Business and Human Rights:

Should Canadian Corporations Be held Liable for Atrocities Abroad?

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ABSTRACT

In recent times, there has been an outcry to hold the Canadian corporations liable for the atrocities committed by their transnational subsidiaries. But there is no clear legal route through which these corporations can be held accountable. However, in *Choc v Hudbay Minerals Inc* the Ontario Superior Court opened new opportunities that is likely to affect the liability of Canadian corporations in the future. In *Choc*, the court accepted the tortious method of finding liability and also considered piercing the corporate veil. More recently, in *Araya v Nevsun Resources Ltd* Canadian courts permitted a suit against a Canadian corporation for violation of customary international laws. This approach provided an alternative forum of finding corporations liable.

However, the methods applied in both *Choc* and *Nevsun* attracted much academic criticisms. This research delves into the plausibility of various methods of finding liability of parent corporations including tortious liability, criminal liability, liability through necessity and also contractual liability. It makes an objective analysis of the jurisprudential and practical implications of all the possible routes. Further, the research also concentrates on the laws of other jurisdictions to focus on a comparative analogy. Finally, attention will be focused on the need for a streamlined statutory intervention in this area.

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CHAPTER 1: CANADIAN CORPORATIONS AND ATROCITIES

A. Introduction

There is an outcry that Canada must regulate the corporate activity effectively and especially should guard against the human rights violations committed by multinational corporations.[1] Over the years, corporations have significantly increased both in terms of their number and in terms of their international influence.[2] Over time, laws have been evolving to hold the transnational corporations accountable for their atrocities, but to this point, there is no clear mechanism to effectively ensure that corporations adhere to either international law or voluntary codes.[3] The mining and extractive industry of Canada has become the prime focus of the Canadian government's recent steps to improve the reputation of Canadian corporations' abroad as good corporate citizens.[4] Against this backdrop, there is an increasing expectation on the courts to take an active role to protect against the atrocities of corporations.

Choc v Hudbay Minerals Inc.[5] began to paint a picture of the Canadian legal nomenclature regarding lawsuits relating to the atrocities committed by Canadian corporations abroad. In essence, the applications judge held that Canadian corporations cannot avoid liability for the atrocities committed by its subsidiaries operating abroad. By allowing the case to proceed to trial, it created a stir in Canada.[6] Further, in *Araya v Nevsun Resources Ltd.*[7] the Supreme Court

[1] Sara L Seck, "Unilateral Home State Regulation: Imperialism or Tool for Subaltern Resistance" (2008) 46 Osgoode Hall L J 565 at 566.
[2] Maureen T Duffy, "Opening the Door a Crack: Possible Domestic Liability for North-American Multinational Corporations for Human Rights Violations by Subsidiaries Overseas" (2015) 66:1 N Ir Leg Q 23 at 23.
[3] Susana C Mijares Pena, "Human Rights Violations by Canadian Companies Abroad: Choc v Hudbay Minerals Inc: (2014) 5:1 Western J of Leg Studies [i] at 17.
[4] Stephanie Stimpson, Jay Todesco & Amy Maginley, "Strategies for Risk Management and Corporate Social Responsibility for Oil and Gas Companies in Emerging Markets" (2015) 53:2 Alta L Rev 259 at 260.
[5] *Choc v Hudbay Minerals Inc.,* (2013) ONSC 1414 [*Choc*].
[6] Duffy, *supra* note 2 at 26.
[7] *Nevsun Resources Ltd. v. Araya,* (2020) SCC 5 (CanLII), online: <https://canlii.ca/t/j5k5j> [*Nevsun*].

of Canada (SCC) permitted a suit in domestic court against a parent corporation for the alleged violations of customary international law.

These cases provided a unique opportunity in paving the way for development of extraterritorial corporate tortious liability. In *Choc*, the court's procedural decision attracted significant academic commentators and it marks as a significant shift in the approach taken by the Canadian courts.[8] Their final decision of *Choc* – if there ever is one – would likely have "significant implications" for the liability of Canadian corporations in the future.[9] However, the present approach indicates that the Canadian higher courts are willing to take the regulatory role in both restricting and remedying the human rights abuses of Canadian corporations operating abroad.[10] Some argue in favor of direct negligence in tort as a method of providing remedy for victims of human rights violations by overseas subsidiaries of Canadian corporations.[11] Alternatively, some argue for liability based on the contractual framework.[12]

B. Mining Corporations and Canada

Canada is a global superpower in the mining business. Approximately 75% of the world's mining companies are situated in Canada.[13] Canadian mining corporations working abroad pose challenges to the legal human rights protection.[14] There is a growing number of corporations being accused of human rights abuses, especially while operating their businesses in developing countries that have weak accountability mechanisms.[15] Moreover, they operate

[8] 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 [Nwapi, "Resources Extraction"].
[9] Pena, *supra* note 3 at 9.
[10] *Ibid* at 1.
[11] *Ibid* at [i].
[12] James Gathii & Ibironke T Odumosu-Ayanu, "The Turn to Contractual Responsibility in the Global Extractive Industry" (2016), 1:1 Bus & Human Rights J 69 at 69.
[13] Nwapi, "Resources Extraction" *supra* note 8 at 123.
[14] Charis Kamphuis, "Canadian Mining Companies and Domestic Law Reform: A Critical Legal Account" (2012) 13:12 German LJ 1459 at 1459.
[15] Madelaine Drohan, "Regulating Canadian mining companies abroad" (January, 2010) at 1, online (pdf): *Centre for International Policy Studies* <www.cips-cepi.ca/wp-content/uploads/2015/01/CIPS_PolicyBrief_Drohan_Jan2010-1.pdf>.

business through complex web of operations that are specifically and technically designed to protect their business operations from the scope of the traditional jurisdictional doctrines.[16] Generally, the Canadian government has shown strong reluctance to regulate the corporate activities operating abroad.[17] Most of the mining operations are carried out in under-developed or developing countries that often lack strong legal protections for communities affected by mining activities.[18] As mentioned, most often, the human rights abuses are committed in developing countries that have weak accountability regime.[19] Because the mining and extractive industries often operate in high conflict areas, they are prone to human rights violation by the security personnel or through the activities of subsidiary companies.[20] There is often no or inadequate accountability mechanisms in those countries.[21] Further, the host country often hesitates to strictly control their objectionable behaviour, for the country fears that the corporation may move to another country and thus impair host state's economic status.[22] Mining corporations have in many cases grown into such powerful and influential global players that the developing countries generally have neither the resources nor the willingness to control them.[23] They have developed into corporations of such enormous size with regard to their economic power and capacity, that they are often equivalent to many states.[24] Thus, effective enforcement and accountability approach may backfire and ultimately affect the development of the economy of the developing country.[25] Further problem arises when the alleged violation occurs in one country and the plaintiffs try to bring action in the

[16] Chilenye Nwapi, "Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor" (2014) 30:78 Utrecht J of Intl & European L 24 at 24 [Nwapi, "Jurisdiction by Necessity"].
[17] Kamphuis, *supra* note 14 at 1460.
[18] Pena, *supra* note 3 at 1.
[19] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 24.
[20] Pena, *supra* note 3 at 3.
[21] Kamphuis, *supra* note 14 at 1465.
[22] Duffy, *supra* note 2 at 24.
[23] Stephen R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001), 111 Yale L J 443 at 461.
[24] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 24.
[25] *Ibid* at 26.

jurisdiction of the parent corporation to adjudicate the allegations committed by its' subsidiaries operating abroad.[26]

Traditionally, the Canadian government has also demonstrated hesitancy holding these corporations liable for their atrocities.[27] Historically, there was no effective accountability mechanism addressing human rights and environmental rights abuses. Government tackled this approach by issuing public statements from time to time that outlined Canada's commitment to the corporate social responsibility and international human rights standards.[28] Most scholars agree that corporations ought to be held liable. There is relatively scant disagreement in the academic field as to whether the corporations should be held liable for the acts of their subsidiaries. But, there are divergent opinions as to the basis of such liability. Currently, these situations are regulated through various international standards and various voluntary codes adopted by the corporations. However, neither the standards nor the codes have been effective in encouraging the corporations to adhere to effective enforcement mechanism.

Considering all of these potential issues, there is a growing expectation from the Canadian domestic courts to hold the corporations liable for the atrocities. The approaches taken by the courts in *Choc* and *Nevsun* cast a shadow on the future liability of multinational corporations for their transnational wrongs.[29] The purpose of this research is to explore the feasibility of the approach taken by the Ontario Superior Court in *Choc*. This work outlines the existing legal approaches that have been designed to hold the corporations liable for their atrocities committed abroad. Further, it seeks to make an objective analysis of the existing methods to figure out their efficacy.

[26] Duffy, *supra* note 2 at 24.
[27] Nwapi, "Resources Extraction" *supra* note 8 at 122.
[28] *Ibid* at 127.
[29] *Ibid* at 122.

CHAPTER 2: EXISTING LEGAL FRAMEWORKS FOR THE CORPORATIONS IN CANADA

Canada has both direct and indirect ways of enforcing international human rights norms. We begin with discussion of the international frameworks. This is followed by Canada's domestic strategies and numerous legislative attempts. Lastly, the attitude of Canadian courts is discussed.

A. International Frameworks

1. UDHR & ICCPR

The direct means are mainly governed by the international law.[30] The leading instruments in this respect are the ones in the International Bill of Human Rights.[31] The International Bill of Human Rights consist of the *United Nations Universal Declaration of Human Rights* (UDHR)[32], the *International Covenant on Economic, Social and Cultural Rights*[33] and the *International Covenant on Civil and Political Rights* (ICCPR)[34] and the Optional Protocol[35]. Article 7 of the UDHR promises freedom from torture, from cruel, inhuman or degrading punishment.[36] Article 7 of the ICCPR guarantees equal protection of law and protect against discrimination.[37] The span of corporate responsibility for international crimes was further expanded by the *Rome Statute of the International Criminal Court*.[38] Since Canada ratified these provisions, Canada is under a positive obligation to take effective measures to ensure compliance with them *i.e.* to protect individuals from the human rights abuses.[39]

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[30] Pena, *supra* note 3 at 2.
[31] *Ibid*.
[32] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, online (pdf): <www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> [UDHR].
[33] *International Covenant on Economic, Social and Cultural Rights*, GA Res 2200A, (1976), online (pdf): <www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf>.
[34] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, online (pdf): <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf> [ICCPR].
[35] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, A/RES/63/117 (2008), online (pdf): < https://www.ohchr.org/Documents/HRBodies/CESCR/OProtocol_en.pdf>.
[36] *UDHR*, *supra* note 32 at art 7.
[37] *ICCPR*, *supra* note 34 at art 7.
[38] *Rome Statute of the International Criminal Court*, (last amended 2010), 17 July 1998 at art 7, online (pdf): <www.icc-cpi.int/resource-library/documents/rs-eng.pdf> [Rome Statute].
[39] Pena, *supra* note 3 at 2.

