantial connection between the parties or the subject matter of the action and the forum.³⁹⁸ This simply means Canadian courts only exercise jurisdiction when there is a meaningful connection between the dispute and a territorial division of Canada.³⁹⁹ This principle was originally developed in the context of the recognition and enforcement of judgments between Canadian provinces.⁴⁰⁰ In *Morguard Investments Ltd. v. De Savoye*,⁴⁰¹ the Supreme Court of Canada addressed a situation where a court in one province (British Columbia) was asked to enforce a judgment from another province (Alberta).⁴⁰² Because both provinces are part of the same country, the Supreme Court found it appropriate to generally accept the assertion of jurisdiction by the courts of another province, provided that there was a real and substantial connection between the forum and the dispute.⁴⁰³ This interprovincial context made it constitutionally easier for Canadian courts to recognize and enforce judgments from other provinces on the basis of a real and substantial connection.⁴⁰⁴ In the subsequent *Club Resorts Ltd. v. Van Breda* case,⁴⁰⁵ the Supreme Court further clarified that the real and substantial connection test also applies to international disputes. The Court confirmed that the real and substantial connection principle provides a framework not only for interprovincial matters but also for determining jurisdiction in cases involving foreign parties and events occurring outside Canada.⁴⁰⁶ This case refined the "real and substantial connection" test by setting out a structured and flexible approach since this connection must be significant and not just brief or relatively unimportant.⁴⁰⁷ It outlined several specific factors to consider:

³⁹⁸ *Ibid.*

³⁹⁹ *Ibid.*

⁴⁰⁰ *Ibid* at 557.

⁴⁰¹ *Morguard Investments Ltd. et al. v. De Savoye*, (1990) 122 N.R. 81 (SCC). [*"Morguard"*].

⁴⁰² *Ibid* at 1102–03.

⁴⁰³ *Ibid* at 1102–03.

⁴⁰⁴ Jean-Gabriel Castel, *supra* note 397 at 558.

⁴⁰⁵ *Van Breda*, *supra* note 134.

⁴⁰⁶ *Ibid* at paras 23, 32–33.

⁴⁰⁷ *Ibid* at paras 75–80.

- (a) Defendant's domicile or residence in the jurisdiction⁴⁰⁸ – If the defendant is a Canadian company or individual, there is usually a strong basis for jurisdiction;⁴⁰⁹
- (b) Defendant's business operations in the jurisdiction – If the company regularly conducts business in Canada, even if the dispute relates to foreign operations, a court may assume jurisdiction;⁴¹⁰
- (c) Tort committed in the jurisdiction – If any part of the wrongful act, such as negligent decision-making or corporate policies, was formulated in Canada, courts may take jurisdiction;⁴¹¹ and
- (d) Contract connected to the dispute made in the jurisdiction – If an agreement related to the case was negotiated, signed, or executed in Canada, this supports jurisdiction as well.⁴¹²

While this case was not specifically about foreign direct liability, it provides guidance for transnational cases where a corporation might be sued in Canada.⁴¹³

Nevertheless, even if none of the above factors identified in *Van Breda* apply, a plaintiff may argue that a real and substantial connection can still be established by demonstrating new connecting factors,⁴¹⁴ such as significant control exercised by a Canadian company over its foreign subsidiary, decision-making conducted in Canada that directly impacts foreign operations, or showing that Canada's interest is involved in the dispute settlement, such as human rights protections.⁴¹⁵ For example, in *Nevsun*, the Supreme Court of Canada ruled

⁴⁰⁸ While "residence" and "domicile" are distinct concepts in common law and civil law respectively, for the purposes of this thesis, they are used interchangeably, as the difference does not impact the main argument regarding the defendant's usual place of living.

⁴⁰⁹ *Van Breda*, *supra* note 134, at para 90.

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

⁴¹³ *Ibid.*, at 90-95, where the Court established the presumptive connecting factors for assuming jurisdiction in transnational tort cases.

⁴¹⁴ *Ibid.*, at 91.

⁴¹⁵ *Choc*, *supra* note 23, at para 47-54.

that Nevsun, as a Canadian mining company, could be sued in Canada due to human rights violations in a foreign country.⁴¹⁶ It did not specifically address the “real and substantial connection” test in detail in its judgment, but it upheld the lower courts’ decisions that allowed the claim to proceed in British Columbia.⁴¹⁷ The lower courts had considered Nevsun’s corporate structure and control, which included decision-making in Canada, as part of their analysis.⁴¹⁸ Similarly, in *Choc*, the Ontario Superior Court ruled that Hudbay Minerals could be sued in Canada for alleged human rights violations in Guatemala because its decision-making in Canada and its control over its subsidiary created a real and substantial connection.⁴¹⁹

The second element is the consideration of presence-based jurisdiction. In the *Chevron* case,⁴²⁰ the Supreme Court of Canada endorsed “tag jurisdiction” over corporations.⁴²¹ It mainly states that if a corporation is carrying on business in a province and is served with process in that jurisdiction, the courts of the jurisdiction will have general jurisdiction over the corporation.⁴²² This case is a decision of the Supreme Court of Canada that clarified the rules regarding the enforcement of foreign judgments in Canada, particularly in the context of transnational corporations.⁴²³ It involves the plaintiff suing a Canadian subsidiary to enforce a judgment and assume the liability that originally belonged to its parent company, which is not registered in Canada.⁴²⁴

In this case, *Yaiguaje et al.*, the plaintiffs sought to enforce a \$9.5 billion judgment obtained in Ecuador against the defendant, Chevron Corp., for environmental damage

⁴¹⁶ *Nevsun* (SCC), *supra* note 18.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Nevsun* (BCCA), *supra* note 15-22.

⁴¹⁹ *Choc*, *supra* note 23, at para 47-54.

⁴²⁰ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R. 69.

⁴²¹ *Ibid.*, at para 80-84. Also see, Tanya J Monestier, “You’re It! Tag Jurisdiction over Corporations in Canada” (2021) 50:3 *Vand J Transnat’l L* 583, online: <https://scholarship.law.vanderbilt.edu/vjtl/vol50/iss3/2>.

⁴²² *Ibid.* at para 2-3.

⁴²³ *Ibid.*, at para 1.

⁴²⁴ *Ibid.*

allegedly caused by oil exploration and extraction in the Amazon rainforest.⁴²⁵ They attempted to enforce the judgment in Ontario, Canada, against Chevron's Canadian subsidiary (Chevron Canada Ltd.), which was not a party to the original Ecuadorian lawsuit.⁴²⁶ The question is: do Canadian courts have jurisdiction to enforce a foreign judgment against a foreign corporation?

Chevron argued that: the Ontario court lacked jurisdiction because Chevron Corp. had no real connection to Ontario; and the subsidiary Chevron Canada was a totally separate legal entity.⁴²⁷ Therefore it could not be held liable for the judgment against its parent company.⁴²⁸ The Supreme Court of Canada did not make a ruling on whether Chevron Canada, as a subsidiary, could be held liable for the parent company's judgment.⁴²⁹ However, it held that the Ontario court indeed have jurisdiction to hear the enforcement action against Chevron.⁴³⁰ It clarified that Canadian courts have jurisdiction to enforce a foreign judgment regardless of whether the defendant or its assets are physically present in the province.⁴³¹ In addition, it ruled that there is no need for a real and substantial connection between the defendant and the Canadian jurisdiction when enforcing a foreign judgment. The only requirement is that the foreign court issuing the original judgment had jurisdiction according to Canadian principles of international law.⁴³²

This case established important legal principles clarifying the test for recognizing and enforcing foreign judgments in Canada.⁴³³ The Canadian court does not need a real and substantial connection with the foreign defendant, because the court's role is not to relitigate

⁴²⁵ *Ibid*, at para 6-7.

⁴²⁶ *Ibid*, at para 10-12.

⁴²⁷ *Ibid*, at paras 9-12, 74.

⁴²⁸ *Ibid*.

⁴²⁹ *Ibid*, at paras 3, 75-77.

⁴³⁰ *Ibid*, at para 3.

⁴³¹ *Ibid* at para 56-58.

⁴³² *Ibid*, para 3, 74.

⁴³³ *Ibid*, at para 27-29, 43-47, 74.

or rehear the case but to determine if the foreign court had jurisdiction only if the judgment is enforceable.⁴³⁴ The case sends a strong message that Canadian courts are open to enforcing foreign judgments against transnational corporations, even where there is no real and substantial connection to the forum.⁴³⁵ It provided clarity for plaintiffs seeking to enforce foreign judgments against large multinational corporations in Canada. It also left open the substantive issue of whether the corporate veil could be pierced to hold a subsidiary liable for its parent company's obligations.⁴³⁶ Nevertheless, by allowing the plaintiffs to pursue enforcement in Canada, the decision highlighted the possibility of holding multinational corporations accountable in Canada, even the local connection to the original dispute is limited.⁴³⁷

The next concern is whether there is a more appropriate venue rather than Canada for hearing certain foreign direct litigation case. This is, as introduced in the debates of the previous cases, the theory of *forum non conveniens*.⁴³⁸ The concept of *forum non conveniens* is a significant legal doctrine in the context of foreign direct liability litigation, particularly when victims of human rights abuses or environmental harm seek to hold parent companies accountable in the home courts of multinational corporations.⁴³⁹ Under this theory, Canadian courts must assess whether Canada is the most appropriate jurisdiction to hear the case, when the plaintiff seeks to have the case at first instance decided in Canada.⁴⁴⁰ However, in *Van Breda*, the Supreme Court of Canada clarified that before a court can entertain the possibility of dismissing a case based on *forum non conveniens*, it must first confirm that it has proper

⁴³⁴ *Ibid.*

⁴³⁵ *Ibid.*, at para 27, 43, 74-75.

⁴³⁶ *Ibid.*, at para 3.

⁴³⁷ *Ibid.*, at para 27, 43-47, 74-75.

⁴³⁸ *Van Breda*, supra note 131 at para 103.

⁴³⁹ Many of the foreign direct liability cases discussed in this thesis, including *Nevsun*, *Choc* and *Van Breda*, engage extensively with the doctrine of *forum non conveniens* and related arguments. See, *Nevsun* (SCC), supra note 18 at para 16-26.

⁴⁴⁰ *Van Breda*, supra note 131 at para 104.

jurisdiction over the matter.⁴⁴¹ This means the establishment of jurisdiction is a prerequisite to any consideration of whether the court is an inconvenient forum for the case.⁴⁴² It indicated that the theory of *forum non conveniens* is in fact a standard for choosing a more appropriate court to hear a case: even if a Canadian court has jurisdiction (jurisdiction *simpliciter*), it may refuse to hear a case if another forum is clearly more suitable.⁴⁴³ Thus, it allows a court to decline jurisdiction if there is a more appropriate forum available for the case.⁴⁴⁴

This theory considers basically two categories of factors: private interest and public interest.⁴⁴⁵ On the one hand, the private interest factors include elements such as ease of access to evidence; availability and cost of obtaining witnesses; possibility of viewing premises, if relevant to the case; enforceability of the judgment; and, relative advantages and obstacles to a fair trial.⁴⁴⁶ On the other hand, public interest factors include administrative difficulties and court congestion, local interest in having local disputes settled locally, interest in having the trial in a place where the law that governs the case will apply, avoidance of unnecessary problems in conflict of laws or application of foreign law, and unfairness of burdening citizens in an unrelated forum with jury duty.⁴⁴⁷ In addition, there are some other factors such as the comparative cost of parallel proceedings, the impact of a transfer on the conduct of the litigation or related proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths

⁴⁴¹ *Ibid.*, at para 79.

⁴⁴² *Ibid.*

⁴⁴³ *Ibid.*, at para 109.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ The balancing of private and public interest factors in the *forum non conveniens* analysis was first articulated by the U.S. Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), where the Court set out a list of relevant considerations for determining whether dismissal is appropriate. Also see, Donald J. Carney, "Forum Non Conveniens in the United States and Canada" (1996) 3:1 Buffalo J Intl L 117, online: <https://digitalcommons.law.buffalo.edu/bjil/vol3/iss1/5>. And, Finty E Jernigan, "Forum Non Conveniens: Whose Convenience and Justice?" (2008) 86 *Tex L Rev* 1079, online: <https://www.corteidh.or.cr/tablas/R08080-4.pdf>.

⁴⁴⁶ *Gulf Oil Corp. v. Gilbert*, *ibid.*, at 508–509.

⁴⁴⁷ *Ibid.*

of the connections of the two parties to the respective forums.⁴⁴⁸ Courts of law weigh these factors to determine whether an alternative forum is clearly more appropriate for hearing the case, ensuring fairness to the parties and efficient resolution of the dispute, and whether there is a "real risk" that the alternative forum would not provide justice.⁴⁴⁹

In cases like *Nevsun* and *Choc*, the defendants invoked *forum non conveniens* to argue that the courts in Eritrea and Guatemala, respectively, were more appropriate forums for the cases.⁴⁵⁰ The defendants typically argue that the foreign court is better equipped to handle the case due to the location of evidence, witnesses, and the applicability of local laws. However, the Canadian courts rejected *Nevsun's* *forum non conveniens* argument, ruling that Eritrea was not a more appropriate forum due to concerns about the fairness and independence of the Eritrean judicial system.⁴⁵¹ The Supreme Court of Canada upheld this decision, allowing the case to proceed in Canada.⁴⁵² The Ontario Superior Court also rejected *Hudbay's* *forum non conveniens* argument, emphasizing that the plaintiffs would face significant obstacles to obtaining a fair trial in Guatemala. This court also allowed the case to proceed in Canada.⁴⁵³ The restrained use of the *forum non conveniens* doctrine by Canadian courts in foreign direct liability cases highlights a growing judicial awareness of the importance of providing victims of transnational corporate misconduct with access to justice and holding parent companies accountable.⁴⁵⁴

In addition to these basic jurisdictional considerations, there are other theories or principles, such as the act of state doctrine, the corporate veil doctrine and so on, that were

⁴⁴⁸ *Supra* note 445, *Carney* (1996) at 132–133.

⁴⁴⁹ *Van Breda*, *supra* note 131, at paras 108–112.

⁴⁵⁰ *Nevsun (BCSC)*, *supra* note 150 at para 150; *Choc*, *supra* note 23 at para 74.

⁴⁵¹ *Nevsun (BCCA)*, *supra* note 18 at paras 97–100.

⁴⁵² *Nevsun (SCC)*, *supra* note 18 at paras 25–26.

⁴⁵³ *Choc*, *supra* note 23 at para 74–82.

⁴⁵⁴ *Supra* note 445, [*Donald J. Carney*] and [*Finity E Jernigan*].

or are thresholds to Canadian courts' efforts to hold Canadian parent companies accountable for human rights violations by their foreign subsidiaries.

2. The Act of State Doctrine and Its Application in Foreign Direct Liability Litigation

The act of state doctrine is a legal principle that traditionally protects the sovereign actions of states from being questioned by foreign courts.⁴⁵⁵ It essentially asserts that courts should refrain from evaluating the public acts committed by a foreign sovereign within its territory so as to maintain respect for sovereignty and not to interference among countries.⁴⁵⁶ The act of state doctrine is a fundamental principle of federal common law in the United States that applies to both state and federal courts.⁴⁵⁷ Unlike sovereign immunity, which determines whether a court has jurisdiction over a case, the act of state doctrine serves as a rule of decision.⁴⁵⁸ This means that when the doctrine is invoked, courts are required to accept the validity of official actions taken by a foreign government within its own territory. Essentially, the doctrine instructs U.S. courts to refrain from questioning the legitimacy of sovereign acts performed by recognized foreign governments within their respective territories.⁴⁵⁹

In the context of the foreign direct liability litigation, the act of state doctrine looks particularly relevant as it may complicate efforts to hold multinational corporations liable for actions taken by their subsidiaries operating abroad. Because this doctrine can pose challenges when:

⁴⁵⁵ Alfonso Iglesias, "Act of State Doctrine" in *Oxford Bibliographies* (Oxford: Oxford University Press, 2020), online: <https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0207.xml>.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ William S. Dodge, "A Primer on the Act of State Doctrine" *Transnational Litigation Blog* (25 March 2022), online: <https://tlblog.org/a-primer-on-the-act-of-state-doctrine/>.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ Matthew Alderton, "The Act of State Doctrine: Questions of Validity and Abstention from Underhill to Habib" (2011) 12 *Melb J Intl L* 1, online: https://law.unimelb.edu.au/__data/assets/pdf_file/0010/1686925/Alderton.pdf.

- (a) The alleged human rights violations involve actions of a foreign government;
- (b) The corporate activities in question were conducted in compliance with or under the direction of a foreign state.

Thus, when victims or plaintiffs attempt to hold parent companies liable for the actions of their subsidiaries, defendants frequently invoke the act of state doctrine to argue that any judicial inquiry into those actions would infringe on the sovereignty of the host state because the action taken by the foreign subsidiary is actually directed by the local government. This defense can significantly hinder victims' ability to seek justice, particularly when serious allegations, such as human rights abuses are involved.⁴⁶⁰ Therefore, it is one of the key issues that create a complex legal landscape for foreign direct liability litigation where the interplay between corporate accountability and state sovereignty must be navigated carefully.

However, Canada courts have shown a different approach regarding this doctrine in foreign direct liability cases. In a case like *Nevsun*, the Canadian courts challenged the doctrine's traditional application. In *Nevsun*, even though *Nevsun* argued that the court could not adjudicate the claims without questioning the sovereign acts of the Eritrean government, the Supreme Court of Canada significantly limited the application of the act of state doctrine by rejecting the application of the doctrine and held that the doctrine did not bar the plaintiffs' claims against *Nevsun* for alleged human rights abuses in Eritrea because it is not part of Canadian common law.⁴⁶¹ Even if it were part of Canada's legal system, it would not apply in cases involving serious human rights violations, as the Court held that public policy exceptions to the doctrine would apply in cases involving serious human-rights violations.⁴⁶²

⁴⁶⁰ *Nevsun* (SCC), *supra* note 18, at para 28-36. The Supreme Court of Canada discussed the application of the act of state doctrine in cases of human rights violations abroad and pointed out that it should not be allowed to become a procedural obstacle to serious human rights violations.

⁴⁶¹ *Ibid*, at para 59.

⁴⁶² *Ibid*, at para 41. Also see, Robert Wisner, "Supreme Court of Canada Opens the Door to Novel International Human Rights Claims: The Uncertain Implications for Canadian Resource Companies", March 2020, *Litigation Bulletin*, McMillan LLP, online: <<https://mcmillan.ca/insights/supreme-court-of-canada-opens-the-door-to-novel>

The court emphasized that international human-rights norms, including prohibitions against forced labor and crimes against humanity, are part of Canadian law and take precedence over concerns of state sovereignty.⁴⁶³ This ruling represented a notable shift from the doctrine's traditional application, highlighting the increasing acknowledgment of human rights as a critical counterweight to the principle of state sovereignty.

The *Nevsun* decision is particularly notable also for its reliance on *jus cogens norms*—peremptory principles of international law from which no derogation is permitted.⁴⁶⁴ The court held that allegations of forced labor and crimes against humanity implicated *jus cogens norms*, which are universally binding and transcend the sovereignty of individual states.⁴⁶⁵ By prioritizing these norms over the act of state doctrine, the court signaled a shift toward greater accountability for corporations involved in human rights abuses, even when such abuses occur with the complicity or direction of foreign states.⁴⁶⁶ This approach aligns with broader trends in international law, where courts and tribunals increasingly recognize that certain human rights violations are so grave that they cannot be shielded by state sovereignty.⁴⁶⁷ For example, the European Court of Human Rights has similarly held that states cannot invoke sovereignty to justify violations of fundamental rights under the European Convention on Human Rights.⁴⁶⁸ The *Nevsun* decision thus reflects a growing consensus that the act of state doctrine must yield to international human-rights obligations.⁴⁶⁹ By rejecting the doctrine's application in cases involving serious human-rights violations, the Supreme Court of Canada has opened the door for similar claims in

international-human-rights-claims-the-uncertain-implications-for-canadian-resource-companies/ >.

⁴⁶³ *Nevsun* (SCC), *supra* note 18, at para 99-104.

⁴⁶⁴ *Ibid.*, at para 100.

⁴⁶⁵ *Ibid.*, at para 101.

⁴⁶⁶ *Ibid.*, at para 103.

⁴⁶⁷ Antonio Cassese, *International Law* (2nd ed) (Oxford: Oxford University Press, 2005) 199.

⁴⁶⁸ *Al-Adsani v United Kingdom*, App No 35763/97, European Court of Human Rights, 21 November 2001, ECHR 2001-XI.

⁴⁶⁹ *Nevsun* (SCC), *supra* note 18, at para 107.

other jurisdictions. This development is particularly relevant for plaintiffs seeking to hold parent companies liable for the actions of their subsidiaries abroad, as it undermines the defense that such actions are shielded by foreign state sovereignty. Moreover, the decision highlights the importance of international human-rights law in shaping domestic legal principles. As courts increasingly recognize the primacy of *jus cogens* norms, the act of state doctrine may continue to erode in cases involving egregious human-rights abuses. This trend is likely to encourage more foreign direct liability claims, particularly in jurisdictions like Canada that prioritize human rights over state sovereignty.

In contrast to Canada's approach, U.S. courts have been more reluctant to limit the act of state doctrine in foreign direct liability cases. The doctrine remains a robust defense in U.S. jurisprudence, often invoked by corporations to dismiss claims involving foreign state actions. However, U.S. courts have recognized exceptions to the doctrine, particularly when the foreign state's actions are commercial rather than sovereign in nature. Under the *Foreign Sovereign Immunities Act* (FSIA)⁴⁷⁰, commercial activity has been defined as one of its several key exceptions where immunity does not apply: Foreign states can be sued in the U.S. if they engage in commercial activities with a direct effect in the U.S.⁴⁷¹ This considers the nature of the act, whether it is commercial or sovereign, and distinguishes between acts of a commercial nature, like business transactions, and sovereign acts, like legislation or military action.⁴⁷² This distinction between commercial and sovereign acts provides a

⁴⁷⁰. The *Foreign Sovereign Immunities Act*, 28 U.S.C. §§ 1602–1611 (1976). (“FSIA”). FSIA is a U.S. law that defines the circumstances under which foreign governments may be sued in U.S. courts. Before FSIA, the process was largely influenced by executive branch recommendations, which led to inconsistent applications of immunity. FSIA codified the rules and gave U.S. courts authority to determine immunity, generally granting sovereign immunity but with specific exceptions.

⁴⁷¹ FSIA, 28 U.S.C. § 1605(a)(2).

⁴⁷² Mathias Reimann, “A Human Rights Exception to Sovereign Immunity: Some Thoughts on *Princz v. Federal Republic of Germany*”, 16 MICH. J. INT’L L. 403 (1995). Online: <<https://repository.law.umich.edu/mjil/vol16/iss2/3>>

potential avenue for holding corporations accountable in cases where their activities are intertwined with foreign state actions.

3. Customary International Law in Domestic Courts

A. Customary International Law and Its Integration into Domestic Legal Systems.

Customary international law is formed through consistent and general practices of states, accompanied by the belief that such actions are legally obligatory, known as *opinio juris*.⁴⁷³ It emerges when states engage in particular conduct over time and do so with the understanding that they are following a legal obligation. Unlike treaty law, customary international law binds all states, even those that have not explicitly consented to the rule, except for those that have persistently objected during its formation.⁴⁷⁴ As one of the oldest sources of international law, customary international law plays a significant role in regulating international relations and obligations, as it reflects both the practices and the legal convictions of the global community.⁴⁷⁵

The relationship between international law and domestic law is a fundamental theoretical issue in legal scholarship.⁴⁷⁶ It covers aspects such as the role of domestic law in international law, and the application of international law in domestic legal systems. At the international level, the general rule is that a state may not invoke its domestic legislation to justify a violation of international law.⁴⁷⁷ However, this does not diminish the significance

⁴⁷³ *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), [1969] ICJ Rep 3. In the *North Sea Continental Shelf Cases*, the International Court of Justice (ICJ) conducted a detailed analysis of *opinio juris*. The Court pointed out that state practice must be accompanied by *opinio juris* in order to form customary international law.

⁴⁷⁴ Malcolm N Shaw. *International Law*. 8th ed., Cambridge University Press, 2017, pp. 56-59.

⁴⁷⁵ Hugh Kindred, *International Law, Chiefly as Interpreted and Applied in Canada*, 6th ed (Toronto: Emond Montgomery, 2000) at 130.

⁴⁷⁶ Markus Peter Beham, “Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2014)” (2014) *Austrian Rev Int'l & Eur L*, online: <https://doi.org/10.1163/15736512-01901039>.

⁴⁷⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art 27.

of domestic law. On the contrary, domestic law reflects a state's stance on international issues and serves as evidence of its compliance with international obligation.⁴⁷⁸ The implementation of international law within domestic legal systems is determined by each country, and practices may vary greatly. Nonetheless, the core principle remains the same: international law should be effectively applied within the domestic legal framework.⁴⁷⁹

Furthermore, customary international law has played a significant role in the development of international legal theory.⁴⁸⁰ However, as an unwritten source of law, customary international law presents unique challenges in its identification and application within domestic courts.⁴⁸¹ Judicial practices across different jurisdictions reveal two primary approaches to integrating customary international law into domestic legal systems:

1. Automatic Incorporation: Under this approach, customary international law rules are automatically absorbed into domestic law without the need for specific legislative action. This method reflects the view that international law is inherently part of the domestic legal order.⁴⁸²
2. Transformation: This approach requires the enactment of specific domestic legislation to incorporate customary international law rules into the national legal system. Here, customary international law does not take effect domestically until it is formally adopted through legislative processes.⁴⁸³

⁴⁷⁸ *North Sea Continental Shelf Cases*, *supra* note 473 at para 74 (confirming that domestic legislation and practice are relevant as evidence of state practice and *opinio juris* for the formation of customary international law).

⁴⁷⁹ *Supra* note 477.

⁴⁸⁰ *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7, art 38(1)(b). *Also see*, *North Sea Continental Shelf Case*, *supra* note 478.

⁴⁸¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *Merits*, [1986] ICJ Rep 14 at paras 183–184. *Also see*, International Law Commission, “Draft Conclusions on Identification of Customary International Law, with Commentaries”, in *Report of the International Law Commission on the Work of its Seventieth Session*, UN GAOR, 73rd Sess, Supp No 10, UN Doc A/73/10 (2018) at 118–120.

⁴⁸² *Nevsun (SCC)*, *supra* note 18 at para 86. *Also see*, Pierre-Marie Dupuy, “International Law and Domestic (Municipal) Law” (April 2011) Max Planck Encyclopedia of Public International Law (Oxford University Press), online: <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1056>>.

⁴⁸³ *Ibid*, Pierre-Marie Dupuy.

These divergent approaches highlight the tension between the universality of customary international law and the sovereignty of domestic legal systems, underscoring the complexity of integrating international norms into national frameworks.⁴⁸⁴

B. Application of Customary International Law to Domestic Legal Systems.

The application of customary international law in domestic courts has significantly shaped the interaction between international and domestic law. This is evident in landmark cases across various jurisdictions, which illustrate how domestic courts interpret and enforce customary international law. For example, the *Filártiga v. Peña-Irala*⁴⁸⁵ case marked a significant expansion of human rights law in the United States. It established a precedent allowing U.S. federal courts to hold non-American citizens accountable for wrongful acts committed abroad that violate international law or treaties to which the U.S. is a signatory. Its ruling effectively broadened the scope of the ATS.⁴⁸⁶ The jurisdiction of U.S. courts was expanded to include tortious acts occurring globally.⁴⁸⁷ It can be seen as the first instance where customary international law was used to establish jurisdiction under the ATS, setting a precedent for the enforcement of international human-rights norms in U.S. courts.

In the field of international law, the U.S. Supreme Court generally follows the definitions set out in the Vienna Convention on the Law of Treaties and international customary law.⁴⁸⁸ According to these principles, international law is divided into two main categories: conventional law and customary law. Conventional law refers to laws constituted by bilateral or multilateral treaties between states; customary law, on the other hand, refers to rules of behavior that have developed over time through international interactions and are widely

⁴⁸⁴ *Ibid.*

⁴⁸⁵ *Supra* note 262.

⁴⁸⁶ Beth Stephens, "Translating *Filartiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations," 27 Yale J. Int'l L. 1 (2002).