2. United Nations Guiding Principles on Business and Human Rights (UNGPs)

Since the 1970s, there has been an effort to form a framework to regulate business activities in order to curb their adverse human rights impacts.[40] However, there has always been strong opposition against imposing legal liability on corporations for their extraterritorial activities.[41] In 1977, the United Nations (UN) developed a Draft Code of Conduct on Transnational Corporations, but it failed to be officially adopted.[42] In 2000, UN Global Compact was launched.[43] It comprises of ten principles relating to human rights, labour, environment and anti-corruption that corporations should voluntarily adopt in their business practices.[44] This is not an effective tool for corporate accountability but rather it is more of an educational platform to generate awareness.[45] In 2003, the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (Norms) was designed to find legal responsibility of corporations.[46] The Norms covered a wide range of matters that companies must respect such as international law and national laws regarding human rights; economic, social and cultural rights; consumer protection and environmental protection.[47] The implementation procedure mentioned in the Norms was comprehensive as well. Corporations not only had to formulate internal rules to comply with the Norms, corporations were also going to face monitoring and verification by the UN or other international or national body to see whether the Norms were being applied.[48] Furthermore, the Norms stated that the corporation had an obligation to provide reparations, restitution,

[40] Dorothée Baumann-Pauly & Justine Nolan, ed, *Business and Human Rights From Principles to Practice* (New York, USA: Routledge, 2016) at 38.
[41] *Ibid* at 42.
[42] *Ibid* at 39.
[43] *Ibid* at 40.
[44] "UN Global Compact", online: UN Global Compact <www.unglobalcompact.org/what-is-gc/mission/principles>.
[45] Pauly & Nolan, *supra* note 40 at 40.
[46] *Ibid* at 41.
[47] UNESC, Commission on Human Rights, *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003) at arts 10 and 13-14, online: *UN Digital Library* < https://digitallibrary.un.org/record/501576?ln=en>.
[48] *Ibid*, art 16.

compensation and rehabilitation to anyone who has suffered damages due to corporation's failure to abide by the Norms.[49] National courts and international tribunals were to enforce the Norms according to national and international law.[50] However, the Norms eventually failed to be adopted due to their binding nature.[51]

In 2005, Professor John Ruggie was appointed as the Special Representative of the Secretary-General on business and human rights.[52] After extensive consultation, he came up with the 'Protect, Respect, Remedy' Framework in 2008.[53] The three pillars of this framework are the state's duty to protect against human rights abuse, the corporation's responsibility to respect human rights, and the access to remedies.[54] The United Nations Guiding Principles on Business and Human Rights (UNGPs) was formulated to in 2011 to operationalize this framework.[55] UNGPs became the common reference point in the business and human rights arena.[56]

UNGPs advance a joint state-corporation approach in order to protect human rights in the business context. UNGPs provide that every nation has a duty to protect human rights, and corporations have a responsibility to respect human rights as well. States, having the primary responsibility to protect human rights in their own territory, should always make it clear, via legislation and regulatory policies, that all corporations domiciled in their state should respect human rights.[57] According to UNGPs, currently states do not have to regulate the

[49] *Ibid*, art 18.
[50] *Ibid*.
[51] Pauly & Nolan, *supra* note 40 at 42.
[52] *Ibid* at 43.
[53] *Ibid* at 43.
[54] UN Human Rights Council, *Protect, respect and remedy : a framework for business and human rights : report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 8th Sess, UN Doc A/HRC/8/5 (2008), online: *United Nations Digital Library* <https://digitallibrary.un.org/record/625292?ln=en> [Protect, respect and remedy].
[55] Pauly & Nolan, *supra* note 40 at 43.
[56] *Ibid.*
[57] UN, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Respect, Protect and Remedy" Framework* (New York: UN Human Rights High Commission, 2011) at Principles 1-3, online: <ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [UNGP].

extraterritorial operations of domestic corporations under international law.[58] However, it is suggested that home countries should take some measures to prevent their domestic corporations from committing human rights violations in the host countries.[59] If a home state is involved in a business with a multinational corporation or supports that corporation, it should take initiatives to prevent the domestic corporation from committing atrocities abroad because the home state has policy reasons to do so, such as protecting the state's own reputation.[60] UNGPs state several methods to regulate the foreign operations of a domestic corporation. There are mild mechanisms such as reporting requirements, or following soft law instruments like Guidelines for Multinational Enterprises of the OECD.[61] There are also, more serious methods such as direct extra-territorial legislation, for example, the recent French statute imposing a duty of vigilance on big multinational corporations.[62] States can also impose criminal sanctions to prosecute a perpetrator based on his nationality regardless of the location of the crime.[63] Although UNGPs have suggested various measures that can be taken by the states, it does not mandate that states have an obligation to regulate the extra-territorial activities of a corporation.

UNGPs recognize that conflict-affected areas are more prone to human rights abuses.[64] Accordingly, home states should take steps to ensure that their corporations are not engaged in the atrocities in a conflict-affected zone.[65] Sexual and gender-based violence is common in a

[58] UNGP, *supra* note 57 at Commentary to Principle 2.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*
[62] *Ibid.*
[63] *Ibid.*
[64] UNGP, *supra* note 57 at Commentary to Principle 7.
[65] *Ibid* at Principle 7.

conflict-affected area.[66] Additionally, government should cut off public support and services to any domestic corporation engaged in human rights violations abroad.[67]

UNGPs provide guidance to corporations on how to respect human rights while carrying out their business activities. It urges businesses to at least respect the rights recognized in the International Bill of Human Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.[68] If the situation requires, corporations are expected to take into account additional human rights issues, for example, if they are involved with indigenous people in a local community.[69] Corporations should try to prevent or alleviate repercussions of any abuse if it is directly connected to the corporation through business relationship with partners in their value chain, even though the corporation did not cause the human rights violations.[70]

According to UNGPs, the corporate responsibility to respect human rights is universal regardless of the business enterprise's "size, sector, operational context, ownership and structure".[71] The way a corporation can fulfill this responsibility depends on these factors, however. For example, bigger corporations will need more complex process in comparison to smaller ones.[72] UNGPs suggest that corporations should have (i) a public statement of policy commitment stating their adherence to human rights, (ii) a human rights due diligence process, and (iii) a remediation process to address the negative impact of any human rights violation.[73]

The human rights due diligence process is at the heart of the UNGPs' corporate responsibility. This process is vital to recognize, prevent and mitigate any negative impact of human rights

[66] *Ibid* at Principle 7(b).
[67] *Ibid* at Principle 7(c).
[68] *Ibid* at Principle 12.
[69] *Ibid* at Commentary to Principle 12.
[70] *Ibid* at Principle 13(b).
[71] *Ibid* at Principle 14.
[72] *Ibid*.
[73] *Ibid* at Principle 15.

violations.[74] The human rights due diligence process begins with identifying both actual and potential human rights consequences of the corporation's own activities and their business partners'.[75] For instance, a corporation should evaluate the human rights situation before executing any new business plan or making a new business partner.[76] In order to precisely identify the human rights risks, corporations should make an effort to engage with the stakeholders directly, or if not possible, the corporation should consult independent expert resources and civil society.[77]After identifying the risks, corporations should act on them by effectively incorporating the findings in their internal business management process.[78] The probable human rights risk should be prevented from being materialized, and the actual risks that have already affected the victims have to be stopped and will also require remediation from the corporations.[79] What steps the corporation have to take will depend on whether their own activities have given rise to violations, or the violations have occurred as a direct result of the entities in a value chain.[80] The latter situation is more complicated and expert advice is likely to be helpful for a corporation.[81] The corporation should use its leverage over the entities in its value chain to stop the abuse.[82]

While the human rights due diligence mechanism of UNGPs has been applauded for providing detailed guidance to corporations, in practice there are significant shortcomings. A 2018 UN report detected that companies frequently failed to understand the mechanism correctly.[83] Firstly, corporations often fail to identify the risks properly because they usually assess

[74] *Ibid* at Principle 17.
[75] *Ibid* at Principle 18.
[76] *Ibid* at Commentary to Principle 18.
[77] *Ibid*.
[78] *Ibid* at Principle 19(a).
[79] *Ibid* at Commentary to Principle 19.
[80] *Ibid* at Principle 19(b).
[81] *Ibid* at Commentary to Principle 19.
[82] *Ibid*.
[83] *Report of Working Group on the issue of human rights and transnational corporations and other business enterprises*, UNGA, 73rd Sess, UN Doc A/73/163 (2018) at 8.

business risks, which do not include human rights risks.[84] Additionally, corporations also did not recognize that human rights due diligence procedure will make their overall risk management better.[85] The report identified that most human rights impact assessments were fulfilled as a tick-box exercise where the stakeholders were not properly consulted.[86] Most corporations did not attempt to find potential human rights risk, but only paid attention after the abuse had taken place.[87] While few major corporations publicly incorporated the human rights due diligence mechanism, small and medium-sized companies interpreted the mechanism as an extra burden.[88]

UNGPs highlight that business enterprises have an independent responsibility to respect human rights regardless of whether the government of a country adequately protects its own citizens.[89] Hence, businesses should respect human rights abroad even if they are not legally liable in another jurisdiction.[90] UNGPs advise corporations that while operating in a foreign conflict-affected territory, there is a greater risk of corporations being complicit in abuse caused by another party such as security personnel.[91] UNGPs suggest corporations to consider these risks as legal compliance issues.[92] UNGPs envisaged the trend of holding corporations liable for extra-territorial activities.