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Supra* note 477, Articles 26 and 31, which articulate the principles governing treaty interpretation and the binding nature of treaties.

accepted.⁴⁸⁹ As far as jurisdiction of the U.S. Supreme Court is concerned, according to Article III, Section 2 of the U.S. Constitution,⁴⁹⁰ the Supreme Court has the power to hear "all Cases affecting Ambassadors, other public Ministers and Consuls," granting it broad authority over matters of foreign affairs and international law. However, in practice, the Supreme Court does not frequently intervene directly in the creation or interpretation of international law, but rather applies international law principles to resolve disputes in specific cases. Another example is the famous maritime case of *The Paquete Habana*.⁴⁹¹ In this case, the Supreme Court explicitly stated that international law is part of the U.S. legal system, and thus its principles can be incorporated into U.S. law and enforced in domestic courts. It is noted that this ruling laid the foundation for the Supreme Court's later incorporation of international law into its decision-making framework.⁴⁹²

In summary, through a series of rulings, the U.S. Supreme Court has successfully integrated international law principles into the American legal system.⁴⁹³ Its decisions are not only binding domestically but are also seen globally as authoritative interpretations of international law.⁴⁹⁴ This case-based approach to shaping international law reflects the unique flexibility of the U.S. judicial system and underscores the important role of international law within the U.S. legal structure.

Nevertheless, the United States courts have adopted certain standards as to whether specific acts constitute or violate customary international law. To be specific, the U.S. Supreme Court took a strict approach to determining whether a particular customary norm,

⁴⁸⁹ Statute of the International Court of Justice, Article 38(1)(b), <https://www.icj-cij.org/statute>.

⁴⁹⁰ *US Const art III, § 2*.

⁴⁹¹ *The Paquete Habana*, 175 U.S. 677 (1900).

⁴⁹² Louis Henkin, "International Law as Law in the United States," 82 Mich. L. Rev. 1555 (1984), discussing how *The Paquete Habana* solidified the role of international law in U.S. courts.

⁴⁹³ Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," 110 Harv. L. Rev. 815 (1997).

⁴⁹⁴ Harold Hongju Koh, "Is International Law Really State Law?" 111 Harv. L. Rev. 1824 (1998).

such as the prohibition of arbitrary arrest, constituted actionable international law under the ATS. Take the case of *Sosa v. Alvarez-Machain*⁴⁹⁵ as an example. In this case, the U.S. Supreme Court addressed critical issues regarding the application of customary international law. The Court ruled that only specific, universally accepted, and binding norms could serve as a basis for claims.⁴⁹⁶ The case originated when José Francisco Sosa, hired by the U.S. Drug Enforcement Administration (DEA), kidnapped Humberto Alvarez-Machain from Mexico. Alvarez was suspected of involvement in the murder of a DEA agent, but Mexico refused to extradite him. After being forcibly brought to the U.S., Alvarez was acquitted due to insufficient evidence. He then filed a lawsuit against Sosa in U.S. courts, claiming that his abduction violated international norms against arbitrary arrest and detention.⁴⁹⁷ This marked an important moment for interpreting the ATS and the *Federal Tort Claims Act*⁴⁹⁸. The Supreme Court ruled that for a violation of customary international law to be actionable under the ATS, it must meet strict criteria: it should be specific, universally recognized, and obligatory.⁴⁹⁹ The Court emphasized that not all violations of international law qualify for legal action; only those widely accepted and clearly defined can serve as a basis for lawsuits.⁵⁰⁰ Ultimately, the Court denied Alvarez's claims, holding that the prohibition against arbitrary arrest and detention lacked the specificity and universal acceptance required to give rise to a cause of action under the Alien Tort Statute.⁵⁰¹ This decision underscored the need for clarity and universality in defining international legal norms before they can be invoked in U.S. courts.

⁴⁹⁵ *Sosa*, *supra* note 255.

⁴⁹⁶ *Ibid.*, at 732-733.

⁴⁹⁷ *Ibid.*, at 698.

⁴⁹⁸ *Federal Tort Claims Act*, 28 U.S.C. §§ 1346(b)(1), 2671-2680 (2004).

⁴⁹⁹ *Sosa*, *supra* note 255, at 694.

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*, at 732-738.

In this case, the U.S. Supreme Court required a high threshold when determining whether a customary rule exists. The Court emphasized that a customary international rule must be "specific, universal, and binding" for it to be actionable in U.S. courts.⁵⁰² This standard is applied by lower federal courts when assessing customary international law.⁵⁰³ The Supreme Court affirmed this approach and raised the standard further on that basis, stating that only norms widely accepted by nations and clearly defined international standards can serve as grounds for legal action.⁵⁰⁴ The Court reaffirmed that the existence of a customary international law norm generally depends on evidence of consistent state practice and a sense of legal obligation.⁵⁰⁵ It stressed that reliance solely on international treaties or United Nations documents is insufficient to establish a norm actionable under the ATS.⁵⁰⁶ Regarding "specific determination," the Court explained that the content of a customary international law norm must be clear, and the facts of the specific case must align strictly with the content of the norm.⁵⁰⁷

After all, the development of the law often relies on case judgments. This is especially true when dealing with different legal jurisdictions, where the application of law — particularly customary international law — often involves diverse considerations and nuanced perspectives. For instance, *Regina v. Keyn*,⁵⁰⁸ a UK case, addressed whether English courts had jurisdiction over incidents in territorial waters. Although the incident occurred within British waters, the court ruled that without explicit legislation, it could not apply customary international law to grant jurisdiction.⁵⁰⁹ This decision clarified that

⁵⁰² *Ibid.*

⁵⁰³ See e.g. *Doe I v Exxon Mobil Corp*, 654 F.3d 11, 67 (D.C. Cir. 2011) applying *Sosa* standard for actionable customary international law norms under the ATS.

⁵⁰⁴ *Sosa*, *supra* note 255, at 732.

⁵⁰⁵ *North Sea Continental Shelf Cases*, *supra* note 473 at para 77.

⁵⁰⁶ *Sosa*, *supra* note 255, at 738.

⁵⁰⁷ *Ibid.*, at 732.

⁵⁰⁸ *Regina v. Keyn*, (1876) 2 Ex D 63 (CCR).

⁵⁰⁹ *Ibid.*

customary international law cannot create new legal obligations in domestic courts without legislative backing.⁵¹⁰

Nonetheless, from these cases and the growing number of judicial precedents applying customary international law in recent years, it is evident that as globalization and international cooperation continue to evolve, domestic courts of law under different jurisdictions, such as the U.S. Supreme Court, will play an increasingly important role in the development of international law. As far as transnational corporations are concerned, they should bear human rights responsibilities with specific regulatory standards, and in some cases, court rulings in certain countries have indirectly recognized the need for transnational corporations to assume human rights responsibilities.⁵¹¹

C. Application of Customary International Law in Canadian Courts.

With regard to the international law considerations, the Supreme Court of Canada's decision in *Nevsun* opened the door for claims based on breaches of customary international law.⁵¹² The Supreme Court of Canada has recognized customary international law as an integral part of Canadian law, allowing for lawsuits against entities like *Nevsun* for alleged human-rights violations.⁵¹³ This recognition reflects a broader understanding that even if corporate liability under customary international law is not explicitly established, companies may still bear responsibility for human-rights abuses. Canadian courts have approached the application of customary international law by avoiding jurisdictional issues and focusing on

⁵¹⁰ *Ibid.*

⁵¹¹ Peter Muchlinski, *Multinational Enterprises & the Law*. 2nd ed (Oxford: Oxford University Press, 2007) at 510-515.

⁵¹² *Supra* note 338. Also see, John A Terry *et al*, "Supreme Court of Canada: Companies may face liability in Canada relating to foreign operations", 3 March 2020, online: *Torys* <<https://www.torys.com/our-latest-thinking/publications/2020/03/supreme-court-of-canada-companies-may-face-liability-in-canada-relating-to-foreign-operations>>.

⁵¹³ *Nevsun* (SCC), *supra* note 18 at 94-104.

human-rights perspectives, ensuring that customary international law principles are integrated into domestic legal frameworks.⁵¹⁴

Canada has long employed an incorporation model that automatically integrates customary international law into domestic law, provided there is no conflicting legislation.⁵¹⁵ This approach has been reaffirmed by the courts in different rulings, such as *R. v. Hape*,⁵¹⁶ where the Supreme Court held that customary international law is part of Canadian common law unless explicitly overridden by statute.⁵¹⁷ Courts have formally accepted or applied it in many instances, meaning that rules of customary international law should be integrated into domestic law when no legislative conflict exists.⁵¹⁸ The rationale for this automatic incorporation is that international customs, as part of international law, also constitute Canadian law unless Canada explicitly declares otherwise through sovereign exercise.⁵¹⁹ Courts may reference rules of customary international law to interpret Canadian laws and develop common law in the absence of explicit legislative guidance.⁵²⁰ Customary international law evolves based on changing practices and acceptance and Canadian courts play a crucial role in this ongoing development.⁵²¹ As described, recognizing customary international-law norms requires two conditions: (i) general practice (though not necessarily universal) and (ii) *opinio juris*, the legal conviction, which is the belief that such practices constitute legal rights or obligations.⁵²² When international customs gain widespread acceptance and are regarded as mandatory, they become norms of customary international

⁵¹⁴ *Ibid.*

⁵¹⁵ *Nevsun* (SCC), *supra* note 18 at 87.

⁵¹⁶ *R. v. Hape*, 2007 SCC 26. [*Hape*]

⁵¹⁷ *Ibid* at paras 39–40.

⁵¹⁸ *Nevsun* (SCC), *supra* note 18 at 87–89.

⁵¹⁹ *Ibid.*

⁵²⁰ *Hape*, *supra* note 516 at para 39.

⁵²¹ *Ibid*, at 56.

⁵²² *North Sea Continental Shelf Cases*, *supra* note 473, at paras 77–78.

law. Once established, these norms can serve as a source of domestic law in Canada unless they conflict with existing statutes.

Thus, it could be argued that since customary international law is part of Canadian common law, violations by Canadian companies can theoretically be remedied directly under domestic law. However, even though the workers' claims in *Nevsun* were based on principles already recognized as part of common law, they may still face the absence of direct remedies for violations of these principles in practice. Nonetheless, it cannot be taken for granted that the victims do not have access to a remedy. The public nature and significance of the alleged torts, the severity of the violations, their impact on domestic and global rights objectives, and the need to prevent future violations necessitate remedies that differ from typical tort claims, which the court can provide to the workers by interpreting existing law or developing common law.

The Supreme Court's ruling in *Nevsun* enhanced Canadian courts' ability to invoke mandatory legal standards for protecting human rights internationally—especially against the backdrop where U.S. courts have restricted the scope of the ATS. The Canadian courts have put restraint on jurisdiction arguments and avoided extraterritoriality issues, and also affirmed direct applicability in human-rights contexts by applying customary international law as part of Canadian domestic law.

4. Corporate Liability and the Veil of Incorporation

Piercing the corporate veil is another legal doctrine that, in exceptional circumstances, may allow courts to disregard the separate legal personality of a corporation and hold a parent company liable for the actions of its subsidiary.

A. The Principle of Corporate Separateness

Parent companies and their subsidiaries are treated as distinct legal entities under corporate law.⁵²³ Generally, a parent company is not liable for the debts or liabilities of its subsidiary unless there are compelling legal reasons to disregard this separation, such as fraud or abuse of the corporate structure.⁵²⁴ This principle of corporate separateness — often described as being protected by the ‘corporate veil’ — is a cornerstone of corporate law, designed to protect shareholders from personal liability for the debts and obligations of the corporation.⁵²⁵

In the context of transnational corporations, this principle is able to protect parent companies from the liabilities of their subsidiaries (and vice versa), creating barriers for victims seeking remedies for harm caused by the actions of a subsidiary.⁵²⁶ As an important part of the structure of a transnational corporation, overseas subsidiaries are legally established and operated independently under the host country’s law and are regarded as separate legal entities from the parent company.⁵²⁷ However, some transnational corporation subsidiaries carry out economic activities such as production, sales and expansion under the highly centralized management of the parent company, and the value of their economic activities is not only assessed by the profits made in the host country, but by their contribution to the overall objectives of the parent company.⁵²⁸ As a result, subsidiaries often sacrifice their own local interests to serve the parent company’s global strategy, which may even undermine the interests of local stakeholders and the host country.⁵²⁹ Parent companies may circumvent legal accountability by making top-down decisions about subsidiary control,

⁵²³ *Salomon*, *supra* note 8.

⁵²⁴ *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 (Gen Div).

⁵²⁵ *Ibid.*

⁵²⁶ *Supra* note 390, “Peter Muchlinski”, at 135-140.

⁵²⁷ Phillip I. Blumberg, “The Corporate Entity in an Era of Multinational Corporations” (1990) 15:2 Del J Corp L 283 at 284–285.

⁵²⁸ *Supra* note 526.

⁵²⁹ *Ibid.*

using asset commingling, transfer pricing, profit repatriation, or other mechanisms.⁵³⁰ Such internalized circumvention occurs more frequently in transnational corporations than in purely domestic companies.⁵³¹ It shows that a transnational corporation may have the basic characteristics of transnationality, global strategy, centralized management and interconnectedness within the company.⁵³² Subsidiaries, affiliates, branch offices, and other entities located in different countries follow the global strategy set by the parent company. Together, they form an economic whole whose primary objective is to serve the overall interests of the group under centralized control and management.⁵³³

However, the protection created by the principle of corporate separateness is not absolute. In certain circumstances, courts may challenge or disregard this principle, the approach used for this is called “Piercing the Corporate Veil”.

B. Piercing the Corporate Veil

As far as the theory of piercing the corporate veil is concerned, Canadian courts may hold parent companies liable for their foreign subsidiaries' actions by piercing the corporate veil. This typically occurs particularly when there is evidence of abuse or misuse of the corporate structure, specifically, when: a) The subsidiary is wholly dominated and controlled by the parent and used as a shield for fraudulent or improper conduct; b) The subsidiary acts as an agent for the parent company; or c) A statute or contract requires it.⁵³⁴

An example of the first situation where a subsidiary is in fact wholly dominated and controlled by its parent company is the case of *Transamerica Life Insurance Co. of Canada*

⁵³⁰ Supra note 527.

⁵³¹ *Ibid.*

⁵³² John H Dunning & Sarianna M Lundan, *Multinational Enterprises and the Global Economy*, 2nd ed (Cheltenham: Edward Elgar, 2008) at 70–75.

⁵³³ Supra note 390, “Peter Muchlinski”, at 40-43.

⁵³⁴ Supra note 11.

*v. Canada Life Assurance Co.*⁵³⁵ In this case, the court considered whether a parent company could be held liable for the actions of its subsidiary.⁵³⁶ The subsidiary was found to be wholly dominated and controlled by the parent company, and its separate legal identity was used to shield the parent from liability.⁵³⁷ The court emphasized that the subsidiary was not operating independently but was merely an instrument of the parent company, and held that in such circumstances, it was appropriate to pierce the corporate veil and hold the parent liable.⁵³⁸

In cases involving transnational corporations, due to the complex structures and multilayer organization, the veil of corporate is more easily used by parent company as a shield to avoid legal responsibility. In *Re FG (Films)*,⁵³⁹ an American company set up a subsidiary in the UK, with the British company having a nominal capital of only £100 and its shares predominantly held by the American company's manager.⁵⁴⁰ Although this British company was formally set up under British law, it had no substantial operations or employees in the UK.⁵⁴¹ It was essentially a "shell" company. The actual production of the film was done by the American company, which provided equipment and financial support.⁵⁴² The British company was just used as a nominal producer to benefit from tax advantages offered to films classified as British.⁵⁴³ However, the British government refused to recognize the film as British and denied the company the registration, claiming that the British company was not the true producer and was merely a front to avoid higher taxes.⁵⁴⁴ This decision was upheld in court, where it was determined that the British company was merely a façade for the

⁵³⁵ *Transamerica*, *supra* note 524.

⁵³⁶ *Ibid* at para 15.

⁵³⁷ *Ibid* at paras 16–17.

⁵³⁸ *Ibid* at para 18.

⁵³⁹ *Re FG (Films) Ltd.*, [1953] 1 WLR 483.

⁵⁴⁰ *Ibid* at 484–85.

⁵⁴¹ *Ibid*.

⁵⁴² *Ibid*.

⁵⁴³ *Ibid*.

⁵⁴⁴ *Ibid* at 486.

American company, and therefore, the film could not be registered as British.⁵⁴⁵ This case highlighted issues surrounding corporate structuring and the use of "shell" companies for tax evasion or regulatory avoidance.⁵⁴⁶

Another example is the case of *Chevron Corp v Yaiguaje*,⁵⁴⁷ a decision of the Supreme Court of Canada that clarified the rules regarding the enforcement of foreign judgments in Canada. However, unlike the previously introduced foreign direct litigation cases, in this case the plaintiff is suing a Canadian subsidiary to enforce a judgment and assume the liability that originally belonged to its parent company who is not registered in Canada.⁵⁴⁸ This actually falls under a "reverse" piercing of the corporate veil lawsuit: What makes this case unusual is that it involves an attempt to enforce a foreign judgment rendered against the parent company in a third country by seizing assets belonging to its Canadian subsidiary, Chevron Canada, after the parent company failed to honour the judgment.⁵⁴⁹ The ruling in this case also fully demonstrates that the principle of corporate separate legal personality should not be arbitrarily disregarded or distorted.⁵⁵⁰ The key issue related to piercing corporate veil here is whether a foreign parent corporation's judgment can be enforced against its Canadian subsidiary.⁵⁵¹

Chevron argued that the subsidiary Chevron Canada was a totally separate legal entity, therefore, it cannot be held responsible for the legal decision or financial obligation imposed on its parent company.⁵⁵² While as far as the separate legal personality of subsidiaries is concerned, the Supreme Court of Canada did not outright rule that the subsidiary company

⁵⁴⁵ *Ibid* at 486–87.

⁵⁴⁶ *Ibid*. See also, Max Planck Institute for Comparative and International Private Law, "Piercing the Corporate Veil" (2012) Max-EUP2012, online: https://max-eup2012.mpipriv.de/index.php/Piercing_the_Corporate_Veil.

⁵⁴⁷ *Chevron*, *supra* note 8.

⁵⁴⁸ *Ibid* at paras 4–6.

⁵⁴⁹ *Ibid* at paras 4–6, 15–17.

⁵⁵⁰ *Ibid* at paras 94–97.

⁵⁵¹ *Ibid* at para 95.

⁵⁵² *Ibid*.

in this case could be held liable for its parent company's judgment.⁵⁵³ Instead, it reaffirmed that subsidiaries are separate legal entities, and liability against a parent company cannot automatically be enforced against its subsidiary.⁵⁵⁴ The question of whether Chevron Canada's assets could be seized was left for the lower courts to decide.⁵⁵⁵ The legal principles with respect to subsidiary liability emphasized in the case is that subsidiaries are presumed to be legally distinct entities from their parent companies.⁵⁵⁶ It revealed that the enforcement of a judgment against a subsidiary requires additional legal arguments beyond jurisdiction. As stated earlier, under specific conditions, courts may question or set aside the principle of corporate separateness, especially when there is evidence indicating that there is abuse or improper use of the corporate structure. In *Chevron Corp v Yaiguaje*, instead of directly ruling on whether Chevron Canada's assets could be used to satisfy the Ecuadorian judgment against Chevron Corp., the Supreme Court of Canada acknowledged certain limitations in specific scenarios for the principle of corporate separateness.⁵⁵⁷ To be specific, the plaintiffs sought to enforce a judgment against Chevron Corp. by targeting its Canadian subsidiary, Chevron Canada.⁵⁵⁸ The Court acknowledged that enforcement against a subsidiary requires evidence that the subsidiary is merely an agent or alter ego of the parent company, lacking true independence.⁵⁵⁹ In addition, there is a high standard for piercing the corporate veil. Canadian courts are reluctant to pierce the corporate veil and will only do so in exceptional circumstances, such as when a parent company uses a subsidiary to evade legal responsibilities or engage in fraudulent activities.⁵⁶⁰ In this case, the plaintiffs failed to demonstrate that Chevron Canada's operations were sufficiently related with Chevron

⁵⁵³ *Ibid* at paras 94-97.

⁵⁵⁴ *Ibid*, at para 95.

⁵⁵⁵ *Ibid*, at para 94, 95.

⁵⁵⁶ *Ibid* at paras 94-97.

⁵⁵⁷ *Ibid*, at para 95.

⁵⁵⁸ *Ibid*, at para 4.

⁵⁵⁹ *Ibid*, at para 95.

⁵⁶⁰ *Ibid*, at para 95; *Transamerica*, *supra* note 524 at 432-33.

Corp.'s liability in the Ecuadorian judgment.⁵⁶¹ There was also consideration of the complexity of transnational corporate structures.⁵⁶² Chevron Canada was not a party to the original Ecuadorian litigation, and its assets and operations were not directly connected to the case.⁵⁶³ Transnational or multinational corporations often rely on complex legal and financial structures to shield parent companies from liability which makes it difficult for claimants to breach the corporate separateness.⁵⁶⁴ In other words, if evidence shows that a subsidiary operates merely as an extension of the parent company, for example, complete control or lack of independence, the Court may pierce the corporate veil and hold the parent company accountable.⁵⁶⁵ The Court implicitly recognized the challenges plaintiffs face in pursuing transnational accountability and signaled that such cases might warrant further judicial consideration in the future.⁵⁶⁶

Therefore, to sum it up, the limitations of corporate separateness as underscored in this case are as follows: Firstly, while corporate separateness provides significant protection to parent companies, it is not inviolable.⁵⁶⁷ Secondly, courts may disregard the principle if there is strong evidence of abuse, fraud, or a lack of genuine independence between parent and subsidiary.⁵⁶⁸ And thirdly, although the plaintiffs in this case did not succeed in piercing the corporate veil, the judgment emphasized the growing scrutiny of transnational corporations' structures and the potential for enforcing accountability across borders.⁵⁶⁹

Indeed, beyond foreign direct liability cases, it is not uncommon for regulatory authorities to hold parent companies accountable for the wrongful actions of their overseas subsidiaries

⁵⁶¹ *Ibid*, *Chevron supra* note 8, at para 95.

⁵⁶² *Ibid*, at para 80.

⁵⁶³ *Ibid*.

⁵⁶⁴ *Ibid*.

⁵⁶⁵ *Ibid*, at para 95.

⁵⁶⁶ *Ibid*, at para 80.

⁵⁶⁷ *Ibid*, at para 95.

⁵⁶⁸ *Ibid*, at para 95; *Transamerica, supra* note 524 at 432–33.

⁵⁶⁹ *Ibid*, at paras 79–80.

in the context of economic activity oversight. This accountability often arises in areas such as antitrust, anti-corruption, environmental regulation, and consumer protection.⁵⁷⁰ Regulatory bodies are increasingly taking action to ensure that parent companies are held responsible for the conduct of their subsidiaries, particularly when the subsidiary's misconduct has significant impacts on markets, consumers, or public interests.⁵⁷¹ For example, in the field of antitrust, the European Commission has repeatedly investigated multinational corporations and their subsidiaries, imposing fines on parent companies when subsidiaries are found to have engaged in anti-competitive practices. It conducted an investigation into Johnson & Johnson (J&J) and Novartis for anti-competitive practices related to the painkiller fentanyl.⁵⁷² The investigation revealed that their respective Dutch subsidiaries had entered into an agreement to delay the market entry of a cheaper generic version of fentanyl in the Netherlands.⁵⁷³ This practice, known as "pay-for-delay," involved J&J paying Novartis to postpone the launch of a generic alternative, thereby maintaining higher prices for the branded drug.⁵⁷⁴ Eventually in 2013, the European Commission fined J&J and Novartis €16 million for violating Article 101 of the *Treaty on the Functioning of the European Union* (TFEU), which prohibits agreements that restrict competition within the EU. The Commission found that the agreement between J&J and Novartis harmed consumers by depriving them of access to affordable medication and undermined the competitive process.⁵⁷⁵

This case highlighted the accountability of parent companies for the actions of their subsidiaries. J&J, as the parent company, was held responsible for the anti-competitive

⁵⁷⁰ See e.g. *Akzo Nobel NV v Commission*, C-97/08 P, [2009] ECR I-8237.

⁵⁷¹ *Ibid.*

⁵⁷² European Commission. (2013). "Antitrust: Commission fines Johnson & Johnson and Novartis €16 million for delaying market entry of generic pain-killer fentanyl" (Press Release, 2013), online: https://ec.europa.eu/commission/presscorner/detail/en/IP_13_1233.

⁵⁷³ *Ibid.*

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

behavior of its subsidiary, which was directly involved in the agreement with Novartis. This decision reinforced the approach that parent companies cannot evade liability for the actions of their subsidiaries when those actions violate EU competition law. This approach is based on the principle that parent companies exercise control over their subsidiaries and should therefore bear joint liability for their subsidiaries' actions. Similar principles can be found in other regulatory areas, such as anti-corruption laws, e.g., the U.S. *Foreign Corrupt Practices Act* (FCPA)⁵⁷⁶ and environmental laws, where parent companies may face legal liability for the wrongful acts of their subsidiaries.⁵⁷⁷

This trend reflects a broader global regulatory shift toward enhancing parent-company accountability to promote compliance among multinational corporations and prevent them from evading legal responsibility through complex corporate structures. As an independent legal person, a company usually has the characteristics of limited liability, that is, the debts or liabilities of the company are not borne by the shareholders. However, such an absolute system of limited liability may create challenges for creditors and minority shareholders when a company's assets are insufficient to meet its obligation.⁵⁷⁸ Therefore, the legal practice of various countries or jurisdictions began to re-examine and adjust this system to better protect the interests of these injured parties. But it is important to note that piercing the corporate veil remains a challenging legal process, with courts generally respecting the principle of separate legal personality between parent companies and their subsidiaries.⁵⁷⁹

⁵⁷⁶ *Foreign Corrupt Practices Act of 1977*, 15 USC §§ 78dd-1–78dd-3 (1977). See, U.S. Department of Justice. *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2020), online: < <https://www.justice.gov/criminal-fraud/fcpa-resource-guide> >. See also, US Department of Justice, *Johnson & Johnson Agrees to Pay \$21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations*, Press Release No 11-446 (8 April 2011), online: <https://www.justice.gov/archives/opa/pr/johnson-johnson-agrees-pay-214-million-criminal-penalty-resolve-foreign-corrupt-practices-act>.

⁵⁷⁷ See e.g. *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 USC §§ 9601–9675 (CERCLA), which can impose liability on parent companies for environmental contamination caused by subsidiaries.

⁵⁷⁸ *Salomon*, *supra* note 8.

⁵⁷⁹ *Supra* note 11.

Each jurisdiction may have its own specific criteria and rules for piercing the corporate veil in foreign direct liability cases.⁵⁸⁰

C. Duty of Care

Recent developments in international law have indeed seen a significant shift from traditional veil-piercing to direct liability approaches, particularly in cases involving parent companies and their foreign subsidiaries. The UK Supreme Court's decision in *Okpabi*⁵⁸¹ also marked a crucial turning point in this shift.⁵⁸² In this case, the court clarified the principles of parent company liability. It determined that defendant Royal Dutch Shell Plc (RDS) could be legally responsible for the systemic pollution caused by its Nigerian subsidiary, Shell Petroleum Development Company of Nigeria (SPDC).⁵⁸³

Key aspects of such shift can be summarized as the following factors: 1) Focus on Direct Duty of Care: the court emphasized that parent companies may owe a direct duty of care to those affected by their subsidiaries' operations, based on the level of control exercised and responsibilities assumed;⁵⁸⁴ 2) Relevance of Corporate Policies: the judgment highlighted that global policy frameworks and public commitments made by multinational parent companies can give rise to liability for environmental or human rights abuses;⁵⁸⁵ 3) Circumventing the Corporate Veil: this approach allows courts to hold parent companies

⁵⁸⁰ Davy Karkason, "Piercing the Corporate Veil: A Comprehensive Guide to International Law" (17 May 2023), online: Transnational Matters < <https://www.transnationalmatters.com/piercing-the-corporate-veil-a-comprehensive-guide-to-international-law/> >.

⁵⁸¹ *Okpabi*, *supra* note 27.

⁵⁸² Daniel Leader, Matthew Renshaw & Stephen Bilko, "Supreme Court: *Okpabi v Royal Dutch Shell*: What Does the Judgment Mean?" (12 February 2021), online: Leigh Day <<https://www.leighday.co.uk/news/blog/2021-blogs/supreme-court-okpabi-v-royal-dutch-shell-what-does-the-judgment-mean/>>. See also, Dentons, "Okpabi v. Shell: UK Supreme Court reaffirms broad potential for environmental damage claims against parent companies" (25 February 2021), online: Dentons <https://www.dentons.com/en/insights/articles/2021/february/25/okpabi-v-shell>.

⁵⁸³ *Okpabi*, *supra* note 27.

⁵⁸⁴ *Supra* note 577.