UNGPs acknowledge that a multinational corporation may find it burdensome to carry out due diligence for all the entities in its value chain because the big corporations have many business partners.[93] In this scenario, the corporations should focus the due diligence process for risk-

[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*.
[87] *Ibid*.
[88] *Ibid* at 9.
[89] UNGP, *supra* note 57 at Commentary to Principle 11.
[90] *Ibid* at Commentary to Principle 12.
[91] *Ibid* at Commentary to Principle 23.
[92] *Ibid*.
[93] *Ibid* at Commentary to Principle 17.

prone areas for example where a supplier is producing goods in a jurisdiction without adequate labour rights protection.[94]

In case of subsidiaries situated abroad, the 2018 UN report noted that it was difficult to put the UNGPs into practice because there is a gap between policy and implementation.[95] In foreign subsidiary situations, it was evident that corporations performed tick-boxing exercise, for instance, companies can fulfill the requirement of human rights training without paying attention to what specific training is needed in that particular context.[96] Although UNGPs have repeatedly stressed to corporations to assess human rights issues in its supply chain, most corporations have only paid heed after the atrocities committed abroad received widespread media attention.[97]

The primary reason for the weak implementation of UNGPs is that it is voluntary in nature. However, one should not suggest that UNGPs were futile in bringing change in the business and human rights arena. The development of the international instruments such as UNGPs was essential because it acted as impetus for developed countries to take stronger domestic measures to regulate their multinational corporations, for example, the recent French statute or upcoming EU legislation covered below. UNGPs have influenced the legislation and policies of different countries. One notable example discussed below is the modern slavery legislation of UK, Australia and potentially Canada. These are discussed below as well. Furthermore, the UN is currently designing a legally binding treaty to regulate multinational corporations regarding

[94] *Ibid.*
[95] Report of Working Group on the issue of human rights and transnational corporations and other business enterprises, *supra* note 83 at 9.
[96] *Ibid.*
[97] *Ibid.*

human rights.[98] The draft treaty has been going through amendments since its first draft in 2018.[99] Throughout the negotiation process, the proposed treaty has faced opposition from states, notably the US, and the completion of the treaty may take few more years.[100] There is undoubtedly a need of a global effort to ensure that companies do not escape liability for their activities abroad. Hence, Canadian courts should recognize the importance of holding their domestic corporations liable for atrocities committed abroad.

3. Voluntary Principles on Security and Human Rights

The Voluntary Principles on Security and Human Rights (Voluntary Principles) provide guidance to corporations in the extractive and energy sectors on respecting fundamental human rights when carrying their activities.[101]At the heart of the Voluntary Principles is a risk assessment mechanism to carefully consider human rights records of public security forces, paramilitary forces, local and national law enforcement organizations, and the reputation of private security.[102] It calls for risk assessment whenever there are high probabilities of direct physical contact between security personnel and citizens.[103] The Voluntary Principles also provide guidance to corporations on how to interact with public security and private security.[104] Governments of different countries, corporations in the extractive and energy sectors, and NGOs may become members of the Voluntary Principles Initiative to jointly take measures to

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[98] OEIGWG (open-ended intergovernmental working group), *Legally binding instrument to regulate, in international human rights law, the activities of transational corporations and other business enterprises*, OEIGWG chairmanship second revised draft (6 August 2020), online (pdf): <www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf>.
[99] *Ibid.*
[100] US Mission Geneva, "The United States Government's Continued Opposition to the Business and Human Rights Treaty Process" (16 October 2019), online: *US Mission to International Organizations in Geneva* <geneva.usmission.gov/2019/10/16/the-united-states-governments-continued-opposition-to-the-business-human-rights-treaty-process>.
[101] "Voluntary Principles on Security and Human Rights" (2000) at 1, online (pdf): <www.voluntaryprinciples.org/wp-content/uploads/2019/12/TheVoluntaryPrinciples.pdf> [Voluntary Principles].
[102] *Ibid* at 3.
[103] *Ibid.*
[104] *Ibid* at 4, 6.

stop the business related human rights violations in different parts of the world.[105] Canada and some Canadian corporations are participants in this Initiative.[106] Although all participants should promote the Voluntary Principles in their respective activities, the participation criteria of the Voluntary Principles expressly clarify that they are not legally binding and any failure to follow them is not to be used to support any lawsuit against a participant.[107]

4. OECD Guidelines for Multinational Enterprise

Apart from these, Organization for Economic Co-Operation and Development's *Guidelines for Multinational Enterprise* (OECD Guidelines) offer various non-binding recommendations for multinational corporations that operate in the member states.[108] The OECD Guidelines are addressed by governments to multinational corporations because the member states have committed to implement them.[109] Being voluntary in nature, corporations are requested to incorporate the OECD Guidelines in their business activities.[110]

Initially, the OECD Guidelines did not address the human rights issues.[111] In 2011, it was updated to add a chapter on human rights that incorporated the principles of the UNGPs.[112] Like UNGPs, the OECD Guidelines call corporations not to violate human rights, and not to cause or contribute to adverse human rights impacts through their own activities.[113] Notably, activities are meant to include both actions and omissions of the corporation.[114]

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[105] Voluntary Principles on Security and Human Rights, "Appendix 2- Participation Criteria, Initiative of the voluntary principles on security and human rights" (2007) at 1, online (pdf) : *Voluntary Principles on Security and Human Rights* <www.voluntaryprinciples.org/wp-content/uploads/2020/09/Participation-Criteria_Sept-2020.pdf>.

[106] Government of Canada, "Canadian engagement in the Voluntary Principles on Security and Human Rights Initiative" (7 August 2017), online: *Government of Canada* <www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/voluntary_principles-principes_volontaires.aspx?lang=eng>.

[107] Voluntary Principles on Security and Human Rights, *supra* note 101 at 6-7.

[108] OECD, *Guidelines for Multinational Enterprises*, (OECD, 2011), online (pdf): <www.oecd.org/daf/inv/mne/48004323.pdf> [OECD Guidelines].

[109] *Ibid* at 13.

[110] Pauly & Nolan, *supra* note 40 at 39.

[111] *Ibid*.

[112] OECD Guidelines, *supra* note 108 at 3.

[113] *Ibid* at 31.

[114] *Ibid* at 32.

4.1 National Contact Points

Member states are required to establish National Contact Points (NCP) to promote the OECD Guidelines and to operate as a forum for discussing anything related to them.[115] The NCP can help resolve issues regarding implementation of the OECD Guidelines if a complaint is brought to them.[116] Hence, any affected individual, community member or NGO can bring a complaint to NCP.[117] In order to assist parties to find a solution, NCP of a host country can consult the NCP of the home country and vice versa.[118] However, it is doubtful whether effective remedies were provided when complaints were brought to the NCP with the OECD principles.[119] There have been extensive criticism that the NCPs have failed to apply the OECD Guidelines in a consistent way.[120]

4.2 Canadian NCP

Established in 2000, Canada's NCP has been a prominent feature of the government's overall CSR initiative for the extractive sector.[121] The NCP arranges different seminars and sessions including events at international platforms to generate awareness.[122] However, the Canadian NCP dispute resolution mechanism has often failed to resolve the human rights cases addressed because it was not possible to generate agreement that the parties or the corporations did not abide by NCP's recommendations.[123] The reasons identified behind the unproductive outcomes of Canadian NCP mechanism are its lack of independence, long delays in completion of procedure, high standard for accepting complaints and lack of effective follow-up process.[124]

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[115] *Ibid* at 18, 68.
[116] *Ibid* at 81.
[117] OECD Watch, "Complaints database" online: *OECD Watch* <www.oecdwatch.org/complaints-database>.
[118] OECD Guidelines, *supra* note 108 at 82.
[119] Pauly & Nolan, *supra* note 40 at 39.
[120] *Ibid.*
[121] Global Affairs Canada, "Canada's Enhanced Corporate Social Responsibility Strategy to Strengthen Canada's Extractive Sector Abroad" online: *Government of Canada* <www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng>.
[122] *Ibid.*
[123] Above Ground, "Canada is back. BUT STILL FAR BEHIND An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises" (November 2016) at 1, online (pdf): *Above ground* <aboveground.ngo/wp-content/uploads/2017/01/Canada-is-back-report-web.pdf>.
[124] *Ibid.*

The NCP has received widespread criticism for its ineffectiveness. A 2019 OECD peer review report of the Canadian NCP noted that there was little confidence in it from the civil society and trade unions, even though the Canadian NCP has tried to improve its operations in different ways.[125] Recently it has been suggested that Canada's NCP needs a total overhaul.[126]

In 2014, the government of Canada announced that corporations who refused to participate in NCP mediation process will not receive trade support.[127] However, this attempt to penalize corporations did not turn out to be as effective as presumed. For instance, the 2014 complaint against China Gold International Resources Corp. Ltd, a corporation registered in Canada that operated a mine in Tibet.[128] The NCP informed Canadian government bodies that the corporation declined to take part in the NCP dialogue, and further suggested that the corporation be deprived of government support until it participates in dialogue in good faith.[129] However, the corporation in question did not pay any heed and continued to refuse to participate in the NCP dialogue.[130]

5. International Labor Organizations

Canada has ratified all the eight fundamental conventions of the International Labor Organizations (ILO) which notably includes the Forced Labor Convention, the Worst Forms of Child Labor Convention, and others.[131] The ILO has a unique tripartite structure which

[125] OECD "OECD Guidelines for Multinational Enterprises National Contact Point Peer Reviews: Canada" (2019) at 4, online (pdf): <mneguidelines.oecd.org/Canada-NCP-Peer-Review-2019.pdf>.
[126] Catherine Coumans, "Canada's National Contact Point is Long Overdue for an Overhaul" (7 October 2020) online: *Mining Watch Canada* <https://miningwatch.ca/sites/default/files/brief_on_ncp_reform_october_7_2020.pdf>.
[127] Global Affairs Canada, *supra* note 121.
[128] Global Affairs Canada, "Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region" (last modified 13 May 2021), online: *Government of Canada* <https://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng>.
[129] *Ibid.*
[130] Above Ground, *supra* note 123 at 5.
[131] International Labour Organization, "Ratifications of ILO conventions: Ratifications for Canada" online: *International Labour Organization* <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102582>.

includes the opinions of workers, employers and governments when making policies.[132] Although the ILO has formulated many conventions focusing on various topics, it has not been effective in enforcing them.[133] States are under the obligation to implement them. Hence, Canada is also obliged to uphold the human rights recognized in the ILO conventions.

B. Domestic Strategies

1. Corporate Social Responsibility Counsellor

In 2009, Canada created its first Corporate Social Responsibility (CSR) strategy for Canadian extractive corporations operating overseas and established the Office of the Extractive Sector CSR Counsellor (Counsellor).[134] The mandate of the Counsellor included reviewing the CSR practices of overseas Canadian corporations and advising them on the implementation of CSR.[135] It was expressly clarified that the Counsellor could not make binding recommendations and policy or legislative recommendations.[136] The Review and Mediation Process of the Counsellor was essentially a constructive dialogue facilitation process to resolve alleged human rights violations which has been termed as "disputes".[137] The process expressly relied on the good will of corporations to participate fairly.[138] Consequently, when contacted by the Counsellor, corporations repeatedly refused to participate in dialogue with the Counsellor.[139] From 2010 to 2013, the Counsellor had received only six complaints and all of them failed to be remedied or even mediated.[140] Amongst six complaints, three of the respondent corporations

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[132] International Labour Organization, "About the ILO" online: *International Labour Organization* <https://www.ilo.org/global/about-the-ilo/lang--en/index.htm>.
[133] Pauly & Nolan, *supra* note 40 at 36.
[134] Global Affairs Canada, "A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (last modified 22 April 2016), online: *Government of Canada* <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>.
[135] *Ibid.*
[136] *Ibid.*
[137] Global Affairs Canada, "Reviewing corporate social responsibility practices" (last modified 3 March 2017), online: *Government of Canada* <www.international.gc.ca/csr_counsellor-conseiller_rse/Reviewing_CSR_Practices-Examen_Pratiques_RSE.aspx?lang=eng>.
[138] *Ibid.*
[139] *Ibid.*
[140] Catherine Coumans, "The Federal CSR Counsellor Has Left the Building - Can we now have an effective ombudsman mechanism for the extractive sector?" (1 November 2013),

refused to participate.[141] The ineffectiveness of the Counsellor led it to be replaced by CORE (discussed below).