⁵⁸⁵ *Ibid.*

accountable without necessarily piercing the corporate veil. Thus, it will help maintain the separate legal personalities of parent and subsidiary companies;⁵⁸⁶ 4) Expanded Scope of Liability: the court outlined four possible “routes” suggesting the existence of a duty of care on the part of a parent company,⁵⁸⁷ which are drawn from the earlier case of *Vedanta Resources PLC v. Lungowe*.⁵⁸⁸ The “routes” include: a) direct or joint management -- the parent company directly or jointly manages the relevant activities of the subsidiary; b) providing defective advice or policies -- the parent company promulgates defective group-wide safety or environmental policies; c) active implementation of policies -- the parent company takes active steps to ensure the implementation of group-wide safety or environmental policies at the subsidiary level; and, d) holding out supervision and control - - the parent company publicly represents that it exercises a particular degree of supervision and control over the subsidiary.⁵⁸⁹ And 5) Importance of Disclosure: the Supreme Court emphasized the crucial role of disclosure in parent company liability cases, noting that such cases are unlikely to be suitable for summary determination.⁵⁹⁰

This shift has significant implications for transnational corporate accountability. It provides a pathway for affected individuals or communities to seek redress against the parent companies in their home jurisdictions, which would potentially overcome the jurisdictional barriers. Moreover, it reflects a growing recognition of the need for corporate due diligence and accountability in an increasingly globalized business environment which will encourage transnational corporations to exercise greater oversight and implement more robust due diligence processes in their global operations.

⁵⁸⁶ King Fung Tsang & Katie Ng, Direct Liability and Veil-Piercing: When One Door Closes, Another Opens, 27 Fordham J. Corp. & Fin. L. 141 (2022). Online:< <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1505&context=jcfl> >.

⁵⁸⁷ *Supra* note 577.

⁵⁸⁸ *Supra* note 15.

⁵⁸⁹ *Ibid.*

⁵⁹⁰ *Ibid.*

However, it's important to note that this development is still evolving. While the UK courts have taken significant steps in this direction, the approach may vary in other jurisdictions. For instance, in the United States, direct liability generally remains an exception to piercing the corporate veil, with the latter still being the dominant method for holding parent companies responsible for their subsidiaries' liabilities.⁵⁹¹ In Canada, courts have shown a willingness to allow claims against Canadian parent companies for harm caused by foreign subsidiaries based on a direct duty of care. In *Choc*, the Ontario Superior Court recognized the possibility of a parent company owing a duty of care to individuals harmed by its subsidiary's operations, particularly when the parent company exercises significant control over those operations.⁵⁹² In *Nevsun*, the Supreme Court of Canada did not specifically address the duty of care in the context of parent company liability, but it opened the door for corporate accountability under customary international law.⁵⁹³ However, Canadian courts have recognized that a parent company may owe a direct duty of care to victims who were harmed by its foreign subsidiary's operations under certain circumstances. It is based on legal principles that consider the parent company's level of control and involvement in the subsidiary's activities, including factors like direct management and oversight, public representations and provision of policies and guidelines. To be more specific, parent companies may be held liable if they exercise significant control over their subsidiary's operations,⁵⁹⁴ especially when the parent company is actively involved in managing or overseeing the subsidiary's activities.⁵⁹⁵ In addition, a parent company's public statements regarding its relationship with or control over its subsidiary can contribute to establishing a

⁵⁹¹ *Supra* note 403.

⁵⁹² *Choc*, *supra* note 23 at paras 59-70.

⁵⁹³ *Nevsun* (SCC), *supra* note 18 at paras 111-122.

⁵⁹⁴ Siskinds LLP, "Is parent company liable for crimes of foreign subsidiary?" 18 November, 2013, online: < <http://www.siskinds.com/parent-companies-may-liable-actions-foreign-subsiadiaries/> >.

⁵⁹⁵ See *Choc*, *supra* note 23 at paras 59-70; *Vedanta*, *supra* note 221 at paras 49-54.

duty of care.⁵⁹⁶ If a parent company holds itself out as exercising supervision over the subsidiary or commits to certain standards, this can be seen as assuming responsibility.⁵⁹⁷ What's more, implementing group-wide policies or providing specific guidelines to subsidiaries can potentially create liability for the parent company.⁵⁹⁸ This is especially true if these policies contain systemic errors, or if the parent takes active steps to ensure the subsidiary's implementation of these policies.

The purpose of invoking the duty of care theory in cases of direct foreign liability is to hold parent companies accountable for the illegal actions of their overseas subsidiaries and to establish the necessary connection between the alleged tortious acts and the territory of the home country. It is believed in this thesis that the practical and potential benefits of applying the duty of care theory may include relieving the plaintiff from the heavy burden of proving the necessity of piercing of the corporate veil, adhering to traditional corporate-law theories without breaking through them, respecting the principles of independent legal personality and limited liability, and providing a connecting point between the litigation and the home country's territory, thereby offering a basis for the home country's claim of jurisdiction over such cases. By analyzing the illegal actions on the grounds that the parent company failed to assume corresponding responsibilities and did not sufficiently supervise the subsidiary, it avoids the difficulties brought by the theory of independent legal personality and the opposition to extraterritorial jurisdiction claims. This approach represents a shift from the traditional corporate law principle of separate legal personality between parent companies and their subsidiaries.⁵⁹⁹ Courts, after all, remain cautious about

⁵⁹⁶ Poonam Puri & Luis Sarabia, "Parents' Subsidiary Liabilities Hit Home" (2016) online: listedmag.com < <http://ppl-ai-file-upload.s3.amazonaws.com/web/direct-files/27869930/b9104ed1-cd5d-4307-826e-fe3fd0e095c3/2016-06-08-Parents-subsidiary-liabilities-hit-home.pdf> >.

⁵⁹⁷ Julius Melnitzer, "Why parent companies may soon be unable to claim immunity from their subsidiary's liabilities" (25 June 2019), online: Financial Post <https://financialpost.com/legal-post/why-parent-companies-may-soon-be-unable-to-claim-immunity-from-their-subsidiarys-liabilities>.

⁵⁹⁸ *Ibid.*

⁵⁹⁹ *Supra* note 11.

piercing the corporate veil, and they are increasingly willing to consider the actual relationship between parent and subsidiary companies when determining liability.⁶⁰⁰

Since Canadian courts do not have a single, well-defined legal framework for these foreign direct litigation cases, they rely on multiple areas of law. This makes its foreign direct litigation more flexible, because the plaintiffs can argue their cases by using different legal principles, for example piercing the corporate veil under corporate law, duty of care and negligence under tort law, and some form of violation of international human-rights law. Courts can adapt legal principles to new circumstances, especially as corporate social responsibility and human rights considerations gain importance. Judges also have the discretion to interpret and apply these laws differently based on the specific facts of each case. But it also makes it less predictable: there is not enough clear precedent. Since foreign direct litigation cases involve multiple legal theories, courts may reach different conclusions depending on which principles they prioritize. Results from the courts tend to vary in terms of the standards of corporate liability, since different courts differ in how strictly they hold parent companies responsible for the actions of their foreign subsidiaries. Further, even if these are resolved, this leaves the potential challenges in jurisdiction and enforcement, , such as *forum non conveniens*. These make it uncertain whether Canadian courts will accept jurisdiction over foreign harms. In summary, while the reliance on multiple legal principles allows Canadian courts to adapt to complex transnational cases, it also introduces uncertainty in outcomes, making foreign direct litigation less predictable for both plaintiffs and defendants.

⁶⁰⁰ Sandra Feldman, "How to avoid piercing the corporate veil between parent corporations and their subsidiaries" (25 March 2022, updated 25 March 2023), online: Wolters Kluwer <https://www.wolterskluwer.com/en/expert-insights/how-to-avoid-piercing-the-corporate-veil-between-parent-corporations-and-their-subsidiaries>.

CHAPTER 4: CHALLENGES AND CRITICISMS

As discussed in previous chapters, Canadian courts have shown willingness to allow foreign direct liability cases to be heard in Canada by various means. However, despite the existence of various legal frameworks and doctrines, which have been flexibly utilized by Canadian courts to make it possible for victims to sue Canadian parent companies in Canada with respect to the atrocities committed by their foreign subsidiaries, significant challenges and complexities remain. It is because there are also a variety of legal doctrines or tools that have been extensively utilized by both plaintiffs and defendants to argue or refute claims in foreign direct liability litigations. These legal tools, while providing a foundation for addressing corporate accountability, often fall short in delivering consistent and effective outcomes due to the intricate nature of transnational corporate structures and the evolving landscape of international human rights law. Moreover, despite the numerous precedents, under the discretionary power of common law judges, none of these approaches seems to have become absolute or fixed as a reliable method or solution for resolving certain foreign direct liability cases.

1. Jurisdictional Challenges

In *Nevsun*, Canadian courts established jurisdiction over the case by affirming real and substantial connection, and at the same time by rejecting the application of *forum non conveniens* doctrine and act of state doctrine.⁶⁰¹ But it does not mean that these doctrines or tools cannot be used by the defendants anymore or are no longer barriers for foreign direct litigation cases in the future. On the contrary, those precedents clearly indicates that the doctrine of *forum non conveniens* remains a potent tool for defendants to delay or dismiss claims.⁶⁰² And the principles underlying the act of state doctrine that absorbed into Canadian

⁶⁰¹ *Nevsun* (SCC), *supra* note 18, at paras 18,19,22 and 59.

⁶⁰² Donald J. Carney, "Forum Non Conveniens in the United States and Canada," 1996, 3:1 Buffalo J Intl L 117, online: <https://digitalcommons.law.buffalo.edu/bjil/vol3/iss1/5>

law remains a contentious issue as well, particularly when the alleged misconduct involves actions taken by foreign governments.⁶⁰³

In addition, the principle of extraterritoriality, which limits the application of domestic laws to actions that occur within a country's borders, also poses challenge.⁶⁰⁴ To be specific, Canadian law generally adheres to the territorial principle of jurisdiction, with extraterritorial jurisdiction being the exception.⁶⁰⁵ However, Canada has used various principles to justify the extraterritorial application of its criminal laws in certain circumstances.⁶⁰⁶ These include: the territorial principle, which extends to international crimes where an essential element is committed within Canadian territory; asserting jurisdiction over offenses committed beyond national borders but with a significant connection to national interest; and universal jurisdiction over certain crimes considered attacks on the international order, such as genocide and crimes against humanity.

Nevertheless, despite these developments, Canadian courts face challenges relating to this issue. On the one hand, the courts have developed the real and substantial connection test to ensure that extraterritorial claims have a meaningful link to Canada. The test was articulated in *Morguard Investments Ltd. v. De Savoye*,⁶⁰⁷ which, although initially developed for interprovincial recognition of judgements, has since been extended into other areas of conflict of laws.⁶⁰⁸ It held that a court may assume jurisdiction if there is a meaningful and substantial link between the forum and the subject matter of the litigation.⁶⁰⁹ It recognized that courts should consider whether there are significant connecting factors, such as the place

⁶⁰³ *Nevsun* (SCC), *supra* note 18, at para 47, 56, 57.

⁶⁰⁴ Allan E. Gotlieb, "Extraterritoriality: A Canadian Perspective", 5 *Nw. J. Int'l L. & Bus.* 449 (1983-1984).

⁶⁰⁵ Laura Barnett & Philippe A. Gagnon, *International Dimensions of Domestic Criminal Law: Extraterritoriality and Extradition* (20 December 2023), online: Library of Parliament < https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/202401E >.

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Morguard Investments Ltd. v. De Savoye*, [1990] 3 SCR 1077.

⁶⁰⁸ *Ibid.*, at 1096-98. Also see H. Patrick Glenn, "Foreign Judgments, the Common Law and the Constitution: *De Savoye v. Morguard Investments Ltd.*," (1992) 37 *McGill L.J.* 537.

⁶⁰⁹ *Ibid.*, at 1108-11.

where the relevant property is situated, where a contract was made or performed, where a tort occurred or its consequences were felt, or where the defendant is resident.⁶¹⁰ The test aims to strike a balance between fairness to the defendant and the orderly administration of justice in an increasingly interconnected world. In fact, in cases like the *Nevsun* case, whether the Canadian courts have appropriate jurisdiction can also be determined by the standard of real and substantial connection test. On the other hand, however, beyond establishing a substantial and genuine connection to Canada, courts must also navigate the tension between respecting state sovereignty and addressing transnational issues effectively.⁶¹¹ This requires carefully balancing the principle of sovereign equality with the need to provide access to justice for foreign plaintiffs. In doing so, courts must remain sensitive to the limits of extraterritorial jurisdiction and avoid undue interference in the internal affairs of foreign states.⁶¹²

2. The Role of International Law

While Canadian courts have recognized the applicability of customary international law in domestic cases, there are still challenges and uncertainties about its interpretation and issues such as how far domestic laws can extend to regulate the conduct of Canadian corporations' subsidiaries abroad.⁶¹³ *Nevsun* opened a door for victims to seek justice in Canadian courts for alleged violations of international law committed abroad by the recognition of customary of international law in domestic courts. It affirmed that customary international law is automatically adopted into Canadian law.⁶¹⁴ However, the application of

⁶¹⁰ *Ibid*, at 1111-12.

⁶¹¹ Jennifer A Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, Corporate Social Responsibility Initiative Working Paper No 59 (Cambridge, Mass: John F Kennedy School of Government, Harvard University, 2010).

⁶¹² Peter Dostal, "Extra-Territorial Jurisdiction of the Courts" (n.d.), online: Criminal Law Notebook < https://criminalnotebook.ca/index.php/Extra-Territorial_Jurisdiction_of_the_Courts >.

⁶¹³ Supreme Court of Canada, *Case in Brief: Nevsun Resources Ltd. v. Araya*, (Ottawa: Supreme Court of Canada, 2020), online: <https://www.scc-csc.ca/judgments-jugements/cb/2020/37919/>.

⁶¹⁴ *Nevsun* (SCC), *supra* note 18 at para 86.

customary international law still faces several challenges.⁶¹⁵ For instance, customary international law are often abstract and subject to varying interpretations, which makes the consistent application in domestic courts difficult.⁶¹⁶ This ambiguity can lead to uncertainty in legal proceedings and potentially inconsistent outcomes.⁶¹⁷ The lack of clear enforcement mechanisms for international legal norms also poses a challenge.⁶¹⁸ Even when courts recognize customary international law principles, they may struggle to provide effective remedies due to the absence of established procedures for implementation.⁶¹⁹ In addition, while *Nevsun* began answering some of the complex questions about jurisdiction and the appropriate forum for adjudicating international law claims mentioned above, it remains unclear whether the adoption of customary international law in Canada is limited to human rights or extends to other areas of international law, such as environmental regulation.⁶²⁰

3. Impact on Corporations

Multinational corporations often operate through complex networks of subsidiaries, joint ventures, and contractors, making it difficult to trace liability back to the parent company.⁶²¹ This complexity is further exacerbated by the use of shell companies and offshore entities, which can obscure the true ownership and control of subsidiaries.⁶²² Since the legal separation between parent companies and subsidiaries allows parent companies to avoid responsibility for the actions of their subsidiaries, those structures enable transnational

⁶¹⁵ C. Ryngaert, “Customary International Law Interpretation: The Role of Domestic Courts” in P. Merkouris, J. Kammerhofer & N. Arajärvi, eds, *The Theory, Practice, and Interpretation of Customary International Law* (Cambridge: Cambridge University Press, 2022) 481 at 481–506.