In 2014, an enhanced CSR strategy for the Canadian mining sector was created.[142] According to an updated strategy, the government of Canada could withdraw its support in the foreign market as a form of penalty for corporations that did not have good CSR practices or who refused to take part in the Counsellor's dialogue facilitation process.[143] In a 2017 committee meeting it was noted that only one company was publicly sanctioned in this manner and other companies have only faced the threat of penalty.[144] Moreover, this type of sanction is unlikely to be effective to increase compliance by corporations operating overseas because the most serious consequence is the removal of diplomatic support.

2. Canadian Ombudsperson for Responsible Enterprise (CORE)

Canada announced the creation of CORE in January 2018, and an Ombudsperson was appointed in April 2019.[145] CORE replaces the Counsellor.[146] Complaints of human rights abuses due to the activities of Canadian corporations abroad in the mining, oil, gas and garments areas can be brought to the CORE.[147] CORE will help to advance the implementation of the soft law regulatory frameworks, the UNGPs and the OECD Guidelines.[148] The CORE

online: *Mining Watch Canada* <miningwatch.ca/blog/2013/11/1/federal-csr-counsellor-has-left-building-can-we-now-have-effective-ombudsman>.

[141] *Ibid.*

[142] Global Affairs Canada, *supra* note 121.

[143] Global Affairs Canada, "About Us" (last modified 24 April 2018), online: *Government of Canada* < https://www.international.gc.ca/csr_counsellor-conseiller_rse/About-us-A-propos-du-bureau.aspx?lang=eng>.

[144] House of Commons, Sub-committee on international human rights of the standing committee on foreign affairs and international development, *Evidence*, 42-1, No 072 (26 September 2017) at 1330 (Duane McMullen), online: *Parliament of Canada* <www.ourcommons.ca/DocumentViewer/en/42-1/SDIR/meeting-72/evidence> at 1330.

[145] Business & Human Rights Resource Centre "Canada creates independent Ombudsperson & multi-stakeholder advisory body to strengthen responsible business conduct abroad - Business & Human Rights Resource Centre" online: <www.business-humanrights.org/en/latest-news/canada-creates-independent-ombudsperson-multi-stakeholder-advisory-body-to-strengthen-responsible-business-conduct-abroad>.

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

[147] *Ibid.*

[148] *Ibid.*

can provide advice to Canadian corporations carrying out overseas operations on best practices and help design policies for the responsible business conduct.[149] The CORE can also advise the Minister of International Trade regarding issues related to responsible conduct of Canadian corporations operating abroad.[150]

The Operating Procedures provide the basic mechanism that will be followed.[151] The compliance and dispute resolution mechanism, called the Human Rights Responsibility Mechanism, consists of several steps, which are initial assessment, dispute resolution, review, reporting with recommendations, and follow-up.[152] In order for a complaint to be admissible, there should be sufficient information that there is allegedly an abuse of an internationally recognized human right, and the abuse arose from the foreign operations of a Canadian corporation in the garment, mining, or oil and gas sector.[153] Once admissible, the next step is initial assessment, which also includes an initiative to solve the problem through information sharing, dialogue and negotiation.[154] If no solution results, the Ombudsperson will try other dispute resolution methods such as mediation.[155] If parties are unwilling to go to mediation, then Ombudsperson will start the review of the complaint.[156]

A vital portion of the review is joint fact-finding, which includes narrowing down the facts in dispute, agreeing on how to gather information, participating in information gathering and analysis, seeking agreement on facts and working towards finding remedies together.[157] During

[149] *Ibid*.
[150] Global Affairs Canada, "Mandate of the Canadian Ombudsperson for Responsible Enterprise" (last modified 28 November 2019), online: *Government of Canada* <core-ombuds.canada.ca/core_ombuds-ocre_ombuds/mandate-mandat.aspx?lang=eng>.
[151] Global Affairs Canada, "Operating Procedures for the Human Rights Responsibility Mechanism of the Canadian Ombudsperson for Responsible Enterprise (CORE)" (last modified 12 March 2021), online: *Government of Canada* <https://core-ombuds.canada.ca/core_ombuds-ocre_ombuds/operating_procedures-procedures_exploitation.aspx?lang=eng>.
[152] *Ibid* at para 3.4.
[153] *Ibid* at para 5.7.
[154] *Ibid* at para 8.1.
[155] *Ibid* at para 8.2.
[156] *Ibid* at para 8.3.
[157] *Ibid* at para 11.6.

the review, if the Canadian corporation refuses to give the required information, the CORE may draw adverse inferences during the fact-finding stage.[158] If joint-fact finding cannot be carried out, the Ombudsperson can recourse to independent fact-finding.[159] The Ombudsperson can independently interview the parties and witnesses, contact experts and governments of host countries, conduct research, among other activities.[160] After a review is completed, the Ombudsperson will draw up a report, and may make recommendations to the parties, such as recommending changes to the Canadian corporation's policies and practices, and recommending remedies such as financial compensation, formal apology or any remedy suggested in the UNGPs.[161] The lack of an effective enforcement mechanism is evident here.

The CORE's objective of addressing transnational human rights violations cannot be achieved if the CORE does not have sufficient power to investigate which includes the power to compel documents and testimony from respondent corporations.[162] With the current powers of the CORE, it seems that the respondent corporations have to voluntarily provide information during a complaint review or mediation. The lack of robust investigatory powers of the CORE has led to speculation that CORE might not be effective, like its predecessor Counsellor.[163] It remains to be seen whether corporations follow the recommendations suggested by the CORE after the completion of a complaint review process. Furthermore, the Operating Procedures are composed with "may" rather than "will" in many instances. This has drawn criticism because this can result in refusing admissible complaints, making the mechanism arbitrary.[164]

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[158] *Ibid* at para 11.2.
[159] *Ibid* at para 11.7.
[160] *Ibid* at paras 11.7-11.8.
[161] *Ibid* at para 13.3.
[162] Canadian Network on Corporate Accountability, "CNCA letter to CORE" (10 July 2020) at 1, online (pdf): <cnca-rcrce.ca/wp-content/uploads/2020/07/CNCA-letter-to-CORE-re-spring-2020-consultations.pdf> [Canadian Network].
[163] Development and Peace "Will the new ombudsperson be a voice for justice?" (24 September 2019) online: *Development and Peace* <www.devp.org/en/articles/will-new-ombudsperson-be-voice-justice>.
[164] Canadian Network, *supra* note 162 at 8.

C. Legislative Attempts

1. Private Member's Bill C-300

In February 2009, Bill C-300, *An Act Respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*[165] was introduced by Liberal MP John McKay.[166] The underlying philosophy of this Bill was to ensure that the Canadian extractive sector gets support from the government to act in alignment with international environmental best practices and with Canada's commitment to maintaining international human rights standards.[167] The Bill proposed standards for the extractive sectors and called for complaint mechanisms for the violations of human rights.[168] From the beginning, this Bill received immense criticisms from the Canadian mining sector. The sector maintained that such robust regulatory schemes would put Canada at a competitive disadvantageous position.[169] Consequently, the Bill was defeated in October 2010 at report stage in House of Commons as there was 134 votes for it, and 140 votes against it.[170] Although the proposed framework earned extensive appreciation and support from civil society commentators, fierce and persistent industry lobbying played an instrumental role in this defeat.[171]

2. Private Member's Bill-C-584

In March 2014, New Democrat MP Eve Peclet introduced the Bill C-584, *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries.*[172] Sadly, the Bill was defeated in October 2014 at

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[165] Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*, 2nd Sess, 40th Parl, 2009, online: <http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3658424&file=4> [*Bill C-300*].
[166] Pena, *supra* note 3 at 4.
[167] *Bill C-300*, *supra* note 165, s 3.
[168] Nwapi, "Resources Extraction" *supra* note 8 at 130.
[169] Pena, *supra* note 3 at 4.
[170] "Bill C-300, *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries*", *House of Commons Debates*, 40-3, vol 145, No 088 (27 October 2010) at 1826, online: Parliament of Canada <https://www.ourcommons.ca/DocumentViewer/en/40-3/house/sitting-88/hansard>.
[171] Nwapi, "Resources Extraction" *supra* note 8 at 130.
[172] Bill C-584, *An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries*, 2nd Sess, 41st Parl, 2014, online: *Parliament of Canada* <https://parl.ca/DocumentViewer/en/41-2/bill/C-584/first-reading>.

second reading as there was 127 votes for it, and 150 votes against it.[173] This Bill had similar provisions to Bill C-300. The Bill aimed to create a new Office of the Ombudsman assigned with the responsibility of developing guidelines on best practices for extractive corporations.[174] Further, it proposed that the Canadian corporations report to the Ombudsman about their extractive activities.