⁶¹⁶ *Hape*, supra note 错误!未定义书签。 at para 39-42.

⁶¹⁷ *Supra* note 615, C. Ryngaert.

⁶¹⁸ *Nevsun* (SCC), supra note 18 at para 121.

⁶¹⁹ *Ibid.*

⁶²⁰ *Supra* note 215, *Western Journal of Legal Studies*.

⁶²¹ Pablo Agustín Escobar Ullauri, “Reconciling the Rights of Multinational Companies under IIAs with the Tort Liability Caused by Their Subsidiaries” (19 December 2020), online: International Institute for Sustainable Development <<https://www.iisd.org/itn/2020/12/19/reconciling-the-rights-of-multinationals-companies-under-iias-with-the-tort-liability-caused-by-their-subsidiaries-pablo-agustin-escobar-ullauri/>>.

⁶²² Sanctions.io Editorial Team, “Sanctions Evasion Through Shell Companies Explained” (6 November 2024), online: Sanctions.io <<https://www.sanctions.io/blog/sanctions-evasion-through-shell-companies-explained>>.

corporations to benefit from the principles of corporate separation and limited liability, making it challenging for tort victims to hold parent companies accountable.⁶²³ However, as discussed, the corporate veil can be pierced in certain circumstance, especially when there is clear evidence of fraud, abuse, or excessive control by the parent company.⁶²⁴ Therefore, parent companies of multinational corporations cannot always rely on the corporate veil to escape responsibility for the misconduct of their overseas subsidiaries. This brings uncertainty to corporation governance and structure management: complex structures with layers of subsidiaries and holding companies can no longer be an absolute guarantee for transnational corporations to minimize liability and protect their assets. Nevertheless, while courts have the authority to “pierce the corporate veil” and hold parent companies liable in certain circumstances, this is an exception rather than the rule. Courts are generally reluctant to disregard the separate legal personality of subsidiaries.⁶²⁵ And the high threshold makes it difficult for plaintiffs to succeed in piercing the corporate veil.⁶²⁶

Furthermore, since the application of customary international law to Canadian business operating abroad is still being explored, related practical implications need to be weighted.⁶²⁷ On the one hand, the potential for parent companies to be held liable for the actions of their foreign subsidiaries — expanded by recent court decisions — is increasing the risk of litigation in Canadian courts with respect to the overseas activities for transnational corporations based in Canada.⁶²⁸ On the other hand, despite the willingness shown by Canadian courts with respect to asserting jurisdiction over extraterritorial corporate conduct,

⁶²³ *Ibid.*

⁶²⁴ Douglas Geoffrey Smith, “Piercing the Corporate Veil in Regulated Industries” (2008) 2008:4 BYU L Rev 1165.

⁶²⁵ *Ibid.*

⁶²⁶ Philip Reed Strauss, “Control and/or Misconduct: Clarifying the Test for Piercing the Corporate Veil in Alaska”, (1992) 9:1 Alaska L Rev 65 at 65, online: <<https://scholarship.law.duke.edu/alr/vol9/iss1/3>>.

⁶²⁷ *Nevsun* (SCC), *supra* note 18 at para 113.

⁶²⁸ *Supra* note 11.

the extent of such jurisdiction remains unclear.⁶²⁹ This uncertainty can make it challenging for corporations to predict their legal obligations and potential liabilities in foreign operations.⁶³⁰ It means that Canadian corporations, especially transnational corporations, must be more cautious about their global operations and the conduct of their subsidiaries.⁶³¹ Further, the extraterritorial reach of Canadian legislation presents complex regulatory challenges for corporations because the interplay between domestic and international law creates a complex regulatory landscape.⁶³² Companies must adeptly maneuver through this intricate network of national and international legal obligations, which may be in conflict with one another at times.⁶³³ Corporations must simultaneously adhere to Canadian legal standards and those of the jurisdictions in which they operate. This dual compliance requirement can lead to situations where legal obligations are not perfectly aligned, requiring careful navigation and interpretation.⁶³⁴ Also, beyond legal implications, Canadian corporations face reputational risks associated with their overseas conduct. Public awareness of corporate social responsibility has increased, and companies may face significant backlash for perceived human rights violations or environmental damage abroad, even if not legally prosecuted.⁶³⁵

The duty of care may, in certain circumstances, operate as a functional exception to the rule of separate legal personality, offering an alternative to the traditional corporate veil-piercing approach. However, the liability of a parent company for the activities of its

⁶²⁹ Jurisdiction issue was discussed in the case of *Chevron Corp. v. Yaiguaje*, *supra* note 错误!未定义书签。 at para 1-3. Also see, Chilenye Nwapi, *Litigating Extraterritorial Corporate Crimes in Canadian Courts* (LLM Thesis, University of British Columbia, 2012), online: UBC cIRcle <http://dx.doi.org/10.14288/1.0073174>.

⁶³⁰ Penelope Simons, “International Law’s Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights” (2017) 3:1 Bus & Hum Rts J 5 at 7.

⁶³¹ *Ibid.*

⁶³² *Supra* note 611.

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

⁶³⁵ *Supra* note 430.

subsidiary is not one of the clearly defined categories of negligence under common law.⁶³⁶ This can be understood as that the relationship between a parent company and its subsidiary grants the parent company the right to supervise, manage, control, and intervene in the subsidiary's operations, but this does not automatically impose a legal obligation on the parent company. The decision in *Smith, Stone and Knight Ltd v Birmingham City Council* illustrates that courts may look beyond the formal separate legal personality where there is evidence of real control and integration between the parent and subsidiary, considering factors such as who manages the business, who profits, and who bears the risks.⁶³⁷ Whether a parent company owes a duty of care for the subsidiary's activities depends on the extent of its control, intervention, and supervision over the subsidiary's operations.⁶³⁸ A parent company will only owe a duty of care for the subsidiary's activities if it meets the general principles of tort law that require such a duty.⁶³⁹ These principles include the parent company establishing group-wide policies and guidelines and expecting the subsidiary's management to adhere to them.⁶⁴⁰ Even if group-wide policies themselves do not automatically give rise to a duty of care, if the parent company publicly emphasizes the implementation of these policies through active measures such as training, supervision, and enforcement, and the subsidiary engages in activities that result in human rights violations, environmental pollution, or other harms, the parent company may be held responsible for the subsidiary's actions, even if it did not actually take such measures.⁶⁴¹ While *Nevsun* held that failure to

⁶³⁶ Norton Rose Fulbright, "Australia – Cross-border guide to parent company liability for foreign subsidiaries" (May 2021), online: <https://www.nortonrosefulbright.com/en-bi/knowledge/publications/45a02b88/australia-cross-border-guide-to-parent-company-liability-for-foreign-subsidiaries>.

⁶³⁷ *Smith, supra* note 391. In the last paragraph, the court identified six factors to determine whether the parent company truly carried on the business, including who managed, directed, financed, controlled and profited from it.

⁶³⁸ *Okpabi supra* note 错误!未定义书签。 at para 147-150. Also see, Graham Mead, "Can a Parent Company Be Liable for a Subsidiary's Operations?" (19 April 2024) online: <<https://prettys.co.uk/articles/can-a-parent-company-be-liable-for-a-subsidiarys-operations/>>.

⁶³⁹ *Okpabi, ibid* at para 147. Also see, *Supra* note 435.

⁶⁴⁰ *Okpabi, ibid* at para 147-148. Also see *supra* note 436.

⁶⁴¹ Martin-Joe Ezeudu, "Reflections on the Corporate Social Responsibility Landscape for Canadian Mining Transnational Corporations in the Aftermath of *Nevsun Resources Ltd v Araya*" (2023) 41:1 *Legal Studies* 73 at

follow through on public statements does not by itself constitute a legal violation,⁶⁴² a parent company that makes such declarations in order to gain reputational or commercial benefit—but then fails to implement them, while continuing to exercise control over its subsidiary in other areas—may be seen as deliberately misleading.⁶⁴³ In such cases, the inaction is not neutral; it serves to create a false impression that the company is addressing certain harms, when in fact it is not.⁶⁴⁴ This may resemble a form of intentional concealment or misrepresentation, as discussed in cases such as *Derry v Peek*,⁶⁴⁵ *Smith v Land and House Property Corp*,⁶⁴⁶ and *Stambovsky v Ackley*.⁶⁴⁷ Accordingly, liability may arise not simply from omission, but from the manipulation of public trust in pursuit of profit.⁶⁴⁸

In summary, a parent company's duty of care is not automatically imposed. It is in fact based on the degree of its actual control over its subsidiary and its actions in formulating and enforcing its group-wide policies. If the parent company demonstrates substantial control or intervention in the subsidiary's activities and publicly commits to ensuring policy implementation, it may be found to have breached its duty of care and held liable for the subsidiary's harmful actions. Therefore, the key factor is the degree of the control and involvement the parent company has in the subsidiary's operations. This, from the perspective of the plaintiffs, creates more burden of proof. Because the plaintiffs will have to provide substantial evidence to prove that the parent company exercised sufficient control over or have involved enough into the subsidiary to be held liable. This often requires access to internal corporate documents, which may be difficult to obtain, especially when the subsidiary operates in a foreign jurisdiction with different legal standards for disclosure. On

78–81, online: <<https://doi.org/10.1080/02646811.2023.2232237>>.

⁶⁴² *Nevsun (BCSC)*, *supra* note 150 at paras 53, 55.

⁶⁴³ *Choc*, *supra* note 23 at paras 66–69.

⁶⁴⁴ *Stambovsky v. Ackley*, 169 A.D.2d 254, 572 N.Y.S.2d 672, 60 USLW 2070 (1991).

⁶⁴⁵ *Derry v. Peek*, (1889) LR 14 App Cas 337.

⁶⁴⁶ *Smith v Land and House Property Corp*, (1884) LR 28 Ch D 7.

⁶⁴⁷ *Supra* note 644.

⁶⁴⁸ *Supra* note 641.

the other hand, the focus on direct control or negligence may not adequately address situations where parent companies benefit from the misconduct of their subsidiaries without directly controlling their operations. For example, a parent company may profit from low labor costs or lax environmental regulations in a host country without actively managing the subsidiary's operations.

All in all, while the legal developments in cases like *Nevsun* and *Choc* represent significant progress, they have also been subject to criticism from various quarters. The lack of coherent legal framework for holding parent companies accountable and the reliance on multiple legal principles create uncertainty and inconsistency in how courts approach these cases.⁶⁴⁹ This can lead to unpredictable outcomes and make it difficult for both plaintiffs and defendants to navigate the legal landscape. Moreover, even when parent companies are held liable, the remedies available to plaintiffs may be insufficient to address the harm caused. For instance, monetary damages, while important, may not fully compensate victims for the loss of livelihoods, environmental degradation, or other long-term impacts of corporate misconduct.⁶⁵⁰ Additionally, there may be a lack of mechanisms to ensure that parent companies take corrective actions to prevent future harm.⁶⁵¹ While cases like *Nevsun* and *Choc* have raised awareness of corporate accountability, they have not necessarily led to widespread changes in corporate behavior. Without stronger legal incentives, transnational corporations may continue to prioritize profits over human rights and environmental protection.

⁶⁴⁹ *Supra* note 111, Lexpert.

⁶⁵⁰ Paul Davies, "Corporate Liability for Wrongdoing within (Foreign) Subsidiaries: Mechanisms from Corporate Law, Tort and Regulation" (2023) NUS EW Barker Centre for Law & Business Working Paper 23/01, online: <https://law.nus.edu.sg/wp-content/uploads/2023/02/EWBCLB-WPS-2301.pdf>.

⁶⁵¹ Canadian Network on Corporate Accountability, *Brief submitted to the House of Commons Standing Committee on International Trade regarding corporate accountability and human rights* (22 November 2022), online (pdf): House of Commons <https://www.ourcommons.ca/Content/Committee/441/CIIT/Brief/BR12258855/br-external/CanadianNetworkonCorporateAccountability-e.pdf>.

The challenges and criticisms outlined in this chapter highlight the need for a more robust and coherent legal framework to address the parent corporate liability in foreign direct litigation in a globalized world. While the legal developments in cases like *Nevsun* and *Choc* represent important steps forward, significant gaps remain. Addressing these gaps will require a combination of legal reforms, stronger regulatory oversight, and greater international cooperation to ensure that transnational corporations are held accountable for their and their subsidiaries' actions, regardless of where they operate.

CHAPTER 5: FUTURE DIRECTIONS AND RECOMMENDATIONS

The increasing complexity of transnational corporate operations and the growing demand for corporate accountability necessitate a coherent and effective legal framework to address foreign direct liability litigation. This chapter will outline possible future directions and recommendations to enhance the accountability of Canadian corporations for the misconduct of their overseas subsidiaries.

1. Legal and Policy Reforms

It has been discussed in this thesis that there are different legal principles applied to address obstacles in handling cases of foreign direct litigation, such as piercing the corporate veil and direct tort liability of the parent corporations, among others. However, while precedents and such litigation strategies have achieved some progress, they remain unpredictable and heavily reliant on judicial discretion. In other words, one of the primary challenges in foreign direct liability litigation in Canada is the lack of a clear statutory framework that explicitly holds parent companies accountable for the actions of their subsidiaries. To address this, Canada should consider enacting legislation that establishes clear guidelines for corporate liability in transnational contexts.