3. Private Member's Bill-C-354

In order to ensure accountability of the transnational corporations, MP Peter Julian introduced Bill C-354 *An Act to Amend the Federal Courts Act (international promotion and protection of human rights)*[175] in April 2009. [176] The underlying objective of the Bill was to provide Canadian federal courts international jurisdiction similar to what was given to the US Courts by the Alien Tort Statute.[177] It intended to cover a wide range of violations such as killing, torture, war crimes and crimes against humanity, sexual violations, transboundary pollution and other violations under the conventions of the ILO.[178] It promised to ensure corporate accountability of the Canadian firms operating abroad by providing mandate to the federal court to adjudicate on allegations of violations of human rights by non-Canadian citizens.[179] The Bill did not go past the first reading stage. Mr. Julian introduced it again as Bill C-323 in 2011.[180] It failed to move past first reading in the House of Commons.[181] In 2016, Mr. Julian

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[173] "Bill C-584, An Act respecting the Corporate Social Responsibility Inherent in the Activities of Canadian Extractive Corporations in Developing Countries", 2nd reading, *House of Commons Debates*, 41-2, vol 147, No 120 (1 October 2014) at 1910, online: *Parliament of Canada* < https://www.ourcommons.ca/DocumentViewer/en/41-2/house/sitting-120/hansard>.
[174] *Ibid*, ss 4-7.
[175] Bill C-354, *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, 2nd Sess, 40th Parl, 2009, [*Bill C-354*] online: Parliament of Canada < www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DoId=3796994>.
[176] Pena, *supra* note 3 at 16.
[177] Nwapi, "Resources Extraction" *supra* note 8 at 130.
[178] *Bill C-354*, *supra* note 178 at s.25(2).
[179] Nwapi, "Resources Extraction" *supra* note 8 at 130.
[180] "Bill C-323, An Act to amend the Federal Courts Act (international promotion and protection of human rights)", 1st Reading, *House of Commons Debates*, 41-2, (5 October 2011) online: *Parliament of Canada* <https://openparliament.ca/bills/41-2/C-323/>.
[181] "Bill C-323, An Act to amend the Federal Courts Act (international promotion and protection of human rights)", 1st Reading, House of Commons, 41-2, (5 October 2011) online: *Parliament of Canada* <https://www.parl.ca/LegisInfo/BillDetails.aspx?Bill=C323&Language=E&Mode=1&Parl=41&Ses=2&billId=6253617&View=6>.

introduced it once more as Bill C-331.[182] However, in June 2019 during second reading of the Bill it was defeated as there was 238 votes against it, and only 49 votes in favor of it.[183]

D. Canadian Courts and atrocities

Victims of corporate-related atrocities have regularly sought the assistance of the Canadian courts. Traditionally, the Canadian courts have been shy to adjudicate human rights cases involving Canadian companies' foreign subsidiaries.[184] Moreover, Canada has not seen much litigation where non-Canadian nationals brought proceedings alleging human rights violations. This is mainly because of the *forum non conveniens.*[185] This implies that the court typically considers that the host state is the more appropriate venue than the home state of the corporate defendant.[186] This attitude is visible from the approach of the court in cases like *Bil'in (Village Council) v Green Park International Ltd.*[187] and *Association Canadienne contre l'impunité c Anvil Mining Ltd*.[188].

In *Green Park International* the Superior Court of Quebec (QCCS) relied on *forum non conveniens* to decline jurisdiction.[189] In that case, the defendants were two corporations registered in Quebec.[190] The plaintiffs alleged that the corporate defendants aided, abetted, assisted and conspired with Israel in war crimes contrary to international law and Canadian and Quebec laws.[191] In that case, the corporations were allegedly acting as agents of Israel and were building, marketing and selling condominiums situated in the West Bank Palestinian

[182] "Bill C-331, An Act to amend the Federal Courts Act (international promotion and protection of human rights)", 1st Reading, *House of Commons Debates*, 42-1, No 128 (14 December 2016) online: *Parliament of Canada* <https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-128/hansard>.
[183] "Bill C-331, An Act to amend the Federal Courts Act (international promotion and protection of human rights)", 2nd Reading, House of Commons, Vote No 1376, 42-1 (19 June 2019) online: *Parliament of Canada* <https://www.ourcommons.ca/Members/en/votes/42/1/1376>.

[184] Pena, *supra* note 3 at 1.
[185] *Ibid*.
[186] *Ibid*.
[187] *Bil'in (Village Council) v Green Park International Ltd.,* [2009] QCCS 4151 [*Village Council*].
[188] *Association Canadienne contre l'impunite' c Anvil Mining Ltd* [2012] QCCA 117 [*Anvil*]; Pena, *supra* note 3 at 1.
[189] *Village Council*, *supra* note 187 at para 338.
[190] *Ibid* at para 14.
[191] *Ibid* at para 5.

Territory.[192] However, Israel did not annex the West Bank and the plaintiffs claimed that land in question was subject to international law.[193] The plaintiffs alleged that according to Article 49 (6) of the Geneva Convention[194], subsection 3(1) of Part I and Article 85(4)(a) of Schedule V of the Canadian *Geneva Conventions Act*[195] and Article 8(2)(b) of the Rome Statute[196], it was unlawful for Israel to use the territory for other purposes because it only had military control over that territory, and Israel could not re-assign the land for reasons other than military or security purposes.[197] Based on these, the plaintiffs alleged that the corporations were in breach of section 6 of the *Canada's Crimes Against Humanity and War Crimes Act (CAHWCA)*[198]; Article 1457 of the *Civil Code of Quebec (CCQ)*[199]*;* and Article 4,6 and 8 of *Quebec Charter of Human Rights and Freedoms*[200] along with the violations of international law.[201] They brought proceedings in Canada as opposed to Israel contending that the Israeli Courts would decline to acknowledge that Israel was in breach of international humanitarian law.[202] They referred to the previous instances where the Israeli High Court of Justice rejected to follow the Geneva Convention, for example, the Israeli court had found that the Geneva Convention was not customary international law as it was not incorporated into its domestic law through legislation.[203] Further, the plaintiffs argued that if Canada fails to follow the Geneva Convention, Canada would be permitting a war crime recognizable by Canadian domestic law and international law.[204] Moreover, both under the Geneva Convention and the

[192] *Ibid*.
[193] *Ibid* at para 14.
[194] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, art 49.
[195] *Geneva Conventions Act*, RSC 1985, c. G-3.
[196] Rome Statute, *supra* note 38 at art 8(2)(b).
[197] *Village Council*, *supra* note 187 at para 14.
[198] *Crimes Against Humanity and War Crimes Act* S.C. 2000, c. 24 *[CAHWCA*].
[199] *Civil Code of Quebec*, CQLR c CCQ-1991, online: <https://canlii.ca/t/55356> [*CCQ*].
[200] *Quebec Charter of Human Rights and Freedoms*, RSQ c. C-12.
[201] *Village Council*, *supra* note 187 at para 14.
[202] *Ibid* at para 8.
[203] *Ibid* at paras 8, 288.
[204] *Ibid* at para 290-297.

CAHWCA, the Canadian criminal courts had jurisdiction over war crimes committed anywhere.[205] The QCCS abstained from determining whether the defendants committed an offence.[206] The court relied on Article 3135 of the *CCQ* under which the Quebec authority can decline jurisdiction if it appears that the other country is in a better position to settle the dispute.[207] QCCS considered the factors mentioned in the landmark case of *Spar Aerospace v. American Mobile Satellite Corp*.[208] regarding the application of Article 3135 of the *CCQ*.[209] In light of this, QCCS observed that the Israeli courts were in a better position to decide the case.[210] The Quebec Court of Appeal (QCCA) affirmed the decision of the QCCS and dismissed the appeal.[211]

Similarly, in *Anvil Mining* the QCCA again declined jurisdiction to hear the case.[212] In that case, the Association Canadienne Contre L'impunité (Canadian Association Against Impunity, ACCI) brought a class action against Anvil Mining Ltd (Anvil) on behalf of the victims.[213] Anvil's head office was in Australia but the corporation was incorporated under the *Business Corporation Act*[214] of the North West Territories in Canada.[215] Since 2005 Anvil had a small office in Montreal in order to maintain relationships with investors and shareholders of the company.[216] Their main business was to mine copper near Dikulushi in Democratic Republic of Congo (DRC).[217] The plaintiffs alleged that in 2004 the corporation provided logistic support to DRC Armed Forces whose military operations ultimately killed 70-80 civilians.[218] In

[205] *Ibid.*
[206] *Ibid.*
[207] *CCQ, supra* note 199 at art 3135.
[208] *Spar Aerospace Ltd. v. American Mobile Satellite Corp*., [2002] 4 S.C.R. 205.
[209] *Village Council*, *supra* note 187 at para 209.
[210] *Ibid* at para 335.
[211] *Bil'In (Village Council) v. Green Park International Inc.,* [2010] QCCA 1455.
[212] *Anvil*, *supra* note 188 at para 94.
[213] *Ibid* at para 7.
[214] *Business Corporation Act*, SNWT 1996, c.19.
[215] *Anvil*, *supra* note 188 at para 9, 16.
[216] *Ibid* at paras 17, 19.
[217] *Ibid* at para 16.
[218] *Ibid* at paras 25-26.

particular, it was alleged that the Anvil supplied the DRC Armed Forces with planes to move out personnel and also utilized the return flight to bring more military personnel into the region.[219] It was further alleged that Anvil also provided the military forces with trucks, drivers, food and fuel.[220]

There, the key question was whether the Quebec courts could accept jurisdiction to hear the case because the alleged activities were committed in DRC and the acts in questions were committed before the defendant corporation established their Montreal office.[221] According to Article 3148 of *CCQ*, the dispute must relate to Anvil's activities in Quebec.[222] The QCCA stressed that the fact that Anvil did not carry out its activities in Quebec at the time of the alleged events was an important factor in deciding whether the dispute related to activities in Quebec.[223] QCCA emphasized that Anvil's employees in Quebec maintained relationships with investors and shareholders, and they did not participate in managing the mine.[224] However, the trial judge was of the view that Anvil's activities in Montreal were connected to the mining activities in DRC because Anvil's main business was the mining operation.[225] But, QCCA found that the trial judge had made an error in law when he was not able to connect the dispute to Anvil's activities in Quebec.[226]

QCCA discussed the application of Article 3136 of *CCQ* which is related to forum of necessity.[227] Article 3136 of the *CCQ* denotes that even where the Quebec authority has no jurisdiction to hear a dispute, it may hear the same provided it has sufficient connection with

[219] *Ibid* at para 26.
[220] *Ibid*.
[221] *Ibid* at paras 50-51.
[222] *Ibid* at para 42.
[223] *Ibid* at paras 71, 79.
[224] *Ibid* at paras 83-84.
[225] *Ibid* at para 45.
[226] *Ibid* at para 91.
[227] *Ibid* at para 97-99.