The present study contends that clear and specific provisions for parent company liability could be a significant step toward a distinct solution for foreign direct litigation cases. This could include, to be specific, explicitly stating that parent companies can be held liable for the actions of their subsidiaries if they exercise significant control over their operations or fail to implement adequate oversight mechanisms. This would create a stronger incentive for multinational corporations to ensure responsible practices throughout their global operations. Such provisions would encourage parent companies to implement more robust oversight

mechanisms, potentially leading to better corporate governance and risk management.⁶⁵² Thus, victims of corporate misconduct in foreign countries might find it easier to seek redress, as they could potentially pursue legal action against the parent company in its home jurisdiction.⁶⁵³ As a result, such threat of liability could serve as a powerful deterrent against corporate malpractice, encouraging companies to prioritize ethical and responsible business practices.⁶⁵⁴

Nevertheless, challenges and considerations remain. For example, defining “significant control” is one of the key challenges, particularly because it requires to establish clear criteria for what constitutes “significant control” over a subsidiary’s operation. Control may involve financial oversight, board appointments, or operational influence. In other words, “significant control” over a subsidiary should be identified based on various factors, including both quantitative and qualitative measures that assess influence over corporate decision-making. For example, under the *Canada Business Corporations Act* (CBCA),⁶⁵⁵ an individual or entity is deemed to have significant control if they own, control, or direct 25% or more of voting shares or 25% of shares by fair market value, either directly or indirectly.⁶⁵⁶ However, in the context of parent-subsidiary liability, according to the previous case analysis in this paper, shareholding percentages alone do not automatically establish control or legal responsibility. Cases, such as *Nevsun*⁶⁵⁷ (where Nevsun owned 60% of the subsidiary who was at the centre of the controversy) and *Choc*⁶⁵⁸ (where Hudbay owned 100% of the relevant

⁶⁵² M Ahmed, “Private International Law and Substantive Liability Issues in Tort Litigation against Multinational Companies in the English Courts: Recent UK Supreme Court Decisions and Post-Brexit Implications” (2021) 17 *Journal of Private International Law* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927494

⁶⁵³ *Ibid.*

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Canada Business Corporations Act*, RSC 1985, c C-44.

⁶⁵⁶ *Ibid.*, s 2.1. See also, Canada, Innovation, Science and Economic Development Canada, *Individuals with Significant Control*, (n.d.), online: Government of Canada <https://ised-isde.canada.ca/site/corporations-canada/en/individuals-significant-control>.

⁶⁵⁷ *Nevsun* (SCC), *supra* note 18.

⁶⁵⁸ *Choc*, *supra* note 23.

subsidiary at the time of the alleged abuses), demonstrate that courts assess liability based on actual control over decision-making and direct involvement rather than just shareholding percentages. In corporate liability cases, control can be assessed through multiple factors beyond shareholding percentages, such as direct managerial involvement, financial dependence, the parent company's role in shaping corporate policies, and whether the parent company has a duty of care towards third parties affected by the subsidiary's actions⁶⁵⁹. A classic example of this approach is seen in *Smith, Stone & Knight Ltd v Birmingham Corporation*,⁶⁶⁰ where the court emphasized substance over form by examining whether the subsidiary was essentially acting as an agent of the parent company.⁶⁶¹ The court identified several key indicators of control, such as who managed the business, who took the profits, and who bore the risks—criteria that go beyond shareholding percentages and focus on real operational influence.⁶⁶² So far, in the foreign direct liability litigation cases we have analyzed, no court has determined that a parent company has significant control over its subsidiary based solely on ownership percentage.

As far as the influence beyond ownership is concerned, for instance, the operational influence which refers to the capacity to direct corporate activities, to veto key decisions like business plans or director or other senior appointments, or to exert control through economic dependence like control over supplier or customer relationships,⁶⁶³ these factors may be difficult to measure or quantify. Thus the elements involved are complex, making it difficult to standardize the content or summarize it into one or a few provisions. And compared with the UK and US, where the focus is on ownership thresholds or formal agency

⁶⁵⁹ Miller Thomson LLP, “*Preserving the corporate veil in parent–subsidiary relationships: A practical guide*”, (11 June 2025), online: <https://www.millerthomson.com/en/insights/ma-in-canada-trends-insights/preserving-the-corporate-veil-in-parent-subsidiary-relationships-a-practical-guide/>

⁶⁶⁰ *Smith*, supra note 391.

⁶⁶¹ *Ibid.*

⁶⁶² *Ibid.*

⁶⁶³ *Supra* note 444.

relationships,⁶⁶⁴ Canada's approach to corporate control emphasizes *de facto* control, including factors such as economic dependence and indirect influence.⁶⁶⁵ As stated in *Silicon Graphics Ltd. v. Canada*,⁶⁶⁶ "In order for there to be a finding of *de facto* control, a person or group of persons must have the clear right and ability to effect a significant change in the board of directors or the powers of the board of directors or to influence in a direct way the shareholders who would otherwise have the ability to elect the board of directors."⁶⁶⁷ While *de jure* control was defined as "...the right of control that rests in ownership of such a number of shares as carries with it the right to a majority of the votes in the election of the Board of Directors", and "*de jure* control is the majority voting control of the corporation, as manifested by the ability to elect the directors of corporation."⁶⁶⁸ Thus, the defining of "significant control" requires case-by-case analysis under Canadian legal and regulatory system. At the same time, care must be taken to ensure that such provisions don't unduly undermine the principle of separate legal personality for corporate entities.⁶⁶⁹ Besides, overly strict liability provisions might discourage foreign direct investment in certain markets, which could potentially impact the economic development.⁶⁷⁰

The process of drafting such targeted and explicit legal provisions could be an extremely rigorous one. However, there is an alternative approach that can be taken to regulate the behaviour of multinational corporations: the implementation of mandatory corporate compliance requirements. A frequently debated initiative is the introduction of a Canadian

⁶⁶⁴ Brian R Cheffins, "Corporate Ownership and Control: British Business Transformed" (24 November 2008), online: Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu/2008/11/24/corporate-ownership-and-control-british-business-transformed/>.

⁶⁶⁵ Robert Couzin, "Some Reflections on Corporate Control" (2005) 53:2 Canadian Tax Journal 305.

⁶⁶⁶ *Silicon Graphics Ltd. v. Canada* (C.A.), 2002 FCA 260 (CanLII), [2003] 1 FC 447.

⁶⁶⁷ *Ibid* at para 35.

⁶⁶⁸ *Ibid* at para 20-22.

⁶⁶⁹ Paul L Davies & Sarah Worthington, *Gower's Principles of Modern Company Law*, 11th ed (London: Sweet & Maxwell, 2021) at 103–106.

⁶⁷⁰ *Supra* note 237, Enneking, p 16.

human-rights-due-diligence law,⁶⁷¹ which would impose a legal obligation on companies to identify, prevent, and address negative human rights and environmental impacts throughout their entire global supply chains. This approach draws inspiration from existing legislation in other jurisdictions. For example, some European authorities have already taken significant steps in this direction. The European Union has made significant progress in promoting corporate compliance in recent years. In 2022, the European Union proposed the *Corporate Sustainability Due Diligence Directive* and entered it into force on 25 July 2024, which requires large companies to conduct due diligence on human-rights and environmental impacts in their supply chains.⁶⁷² This directive applies not only to businesses within the European Union, but also to third-country companies operating in the European Union market. This initiative is designed to ensure that companies that are involved in the European Union market adhere to human-rights and environmental protection standards worldwide.⁶⁷³ Germany implemented the Supply Chain Due Diligence Act (*Lieferkettengesetz*) in 2023, which requires companies to assess and deal with human-rights and environmental risks in their supply chains. The law applies to companies whose annual turnover exceeds a certain threshold and requires them to take preventive measures to prevent infringement of human rights and avoid environmental harm in their supply chains. The implementation of this law in Germany provides a valuable model for other countries to learn from. France's *Duty of Vigilance Law* is also an example.⁶⁷⁴ Similarly, a Canadian equivalent could obligate

⁶⁷¹ Government of Canada, *Statement by Minister Ng on Forced Labour Measures in 2024 Fall Economic Statement* (18 December 2024). The Canadian government has publicly indicated its intention to introduce legislation that would require businesses and government entities to scrutinize their international supply chains for risks to fundamental labour rights and to take action to resolve these risks in its 2024 Fall Economic Statement which can be found at <https://www.canada.ca/en/global-affairs/news/2024/12/statement-by-minister-ng-on-forced-labour-measures-in-2024-fall-economic-statement.html>

⁶⁷² European Union, *Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937*, [2024] OJ, L 202, 1.

⁶⁷³ European Commission, *Corporate Sustainability Due Diligence* (n.d.), online: https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-sustainability-due-diligence_en.

⁶⁷⁴ Loi n 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (France's Duty of Vigilance Law), JO, 28 March 2017.

corporations to adopt and implement due diligence policies, report transparently on their activities, and face legal consequences for failing to prevent certain foreseeable harm.

Currently, Canada has also begun to or attempt to adopt similar measures, although there are areas that need further scrutiny and critique. For example, Bill C-262, the *Corporate Responsibility to Protect Human Rights Act*, represents a significant effort by Canada to address corporate accountability for human rights and environment impacts abroad.⁶⁷⁵ It was introduced in the House of Commons in 2022 as a private member's bill and aimed to address precisely these issues by establishing mandatory human rights and environmental due diligence obligations for Canadian companies operating internationally.⁶⁷⁶ According to Bill C-262, companies would be required to identify, prevent, and mitigate risks of human rights abuses and environmental harm throughout their operations, including subsidiaries and supply chains.⁶⁷⁷ Although the bill did not progress beyond first reading,⁶⁷⁸ it can be marked as a significant step in parliamentary recognition of the need for statutory mechanisms. It also proposed providing foreign victims with a statutory cause of action in Canadian courts so as to enable them to seek remedies for harms caused by corporate negligence.⁶⁷⁹ If companies failed to conduct due diligence or caused harm, affected individuals or communities could file lawsuits in Canadian courts. Courts could order remedies such as halting harmful practices or providing compensation to victims. The introduction of such legislation, whether in the same form or with improvements, could serve to complement existing tort-based liability mechanisms by reducing the evidentiary burden on the plaintiffs of foreign direct liability cases. This is in part because instead of proving negligence or harm

⁶⁷⁵ Bill C-262, *An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad (Corporate Responsibility to Protect Human Rights Act)*, 1st Sess, 44th Parl, 2022. <https://www.parl.ca/legisinfo/en/bill/44-1/c-262>

⁶⁷⁶ *Ibid.*

⁶⁷⁷ *Ibid.*

⁶⁷⁸ The first reading was completed on Tuesday, March 29, 2022 but no more progress with this bill after since. See <https://www.parl.ca/legisinfo/en/bill/44-1/c-262>.

⁶⁷⁹ *Supra* note 455, s 10.

directly, the plaintiffs could rely on the failure of companies to meet their statutory due diligence obligations as the basis for their claim.⁶⁸⁰ This shift could place greater responsibility on corporate actors to proactively monitor and address risks in their global operations.⁶⁸¹

In addition to providing enforceable mechanisms for foreign direct liability litigation cases from the perspective of corporate self-regulation and management, the enforceability of these mechanisms also needs to be strengthened and enhanced from a regulatory standpoint. To be specific, regulatory bodies in Canada and other jurisdictions often lack the resources and authority to effectively monitor and enforce corporate compliance with human-rights and environmental standards. This lack of oversight can create a regulatory gap, allowing corporations to operate with impunity in foreign jurisdictions.⁶⁸² Therefore, legislations need to be established to empower Canadian authorities with mandatory and effective tools to monitor and investigate the conduct of Canadian companies and their oversea subsidiaries. For example, a statute could be used to empower a governmental or quasi-government institution with the necessary investigative tools to hold Canadian corporations accountable for human-rights abuses and environmental harm linked to their international operations. This could, to some extent, grants certain authorities to compel the production of documents and require evidence in any form such as witness testimony. It aims to enhance the authority and capacity of regulatory bodies to exercise more effective oversight and supervision over the operations of Canadian multinational enterprises. On one hand, this would enable timely detection of any misconduct by their overseas subsidiaries; on the other hand, it would grant these bodies the power to investigate and impose constraints on such activities. An attempt

⁶⁸⁰ Robert McCorquodale & Justine Nolan, “The Effectiveness of Human Rights Due Diligence for Preventing Business Human Rights Abuses” (2021) 68:3 *Netherlands International Law Review* 455, DOI: 10.1007/s40802-021-00201-x.

⁶⁸¹ *Ibid.*

⁶⁸² UNHRC, *supra* note 120.

to do this has already been made in Canada. For example, alongside Bill C-262, another private member's bill, Bill C-263,⁶⁸³ was introduced to strengthen the powers of the Canadian Ombudsperson for Responsible Enterprise (CORE). This bill sought to grant CORE investigatory powers, such as compelling document production and witness testimony under oath, which are currently absent from its mandate.⁶⁸⁴ Together with Bill C-262, these bills aimed to create a robust framework for holding Canadian corporations accountable. However, unfortunately neither Bill C-262 nor Bill C-263 has been passed by the Canadian Parliament.

Thus, while litigation strategies continue to play an important role in addressing corporate misconduct abroad, they must be complemented by legislative reforms that provide a stronger, more predictable foundation for corporate accountability. As global expectations of business responsibility continue to rise, Canada has both the opportunity and the obligation to lead by example in creating a legal environment that prioritizes justice for victims of transnational corporate harm.⁶⁸⁵

2. National Standards and Voluntary Codes

In addition to formal and mandatory legal mechanisms, it is believed that so-called “soft rules” or “soft law” such as national standards and voluntary codes of corporate conducts can be adopted to play a significant role in shaping corporate behavior and guiding transnational accountability efforts.⁶⁸⁶

⁶⁸³ Bill C-263, *An Act to establish the Office of the Commissioner for Responsible Business Conduct Abroad and to make consequential amendments to other Acts (Responsible Business Conduct Abroad Act)*, 1st Sess, 44th Parl, Canada, 2022, <https://www.parl.ca/legisinfo/en/bill/44-1/c-263?view=progress>

⁶⁸⁴ Canadian Network on Corporate Accountability, “Press Release – Bills Introduced to Protect People and the Planet Warrant All-Party Support”, 29 March 2022, online: CNCA <https://cnca-rcrce.ca/2022/03/29/news-release-bills-introduced-to-protect-people-and-the-planet-warrant-all-party-support/>.

⁶⁸⁵ UNHRC, *supra* note 120.

⁶⁸⁶ *Supra* note 680.

There are already several international standards in place to regulate corporate conduct in relation to human rights. For example, the *United Nations Guiding Principles on Business and Human Rights* (UNGPs) are the globally recognized framework for preventing, addressing, and remedying human rights abuses connected to business activities.⁶⁸⁷ It requires states and expects businesses to avoid infringing on the human rights of others by implementing effective policies and conducting due diligence to “identify, prevent, mitigate, and account for how they address their impacts on human rights”.⁶⁸⁸ While these instruments are usually not legally binding, they can help to establish normative standards and expectations for corporate behaviors and are able to be used as the basis for either domestic regulation or litigation strategies.

From the perspective of enforcement, at present, there is no legal mechanism to ensure that these companies comply with those soft rules like international standards or voluntary codes.⁶⁸⁹ Therefore, one feasible measure to meet the expectations for accountability of parent companies is to transit the publication of corporate social responsibility (CSR) policies, sustainability reports, and codes of conduct from a total voluntary action to a mandatory requirement. On this point, the proposed *UN Treaty on Business and Human Rights* aims to establish binding international obligations for corporations concerning human rights.⁶⁹⁰ It includes provisions that support access to justice for the victims of human-rights abuses committed by transnational corporations,⁶⁹¹ and also require states to adopt laws making human-rights due diligence mandatory for companies, obliging them to assess and

⁶⁸⁷ *Supra* note 178.

⁶⁸⁸ *Supra* note 430.

⁶⁸⁹ *Supra* note 80, Susana C. Mijares Peña.

⁶⁹⁰ UN Human Rights Council, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*, online: <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc?utm_source=chatgpt.com>. Article 2 of the proposed treaty seeks to legally require businesses and states to uphold and enforce human rights standards in the context of corporate activities.

⁶⁹¹ *Ibid*, article 8.

address human rights risks in their operations and supply chains.⁶⁹² Such mandatory requirements would not only enhance corporate transparency, but also strengthen legal accountability. Currently, many Canadian corporations publish related policies or documents which outline their commitments to human rights, environmental protection, and ethical business practices across global operations. For example, Barrick Gold Corporation, one of Canada's largest mining companies, has a comprehensive Human Rights Policy that aligns with the UN Guiding Principles on Business and Human Rights. This policy includes commitments to respecting the rights of communities and workers at all its global sites.⁶⁹³ In addition, Barrick has published a detailed Human Rights Report, which outlines their approach to managing human rights risks and impacts across their operations.⁶⁹⁴ These documents are typically voluntary and not enforceable under statutory law. But since there are usually terms about corporate oversight, supply-chain responsibility, and compliance mechanisms included in these documents, they can, to some extent, serve as evidences indicating the control and involvement of parent companies to their overall operation all around the world, including their control or impact exerted on overseas subsidiaries. However, if a more effective mechanism is needed to hold parent companies accountable for the actions of their subsidiaries, particularly in the case of large multinational companies, then the adoption and implementation of such internal standards and codes should be made mandatory. This could take the form of national legislation requiring companies of a certain size or international reach to establish and comply with binding rules on human rights-related internal governance, including oversight of subsidiaries, supply chain management, mandatory human rights due diligence, and duties to report related violations. In the context

⁶⁹² *Ibid.*, article 9.

⁶⁹³ Barrick Gold Corporation, *Sustainability Report 2024* (2024) at 53, online: (pdf): Barrick <https://s25.q4cdn.com/322814910/files/doc_downloads/sustainability/Barrick_Sustainability_Report_2024.pdf>.

⁶⁹⁴ Barrick Gold Corporation, *Human Rights Report* (2021), online (pdf): Barrick Gold Corporation <https://www.barrick.com/files/doc_downloads/sustainability/Barrick_Human_Rights_Report.pdf>.

of Canadian transnational corporations, this could also mean shifting from a purely voluntary CSR framework to a statutory model that obliges corporations to implement robust human rights compliance mechanisms. While some jurisdictions, such as the European Union, have introduced mandatory due diligence requirements for corporations, for example, through the *Corporate Sustainability Due Diligence Directive*,⁶⁹⁵ Canada has yet to adopt similar measures. Without mandatory due diligence, corporations may not be required to assess and address the human rights and environmental impacts of their operations, leaving victims without adequate protection. Thus, adopting similar legislation in Canada would not only strengthen the legal foundation for pursuing corporate accountability, both domestically and abroad, but also reflect the Canada's commitment to aligning national regulation with emerging international human-rights standards. However, introducing such mandatory national standards may face resistance from the corporate sector due to potential compliance costs and increased liability risks. Moreover, careful drafting will be required to ensure clarity, enforceability and alignment with international standards, while balancing the interests of business and the rights of affected communities.

In conclusion, while voluntary standards and soft law instruments, such as the UNGPs and corporate social responsibility codes, play a valuable role in shaping business practices and raising awareness, they are not sufficient on their own to ensure meaningful accountability. These frameworks must be seen as complementary to legally binding mechanisms, rather than as substitutes. To truly safeguard human rights and prevent corporate abuse, soft law initiatives must operate in tandem with enforceable legal duties and regulatory oversight.

⁶⁹⁵ *Supra* note 672, European Union, *Directive (EU) 2024/1760*.

3. Alternative Approaches

Apart from regulatory measures for holding Canadian parent companies liable for the actions of their subsidiaries abroad, courts can consider alternative approaches to apply to reach the same conclusion.

As introduced earlier, Canadian courts, like in the *Choc* case, have recognized that a parent company can owe a duty of care to individuals harmed by its subsidiary's operations.⁶⁹⁶ It emphasizes that if a parent company has direct involvement or control over the subsidiary's activities, or make public commitments, for example, through corporate social responsibility policies, and then fails to uphold them, it could be liable for negligence.⁶⁹⁷ This case inspires that, in addition to strict home-state regulation, alternative approaches, such as direct tort liability, can be sought as a method for handling foreign direct liability litigation cases. These approaches have the advantage is they do not require piercing the corporate veil. Instead, they treat the parent company a directly responsible for its own actions or omissions.

In addition to direct tort liability, criminal liability or contractual liability is also worthy of consideration in appropriate circumstances. Criminal liability offers a potential way for addressing corporate misconduct abroad, especially in cases involving serious human-rights violations, such as forced labour, or environmental destruction.⁶⁹⁸ The recognition of the need of expanding criminal accountability for corporate actions is growing.⁶⁹⁹ Moreover, laws such as the *Corruption of Foreign Public Officials Act*⁷⁰⁰ already establish

⁶⁹⁶ *Supra* note 23.

⁶⁹⁷ *Ibid*, para 68-70.

⁶⁹⁸ Jennifer Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedie* (Geneva: Office of the UN High Commissioner for Human Rights, 2014), online: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

⁶⁹⁹ Wolfgang Kaleck & Miriam Saage-Maaß, "Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges" (2010) 8:3 *J Intl Crim Just* 699, online: <https://doi.org/10.1093/jicj/mqq043>. See also, Jonathan Clough, "Punishing the Parent: Corporate Criminal Complicity in Human Rights Abuses" (2008) 33:3 *Brooklyn J Intl L* 899, Monash University Faculty of Law Legal Studies Research Paper No 2009-05, online: SSRN <https://ssrn.com/abstract=1491306>.

⁷⁰⁰ *Corruption of Foreign Public Officials Act*, SC 1998, c 34.

extraterritorial criminal jurisdiction, allowing Canada to prosecute bribery of foreign officials by Canadian companies.⁷⁰¹ Similar principles could be established or extended to corporate human-rights abuses. And for the contractual liability, there are scholars suggesting that it may serve as a more effective approach to establish corporate responsibility. Again, taking the *Choc* case as an example, the Ontario Superior Court ruled that Hudbay could potentially be held liable for the acts committed by its subsidiaries, based on its direct involvement in managing the mine and security operations. Although agreeing with the Court's conclusion, some scholars have put forward different views on its reasoning. They argued that the legal basis used by the court was "far too broad" basis and it took an unnecessarily complex legal approach.⁷⁰² According to their analysis, the same outcome could have been reached using more straightforward legal grounds, such as corporate and contract law.⁷⁰³

Specifically, regarding the liability of Hudbay's subsidiaries, Skye and CGN: since Skye merged with Hudbay, Canadian corporate law dictates that Hudbay inherits all of Skye's legal liabilities, which means there is no need for further legal analysis regarding direct negligence. Thus, Hudbay is automatically responsible.⁷⁰⁴ As for CGN, when Hudbay sold the company, it contractually agreed to retain control over any litigation involving CGN. Under contract law, Hudbay voluntarily took on the responsibility which makes it a legitimate defendant in the lawsuit.⁷⁰⁵ Therefore, it was argued by the authors that, instead of relying on novel legal principles, the court should have applied established corporate and contract law to reach the same conclusion.⁷⁰⁶ It can be seen that this argument proposes a

⁷⁰¹ *Corruption of Foreign Public Officials Act*, S.C. 1998, c. 34, s. 5.

⁷⁰² Darcy L. MacPherson & John Pozios, "Liability of Canadian Corporations for the Actions of Subsidiaries Elsewhere: A Comment on *Choc v Hudbay Minerals Inc*" (2014) 8 CCLT- (3d) 103 at 103.

⁷⁰³ *Ibid.*

⁷⁰⁴ *Ibid.*

⁷⁰⁵ *Ibid.*

⁷⁰⁶ *Ibid.*

simpler and more traditional legal approach to determine liability rather than expanding legal doctrines in an uncertain way.

However, the argument in this thesis is that these approaches are applied on a case-by-case basis. The choice of approach depends on the specific factual details of each case. As a result, they lack generalizability. One approach that may offer a promising avenue for the victims seeking justice in one case might be inadequate to support or realize their claims in another case. For example, contractual liability can offer a straightforward path to corporate accountability especially when there is well-documented agreements. As demonstrated in the case of *Choc*, Hudbay's contractual obligations and post-sale commitments concerning its subsidiary made it a legitimate party in the case. A parent company might also be liable if it enters into contracts that include human-rights or environmental commitments. However, since companies may deliberately structure their agreements to avoid assuming legal responsibilities, proving that a parent company has retained sufficient contractual control can become a challenge. Therefore, contractual liability, and other alternative approaches must be applied with caution and flexibility. Nevertheless, rather than relying solely on legislative reforms or international and national principles, which are often slow to emerge and/or may lack enforcement mechanisms, creative strategies within existing legal frameworks could be sought as alternative approaches. While alternative approaches remain inherently limited in their ability to provide consistent and generalizable outcomes for all foreign direct liability litigation, it is argued that these approaches serve not only as legal remedies but also as mechanisms for social accountability, public pressure, and corporate reform.

All in all, the multifaceted legal environment necessitates the implementation of comprehensive compliance frameworks and thorough due diligence procedures to effectively mitigate potential legal exposures.

CHAPTER 6: CONCLUSION

The previous chapters have examined how Canadian parent corporations can be held legally accountable for the misconduct of their overseas subsidiaries from introducing the context of globalization and the emergence of transnational corporate structures. It highlights how legal gaps have made it difficult to hold parent companies liable for harms occurring abroad. The study started from analyzing landmark cases such as *Nevsun Resources Ltd. v. Araya*, *Choc v. Hudbay Minerals Inc.*, and *Garcia v. Tahoe Resources Inc.* These cases demonstrated that Canadian courts are increasingly willing to hear claims against Canadian companies for overseas human rights violations, particularly where there is evidence of control, negligence, or complicity on the part of the parent company. In addition, it also explored the legal doctrines relevant to foreign direct litigation, including jurisdiction, the corporate veil, and the application of customary international law. It highlighted the ongoing tension between traditional legal principles like corporate separateness and the modern demand for transnational justice.

The findings of this research suggest that Canada is at a pivotal moment in shaping the future of corporate accountability. The decisions in *Nevsun* and *Choc* show a willingness to reinterpret longstanding legal doctrines in ways that prioritize justice for victims of overseas misconduct. If this trend continues, Canada could become a global leader in advancing legal remedies for transnational human-rights abuses.

However, practical challenges exist in pursuing foreign direct litigation cases, such as jurisdictional barriers and complexity of accessible theories. Without legislative reform, progress will remain limited and inconsistent. Clear statutory guidance is necessary to support the courts and provide predictability to corporations. This research implies that a proactive approach — through legal reforms, corporate governance standards, and international cooperation—is essential for closing the accountability gap. Furthermore, as globalization

deepens and supply chains become more complex, the demand for corporate responsibility will only grow. Countries like Canada will be increasingly called upon to balance their economic interests with their obligations under international human rights law.

Thus, it attempted to provide potential future directions and policy recommendations in this paper, including the adoption of mandatory human rights due diligence legislation and the development of clearer statutory standards for parent company liability. It emphasized the importance of aligning Canadian corporate practices with international human rights norms. Normatively, Canada must take decisive steps to strengthen its corporate accountability regime. Specifically:

1) Enact mandatory human rights and environmental due diligence law with extraterritorial application:

Such legislation should establish clear, enforceable obligations for Canadian parent companies over their global operations and supply chains. The statute should, firstly, mandate thorough, ongoing due diligence to identify, prevent, and mitigate risks of human rights abuses and environmental harms, with meaningful reporting and independent oversight; secondly, establish legal liability for failure in due diligence—not only for knowledge and complicity but for negligence in oversight, where due diligence would have detected, prevented, or limited the harm; thirdly, provide a civil cause of action in Canadian courts for foreign plaintiffs, overcoming jurisdictional barriers such as *forum non conveniens* where justice is not reasonably available abroad; fourthly, ensure fair procedural safeguards so victims can bring claims without insurmountable costs or risks; and lastly, introduce penalties and remedies—including injunctive relief, damages, and public reporting requirements—for non-compliance.

2) Promote judicial boldness in recognizing parent company duty of care:

While legislative reform is necessary, it must be matched by judicial courage. It suggested to apply a flexible approach to the duty of care, especially when there is evidence of operational control, integration, or public commitments regarding human rights and environmental practices; be sensitive to the realities of modern corporate groups and the expectations established by international norms (such as the UN Guiding Principles); treat statements of policy and publicly-announced codes of conduct as potentially actionable undertakings, not mere aspirations; and refuse to hide behind the formalities of corporate separateness when justice requires otherwise.

3) Exercise Global Leadership in Business and Human Rights:

Canada has an opportunity—and a responsibility—to exercise leadership in advancing business and human rights accountability. Adopting a strong due diligence regime and providing real remedies for foreign victims would align Canada with recent reforms in the European Union and anticipated standards in other major economies. Such action affirms Canada's commitment to rule of law, international solidarity, and the dignity of affected communities.

All in all, the issue of Foreign Direct Liability Litigation lies at the heart of a fundamental tension in our global legal order: the conflict between corporate autonomy and the need for accountability. While corporations play a vital role in economic development, this role must be exercised responsibly and with respect for human rights and environmental standards. This research demonstrates that Canadian law has begun to shift in response to these global demands. Still, it is not enough to rely solely on case-by-case litigation. A comprehensive legal framework is necessary to ensure justice is not a matter of jurisdictional luck but a consistent standard in global corporate operations. Ultimately, the goal of Foreign Direct Liability Litigation is not only to punish misconduct, but also to prevent it. Through stronger legal

mechanisms and a commitment to human dignity, Canada has the opportunity to model a more ethical and sustainable approach to globalization.

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