Quebec.[228] However, ultimately the QCCA declined to accept the forum of necessity argument on the ground that the plaintiffs did not exhaust all available local remedies in DRC.[229] The plaintiffs faced difficulty in finding lawyers to represent them in Australia after the victims, NGO members and other associated people received death threats from government of DRC.[230] However, QCCA expressed that the plaintiffs had not mentioned what initiatives they had taken to solve this.[231] QCCA concluded that the plaintiffs did not show that it was impossible to go to a foreign court, and there was not sufficient connection with Quebec.[232] Therefore, the action was dismissed on the ground that the Canadian courts did not have jurisdiction. SCC dismissed the leave to appeal.[233]

The trial judge's analysis of *forum non coveniens* was curious.[234] The judge found that the victims could bring proceedings in both DRC and Australia, but the victims could not receive a fair trial in DRC and no lawyers in Australia were ready to take the case either.[235] Hence, the trial judge had found that Anvil did not prove that foreign jurisdiction was more appropriate than Quebec to hear the case.[236]

The issue of 'real and substantial connection'[237] –part of conflict of law's jurisdictional test- arose in *Bouzari v Islamic Republic of Iran*.[238] In that case, the plaintiffs brought civil proceedings in Canada demanding justice for the alleged extra-territorial human rights violations occurred in Iran.[239] The Ontario Court of Appeal pointed out the inadequacy of the

[228] *CCQ, supra* note 199 at art 3136.
[229] *Anvil*, *supra* note 188 at para 100.
[230] *Ibid* at para 35.
[231] *Ibid* at para 102.
[232] *Ibid* at para 103.
[233] *Association canadienne contre l'impunité v Anvil Mining Ltd*, [2012] SCCA No 128, [2012] CSCR no 128.
[234] *Anvil*, *supra* note 188 at para 46.
[235] *Ibid* at para 47.
[236] *Ibid* at para 48.
[237] This is a constitutional requirement as put in *Morguard Investments Ltd. v De Savoye*, [1990] 3 SCR 1077.
[238] *Bouzari v Islamic Republic of Iran* (2004) 71 OR (3d) 675 (ONCA) [*Bouzari*].
[239] *Ibid* at para 1.

real and substantial connection test.[240] The court further observed that intervening in such situation would have crossed its diplomatic presence.[241] Most interestingly, the court observed that the international law did not provide for any broadly shared commitment among states to assume jurisdiction over civil actions in such circumstances.[242]

This issue was further raised in the case of *Van Breda.*[243] The SCC provided some clarity to the 'real and substantial connection' test, which is often raised when the overseas mining operations of Canadian mining corporations allegedly cause injuries to foreign victims.[244] In that case, the defendant corporation, Club Resort Ltd. (Club Resorts) was incorporated in the Cayman Islands.[245] Club Resorts managed the hotels in Cuba where the plaintiffs stayed for their vacation.[246] There, one Canadian citizen suffered from catastrophic injuries while exercising using the metal structures in the hotel facility in Cuba, and another Canadian drowned during scuba diving, which was included in the hotel's vacation package in Cuba.[247] The SCC considered the real and substantial connection test in both scenarios. The SCC found that the Ontario courts had jurisdiction to hear the both the cases because there was sufficient connection between the Ontario court and subject matter of litigation.[248]

In *Van Breda*, Justice LeBel had the opportunity to review the jurisprudence of the doctrine of *forum non conveniens*.[249] Jurisdiction must be established before considering *forum non conveniens*.[250] Hence, the plaintiff need to establish that one or more of the presumptive

[240] *Ibid* at para 25.
[241] *Ibid* at para 34.
[242] *Ibid* at para 35.
[243] *Club Resorts Ltd v Van Breda* [2012] 1 SCR 572 [*Van Breda*].
[244] Pena, *supra* note 3 at 8.
[245] *Van Breda, supra* note 243 at para 1.
[246] *Ibid* at para 1.
[247] *Ibid* at paras 4, 7.
[248] *Ibid* at para 117.
[249] *Ibid* at paras 101-109.
[250] *Ibid* at para 101.

connecting factors exists in the first place.[251] There is a non-exhaustive list of the connecting factors.[252] In a tort case, the most common ones are a) the defendant is domiciled or resident in the province, b) the defendant carries on business in the province, c) the tort was committed in the province and d) a contract connected with the dispute was made in the province.[253] If one of these factors is established, court shall presume constitutional jurisdiction.[254]After that, the focus shifts to the defendant to rebut this presumption by establishing that the said connection of the plaintiffs is inappropriate.[255] Considering all these, if either the plaintiff cannot establish a connecting factor or if the defendant has properly rebutted presumption of jurisdiction, the court will not have jurisdiction, and subsequently the case will be dismissed.[256] After jurisdiction is established, the case can proceed to the court.[257] The court itself cannot decline jurisdiction.[258] The defendant can raise *forum non conveniens* and the defendant bears the burden to show why the court should not hear the case and displace the forum chosen by the plaintiff.[259] The defendant must identify another appropriate forum to hear the case "using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum".[260] When defendant asks for stay relying on *forum non conveniens*, defendants must show that the alternative forum is clearly more appropriate.[261]

The underlying reason behind this approach is that neither the domestic laws nor the customary international legal provisions particularly acknowledged or recognized that transnational corporations may be held liable for breach of international human rights laws for their atrocities

[251] *Ibid* at para 80.
[252] *Ibid*.
[253] *Ibid* at para 90.
[254] *Ibid* at para 80.
[255] *Ibid* at para 81.
[256] *Ibid*.
[257] *Ibid* at para 102.
[258] *Ibid*.
[259] *Ibid* at para 103.
[260] *Ibid*.
[261] *Ibid* at para 108.

committed abroad.[262] Hence, Canada always faces criticisms for not being able to provide adequate human rights protection to foreign victims because the domestic courts of Canada decline access to foreign plaintiffs when they bring proceedings.[263]

The existing Canadian approach in this regard, raises serious concerns as to a) what extent Canada has international legal obligations to victims in foreign countries and b) the extent to which the foreign subsidiaries can be subject to the Canadian law.[264] It is thought by some that the present international laws fail to provide effective assistance to the victims of violation of human rights.[265] They deal with broader objectives, but fail to provide effective accountability mechanisms. This was reflected on the 2008 UN Human Rights Council Report[266] of Professor John Ruggie where he observed that the international community was still in the initial stages of adapting a human rights regime which effectively protects individual and communities against human rights violations by corporations.[267]

[262] Pena, *supra* note 3 at 5.
[263] *Ibid.*
[264] *Ibid.*
[265] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 27.
[266] Protect, respect and remedy, *supra* note 54 at para 1.
[267] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 27.

CHAPTER 3: CHOC V HUDBAY

Before delving into *Choc*, it is important to discuss the overall conditions that led the Guatemalan nationals to bring proceedings before the Canadian court as opposed to their domestic court. It is deeply connected to the harmful impact the extractive corporations have on the local communities especially in countries such as Africa, Asia and Latin America.[268]

A. Facts

Hudbay Minerals Inc (Hudbay) is a Canadian mining company incorporated under the *Canada Business Corporation Act*[269] which has its headquarters in Toronto.[270] It has two subsidiaries named HMI Nickel Inc. (HMI Nickel) and Compania Guatemalteca de Niquel S.A. (CGN).[271] Separate class actions were brought against each of the subsidiaries by the affected members of the Q'eqchi Mayan Community of Lote Ocho.[272] The plaintiffs were these affected members of the Q'eqchi Mayan Community. At the time of the alleged wrongdoing, Hudbay was either the sole or controlling shareholder of each the subsidiaries.[273] The problem arose in the Fenix Mining Project (Mining Project), an open-pit nickel mining and smelting operation which occupied a large swath of land situated in El Estor in Guatemala.[274] Hudbay, HMI Nickel and CGN owned the Mining Project.[275] The Ontario court mentioned in the motion/judgment that the allegations of facts in the statements of claim were to be taken as proven.[276] The facts pleaded by the plaintiffs in the statements of claim must be proven at the trial, which is yet to take place.

Initially, in 1960, Inco Limited (INCO) began negotiations with the government of Guatemala for building the nickel mine in El Estor, and in 1965 the government of Guatemala sanctioned

[268] Nwapi, "Resources Extraction" *supra* note 8 at 122.
[269] *Canada Business Corporations Act*, RSC 1985, c C-44.
[270] *Choc*, *supra* note 5 at para 8.
[271] *Ibid* at paras 8-10.
[272] *Ibid* at para 4.
[273] *Ibid* at para 8.
[274] *Ibid* at para 4.
[275] *Ibid* at paras 8-10.
[276] *Ibid* at para 42.

a 40-year mining lease to INCO.[277] Following this, from 1968 to 1971, the local Q'eqchi Mayan farmers were removed from the land near the mine to accommodate the workforce and for convenience INCO planned to build a new town in that area for their workers.[278] But, in 1982 the mine was closed by INCO after the government of Guatemala attempted to impose a 5% royalty.[279] Meanwhile, members of the local community began to return to their ancestral properties in El Estor.[280] However, in 2004 the Skye Resources (SR) purchased the El Estor mine.[281] But, the local community was neither consulted nor made aware of this transfer of the mine from SR to INCO. Subsequently, in 2008 SR was purchased by Hudbay.[282] In August 2008, SR became HMI Nickel and amalgamated with the parent company, Hudbay.[283] Accordingly, Hudbay became legally responsible for all the legal liabilities of SR.[284] But the Fenix mining project was formally owned and operated by CGN.[285] CGN is a 98.2% owned subsidiary of Hudbay.[286] In August 2011, Hudbay sold the Fenix mining project to the Russian company, the Solway Group at a loss of $290 million.[287] However, according to the sale and purchase agreement, Hudbay remained legally responsible for and in control of the conduct of litigation against CGN.[288]

[277] Klippensteins Barristers & Solicitors, "Lawsuits against Canadian Company HudBay Minerals Inc. over Human Rights Abuse in Guatemala: Canadian Mining in El Estor", (2021), online: *Choc v HudBay Minerals Inc & Caal v HudBay Minerals Inc* <http://www.chocversushudbay.com/history-of-the-mine/>.
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*
[284] *Choc*, *supra* note 5 at para 9.
[285] *Ibid.*
[286] *Ibid* at para 10.
[287] Klippensteins Barristers & Solicitors, "Ontario Lawsuits Against HudBay Regarding Alleged Human Rights Abuse Continue Despite Sale of Fenix Project" (10 August 2011), online: *Globe Newswire* <www.globenewswire.com/news-release/2011/08/10/1345584/0/en/Ontario-Lawsuits-Against-HudBay-Regarding-Alleged-Human-Rights-Abuse-Continue-Despite-Sale-of-Fenix-Project.html>.
[288] *Choc*, *supra* note 5 at para 10.

B. Disputed Land

Local Mayan Q'eqchi community members formerly lived in the area of the Fenix mining project.[289] The defendants alleged that they had legal rights to the land, but the Q'eqchi Mayan community argued that its members were the rightful owners because it was their ancestral homeland.[290] The plaintiffs alleged that defendants do not own the land because the defendants had been given rights to the land by dictatorial military government during the Guatemalan Civil War (1960-1996), while the local community was being massacred and expelled from their land.[291] In 2006, the local Mayan Q'eqchi community returned to the disputed area in El Estor and tried to reclaim and farm the land.[292] Afterwards, the human rights violations allegedly took place against the Mayan Q'eqchi community. These gave rise to the legal proceedings in Canada.

C. Alleged Human Rights Abuses

The plaintiffs claimed that in November 2006, the Guatemalan police forcefully evicted the local communities situated on the Fenix Mining Project without a court order.[293] Allegations of violent abuse included that police severely beat up the community members and left them unconscious by the road.[294] According to the plaintiffs, in January 2007, SR announced in a press release that the evictions were conducted by trained individuals, and SR further expressed their gratitude to the Guatemalan government for upholding the company's rights to the land.[295] The plaintiffs claimed that on January 8 and 9, 2007, Fenix security personnel, police and military carried out forced evictions on the disputed land, which included burning many houses, firing gunshots and stealing goods.[296] It is alleged that, SR published a press release on January 10, 2007 and expressed its gratitude to the government and the National Police Force

[289] *Ibid* at para 11.
[290] *Ibid*.
[291] *Ibid*.
[292] *Ibid* at para 13.
[293] Caal Statement of Claim at para 55 [*Caal Statement of Claim*].
[294] *Ibid.*
[295] *Ibid* at para 56.
[296] *Ibid* at para 57.

emphasizing that the security personnel were specially trained and throughout the eviction process, a peaceful atmosphere was maintained.[297]After few days, on January 17, 2007, a second round of eviction was initiated by security personnel accompanied by the police and military forces, allegedly at the request of SR, when the local community began to rebuild their homes.[298]

It was alleged that 11 women were physically assaulted and gang-raped by group of uniformed mine security personnel during the eviction process.[299] Among these women were Rosa Coc Ich, Margarita Caal and Yolanda Choc Cac.[300] They all suffered serious injuries.[301] For example, allegedly Ms. Choc Ich was gang raped by 9 men and her injuries are so grievous that she is no longer able to have children.[302] Furthermore, Ms. Caal was six months' pregnant at the time when she was allegedly raped by 10 men, including uniformed security personnel of Fenix and bearing the consequences of it, she gave birth to a stillborn baby.[303] Ms. Cac was allegedly raped by 12 men including security personnel while she was three months pregnant, and she consequently suffered a miscarriage.[304] On the same day, when the alleged rape took place, the CEO of the SR stated in a public letter that "the company did everything in its power to ensure that evictions were carried out in the best possible manner while respecting human rights".[305]

After the evictions took place, the local community members came back to the disputed land to live and farm on the land.[306] Allegedly, on September 11,2009 Adolfo Ich, a community

[297] *Ibid* at para 57.
[298] *Ibid* at para 62.
[299] *Ibid* at para 64.
[300] *Ibid* at paras 64-66.
[301] *Ibid.*
[302] *Ibid* at para 65.
[303] *Ibid* at para 66.
[304] *Ibid* at para 67.
[305] *Ibid* at para 76.
[306] Angelica Choc Statement of Claim at para 28 [*Choc Statement of Claim*].

leader, invited government officials to a meeting in El Estor on behalf of all local communities to raise his voice against the abuse caused by the mining companies and demanded that Hudbay leave the land.[307] The plaintiffs claimed that around the week of September 20-27, 2009, Hudbay's Fenix security personnel came to the local community on the disputed land to ask them to leave, and had also destroyed the local community's property and fired at them.[308] During the morning of September 27, 2009, allegedly the Governor of the Department of Izabal, along with police and Fenix security people visited a local community on the contested land.[309] The plaintiffs claimed that the local community thought this visit meant the beginning of more evictions. A series of protests begun on that day which included a road blockade and general protests.[310] The plaintiffs claimed that in the early afternoon of the same day Adolfo came back home to his wife after he participated in some protests.[311] Adolfo allegedly heard a gunshot at a protest site and went to inspect the area without any arms.[312] The plaintiffs claimed that the Fenix security people, who were heavily armed with handguns, shot-guns, machetes, pepper-spray and tear gas, open fired in the air and also in the direction of local community members.[313] Adolfo was allegedly beaten up by a dozen armed members of the Fenix security team and he was struck on his right forearm with a machete which severed his arm from his body.[314] Adolfo died from his severe wounds. His injuries allegedly comprised of "a bullet wound to his throat, fragmented left ear bones, a shattered jaw, a partially severed right forearm, a broken right arm, blunt force trauma wounds to his head and skull and a lacerated left shoulder".[315] At the protests of that day, seven other members of the local community had

[307] *Ibid* at para 29.
[308] *Ibid* at para 31.
[309] *Ibid* at para 33.
[310] *Ibid.*
[311] *Ibid* at para 34.
[312] *Ibid.*
[313] *Ibid.*
[314] *Ibid* at para 39.
[315] *Ibid* at para 41.

allegedly suffered from severe injuries because of the gunshots fired by Fenix security people.[316]

On the same day, German Chub Choc (Mr. Chub) was allegedly shot at a close range by the head of security for the Fenix Mining Project.[317] In the afternoon of the same day, it was alleged that Mr. Chub was watching a soccer game at the community soccer field when Fenix security personnel and the Head of Security for the Fenix Project came in with weapons, such as handguns, shot-guns, and machetes.[318] The plaintiff claimed that Mr. Chub did not take part in the protests that occurred that day and no protest activities took place in the vicinity of Mr. Chub when the Fenix security personnel arrived. [319] The Head of Security allegedly shot Mr. Chub even though Mr. Chub did not provoke him.[320] The plaintiff claimed that the bullet went through Mr. Chub's shoulder, piercing his left lung and severely injured his spinal column.[321]Afterwards, Mr. Chub allegedly spent three months in hospital and another 17 months in different physiotherapy and rehabilitation centers due to his severe injuries.[322]

D. Allegation of the Plaintiffs

The first action, *Margarita Caal Caal v. Hudbay Minerals Inc.* (Caal action) was brought by Rosa Elbira Coc Ich, Margarita Caal and nine other women of the local community.[323] They brought proceedings against Hudbay and HMI because SR was negligent regarding directing and supervising the security personnel who raped the victims.[324] The second action, *Angelica Choc v Hudbay Minerals Inc.* (Choc action) was brought by the widow of Adolfo Ich's widow, Angelica Choc.[325] She alleged that the death of Adolfo Ich took place due to the unlawful

[316] *Ibid* at para 42.
[317] Chub Statement of Claim at para 2 [*Chub Statement of Claim*].
[318] *Ibid* para 49.
[319] *Ibid* at para 50.
[320] *Ibid* at para 52.
[321] *Ibid*.
[322] *Ibid* at para 54.
[323] *Caal Statement of Claim*, *supra* note 293 at para 15.
[324] *Ibid* at para 2.
[325] *Choc Statement of Claim*, *supra* note 306 at para 2.

actions and omissions of Hudbay and its subsidiaries, HMI Nickel and CGN.[326] The final action, *German Chub Choc v Hudbay Minerals Inc.* (Chub action) was brought by German Chub.[327] It was alleged that his injuries were caused by Hudbay and its subsidiary, CGN.[328]

E. Fenix Security Personnel

In all the actions, the plaintiffs alleged that private security personnel were employed according to the instructions of Hudbay or SR, and these private security personnel were directly or indirectly controlled by Hudbay or SR.[329] The plaintiffs alleged that the security personnel were hired solely through an informal oral agreement, and SR (and later Hudbay) had power over the terms of the oral agreement.[330] The plaintiffs claimed that such appointment failed to include rules of conduct, failed adhere to adequate standards regarding the application of appropriate use of force and failed to ensure adequate training of the security personnel.[331] It was further alleged that the companies were aware that the security company was operating without necessary authorization and license for providing armed security services in Guatemala.[332] It was further claimed that SR and Hudbay knew of the history of violence of the security personnel since it was public knowledge that they had history of arms and drug trafficking.[333] The plaintiffs alleged that Fenix security personnel were comprised of people who were part of Guatemala military or paramilitary groups during the Guatemalan civil war, and had participated in war crimes and crimes against humanity.[334] The plaintiffs claimed that the defendants knew or should have known that private security forces, police and military in Guatemala often perpetrate violence, and that private security personnel still used brutal

[326] *Ibid.*
[327] *Chub Statement of Claim, supra* note 317 at para 5.
[328] *Ibid.*
[329] *Ibid* at para 20; *Caal Statement of Claim, supra* note 293 at para 23; *Choc Statement of Claim, supra* note 306 at para 17.
[330] *Chub Statement of Claim, supra* note 317 at paras 21-22.
[331] *Ibid* at para 22.
[332] *Ibid* at paras 24-26.
[333] *Ibid* at para 27.
[334] *Choc Statement of Claim, supra* note 306 at para 19.

strategies similar to what they did during the Guatemalan civil war.[335] The plaintiffs further claimed that SR and Hudbay knew that the chief of security personnel had been accused of numerous criminal acts that he committed while employed as the head of security.[336]

F. Public Representations by Hudbay

The plaintiffs alleged that Hudbay had made many public representations about its Corporate Social Responsibility such as Hudbay's "Corporate Social Responsibility 08". This stated that "At HudBay, we embrace our responsibilities through our Company-wide commitment to the welfare of neighboring communities…Our core values are reflected in every region where we operate, including our new Fenix project in Guatemala which we acquired in 2008."[337] The plaintiffs alleged that the 2009 "Corporate Social Responsibility Report" went on to mention that Hudbay aimed to cement their relationship "with the broader community, whose efficient functioning and support are critical to the long-term success of the company in Guatemala."[338] The plaintiffs alleged that HMI Nickel publicly mentioned that it would comply with the International Finance Corporation (IFC) Performance Standards.[339] The plaintiffs alleged that by these standards HMI Nickel failed to adhere to the required standards regarding "terms of hiring, rules of conduct, training, equipping and monitoring" of Fenix security personnel.[340] The plaintiffs alleged that HMI Nickel failed to train security personnel adequately regarding the use of force and appropriate conduct towards local community as required by the IFC standards, though Hudbay had publicly claimed to comply with these standards.[341]

Based on all these factors, the plaintiffs claimed that the parent corporation, Hudbay, is directly liable in negligence for its breach of duty and standard of care in operating the mining

[335] *Ibid* at paras 47-48.
[336] *Chub Statement of Claim*, *supra* note 317 at paras 29-30.
[337] *Choc Statement of Claim*, *supra* note 306 at paras 52-53(a).
[338] *Ibid* at para 56(a).
[339] *Ibid* at para 57.
[340] *Ibid* at para 58(a).
[341] *Ibid* at para 58(b).

project.[342] According to the statements of claim, the primary causes of action in all three actions is based on direct actions and omissions of Hudbay as opposed to share ownership or vicarious liability of the parent corporation for the activities of its subsidiaries.[343] Allegations of direct negligence against Hudbay and SR arose out of the management of the mining project and mismanagement of the security personnel, that ultimately resulted in the alleged shots of the plaintiffs in the *Choc* and *Chub* actions and alleged rape of the plaintiffs in *Caal* action.[344] Further, in the *Choc* action only the plaintiff additionally claimed vicarious liability for CGN's alleged torts of battery, wrongful imprisonment, and wrongful death.[345] The last allegations against Hudbay is the lifting the corporate veil along with the claim of a breach of duty of care.[346]

The plaintiffs pleaded direct negligence against the parent corporation because the parent retained considerable direct responsibility and control over the mining project which also included responsibility of the security personnel, and exercised ultimate control over the eviction process.[347] Further, throughout the period Hudbay/SR acknowledged direct responsibility for the security practices exercised at the mining project by publishing public statements that demonstrated commitment to implement detailed standards of conduct and willingness to adhere to the Guatemalan law along with international law and Voluntary Principles on Security and Human Rights.[348] It was also alleged against Hudbay/SR that by failing to implement and enforce, and inadequately supervising the security personnel, they created a high risk of violence.[349]

[342] *Choc*, *supra* note 5 at para 24.
[343] *Ibid* at para 25.
[344] *Ibid*.
[345] *Ibid* at para 31.
[346] *Ibid.*
[347] *Ibid* at para 26.
[348] *Ibid*.
[349] *Ibid*.

The plaintiffs brought proceedings in Canada as opposed to Guatemala. Typically, for the incidents occurred in Guatemala, Guatemala would be the most appropriate forum. Despite this, they brought proceedings in Canada because they had concerns over the corruption in Guatemalan judicial system, which would have rendered the litigation difficult if not impossible.[350]

G. Ontario Superior Court Decision

In response to the claim, Hudbay, HMI Nickel and CGN brought three separate motions before the Ontario Superior Court of Justice. These were:

(a) to strike out these actions on the ground that they disclose no reasonable cause of action in negligence pursuant to Rule 21.01(1)(b) of the *Ontario Rules of Civil Procedure*[351],

(b) to strike the amended statement of claim of *Caal* on the ground that they are statute barred by virtue of the *Limitation Act, 2002*[352] and

(c) to dismiss the *Choc* action on the basis that the Ontario court lacks jurisdiction over the Guatemalan corporation, CGN.[353] In essence, they indicated that the plaintiffs failed to state a case based on which relief could be granted.

H. Decision of the Court

1. Failure to Disclose Reasonable Cause of Action

Generally, the court will only strike out the claim if it is "plain and obvious" that the plaintiff's version of the story discloses no cause of action.[354] For this, there needs to be no sufficient evidence that the plaintiffs have any chance of success *i.e.* even if the alleged facts are admitted by the defendant, they are not sufficient enough to grant the plaintiffs the remedy they seek.[355] In that respect, the mere fact that the alleged cause of action is a 'novel' one does not automatically make the action amenable to being struck out.[356] For strike out, an element of

[350] Caal Statement of Claim, *supra* note 293 at para 97.
[351] *Rules of Civil Procedure*, RRO 1990, Reg 194.
[352] *Limitations Act, 2002,* SO 2002, c 24, Schedule B.
[353] Choc, *supra* note 5 at para 15.
[354] Nwapi, "Resources Extraction" *supra* note 8 at 133.
[355] *Ibid*.
[356] *Ibid*.

"certain to fail" must exist as a result of some fundamental and incurable defect.[357] In the absence of this, the plaintiffs should be given an opportunity to plead their case and the defendants can establish their defence.[358] It is a very stringent test.[359] The defendant approached these issues following two arguments.[360] First, they relied on the provision of piercing the corporate veil and secondly, on non-existence of a duty of care.[361]

2. Piercing the corporate veil

Traditionally, *Salomon v Salomon*[362] established separate legal personality between the corporations and the shareholders. This principle is also applicable to parent-subsidiary relationships. However, there are some exceptional circumstances where the courts pierce this corporate veil, and consider the parent and subsidiary corporation as one, as opposed to separate legal identities. Such an approach is taken only where it appears before the court that the subsidiary corporation is "a mere agent" of "its controlling shareholders or parent company".[363] Moreover, in *Gregorio v Intrans-Corp*[364] it was observed that "a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent and is nothing more than a conduit used by the parent to avoid liability".[365] Generally, corporate veil is protected unless one of the three circumstances exist. They are

(a) when the court construes "a statute, contract of other document",

(b) when the court finds that the subsidiary corporation is a "mere façade" and is a front to conceal true facts, and

[357] *Ibid.*
[358] *Ibid* at 134.
[359] *Ibid.*
[360] *Ibid.*
[361] *Ibid.*
[362] *Salomon v Salomon & Co Ltd* [1897] AC 22 (H.L.).
[363] *Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2 at para 12.
[364] *Gregorio v Intrans-Corp* (1994) 18 OR (3d) 527 (Ont CA).
[365] *Ibid* at para 28.

(c) when the subsidiary corporation "is an authorized agent of its controllers or its members, corporate or human" .[366]

According to Hudbay, the plaintiffs attempted to pierce the corporate veil between the parent and the subsidiary corporation on the ground of complete domination and control.[367] But, in the *Choc* action, the court observed that though the plaintiffs mentioned about complete domination and control of the CGN by Hudbay, but they did not plead that such domination and control was exercised to shield Hudbay from liability.[368] Therefore, the court found that the plaintiff did not rely on this particular exception.[369] Rather, the court mentioned that the plaintiffs in the *Choc* action pleaded that the CGN was acting as the agent of Hudbay.[370] However, at that stage of the proceedings, it was not permissible for the courts to consider at length how the plaintiffs will be able to establish agency relationship between the parent and subsidiary unless the situation was 'patently ridiculous or incapable of proof'.[371] The court also found that in these cases the plaintiffs sought direct liability of the parent corporation, Hudbay, rather than emphasizing on the vicarious liability arising out of the parent-subsidiary relationship.[372] Therefore, there is no issue of parent-subsidiary relationship, and hence no issue of lifting the veil. Here, the court found that it was not plain and obvious that the claim was incapable of proof.[373]

3. Duty of care

Further, the court had to decide as to whether it was plain and obvious that Hudbay did not owe any duty of care in respect of alleged activities of its foreign subsidiaries.[374] Here, the plaintiffs

[366] *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co* (1996), 28 OR (3d) 423 at para 19.
[367] *Choc*, *supra* note 5 at para 3.
[368] *Choc*, *supra* note 5 at paras 47-48; Nwapi, "Resources Extraction" *supra* note 8 at 135.
[369] *Choc*, *supra* note 5 at para 47.
[370] *Ibid* at para 49.
[371] Choc, *supra* note 4 at para 49; Nwapi, "Resources Extraction" *supra* note 8 at 135.
[372] Choc, *supra* note 4 at paras 50-75; Nwapi, "Resources Extraction" *supra* note 8 at 135;
[373] *Choc*, *supra* note 5 at para 75.
[374] Nwapi, "Resources Extraction" *supra* note 8 at 136.

alleged that Hudbay was negligent for failing to prevent the commission of the acts as opposed to bringing direct negligence that Hudbay was responsible for the actions of the subsidiary security personnel.[375] The plaintiffs mainly emphasized Hudbay's negligence in supervising the actions of the foreign subsidiaries that ultimately led to the commission of the alleged violations against the plaintiffs.[376]

Since scenarios such as *Choc* do not fall within the existing established duty of care situation, the court ruled that duty of care will be established if it satisfies the test laid down in *Anns.*[377] This test was originally formulated by the House of Lords in the UK. A few years later this test was abandoned by the House of Lords in *Murphy v Brentwood District Council.*[378] However, the principle of *Anns* remains good law in Canada.[379] Accordingly, the victims of crime against humanity by a Canadian company's foreign subsidiary need to prove that

(a) the harms complained of were reasonably foreseeable consequence of the alleged breach,

(b) there is sufficient proximity between the parties that would not be unjust or unfair to impose duty of care on the defendants; and

(c) there are no contrary policy reasons to negate or otherwise restrict that duty.[380]

The *Anns* principles can be distilled to two parts.[381] The first part deals with the *prima facie* duty of care which may arise where the plaintiffs can establish foreseeability and proximity between the alleged conduct of the defendant and suffered harm of the plaintiff.[382] The second

[375] *Ibid*.
[376] *Ibid.*
[377] *Anns v Merton London Borough Council* [1977] 2 All ER 492.
[378] [1991] UKHL 2.
[379] *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 at para 46.
[380] *Choc*, *supra* note 5 at para 57; Pena, *supra* note 3 at 14.
[381] Nwapi, "Resources Extraction" *supra* note 8 at 138.
[382] *Ibid.*

part concentrates as to whether there are other residual policy reasons outside the relationship of the parties that may negate the imposition of the duty of care.[383]

4. Tort: Direct Liability

Ontario Superior Court of Justice observed that holding Hudbay directly liable for the torts committed by the security personnel would create a 'novel' duty of care situation and it was thought such a formulation was not plain and obvious that the claim would fail.[384] This case created a unique opportunity for the Canadian courts to formulate liability model for transnational violation of human rights.[385] As mentioned earlier, traditionally in such situations the Canadian courts declined jurisdiction. But surprisingly, in *Choc* the Superior Court observed that for the first time the Canadian courts will be looking forward to address issues of international concerns such as the violation of human rights by transnational corporations.[386]

4.1 Foreseeability

In determining foreseeability, the court considers the factors that may arise out of the relationship between the plaintiff and defendant.[387] The Superior Court relied on the judgment in *Bingley v Morrison Fuels, a Division of 503373 Ontario Ltd.*[388] In light of this, there will be foreseeability if the defendant could foresee the general way the sort of thing that happened.[389] The general harm must be foreseeable, not the manner of coincidence.[390] If physical damage is foreseeable then the extent of the damage and its manner of incidence do not have to be foreseeable.[391] Professor Radu Mares is of the view that whenever a multinational parent company starts mining project through a subsidiary company in weakly governed host country,

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[383] Nwapi, "Resources Extraction" *supra* note 8 at 138; *Cooper v Hobbart* 2001 SCC 79 at para 30 [*Cooper*].
[384] *Choc*, *supra* note 5 at paras 54-55.
[385] Pena, *supra* note 3 at 13.
[386] *Ibid*.
[387] *Cooper*, *supra* note 383 at para 30.
[388] 2009 ONCA 319 at para 24, 95 OR (3d) 191.
[389] *Ibid*.
[390] *Ibid*.
[391] *Assiniboine South School Division No 3 v Greater Winnipeg Gas Co*, [1971] M.J. No. 39 (ManCA) at para 17, 21 DLR (3d) 608.

the risk of abuse becomes foreseeable.[392] Further, by its very nature, the mining corporations are expected to bring unreliable players, such as security forces, abusive contractors and corrupt government officials, into contact with the people of local communities.[393]

In *Choc*, the court accepted the factors presented by the plaintiffs in that both Hudbay and SR knew that violations were frequently used in such evictions, and thus there was a high risk of that happening there.[394] The court observed that in *Caal* action, the plaintiffs alleged that Hudbay or SR have controlled and directed the security personnel during the eviction.[395] Moreover, in the statements of claim of the *Choc* and *Chub* actions, the plaintiffs stated that Hudbay/SR were all aware of the frequent use of violence by the security personnel in forced evictions. [396] Further, the court emphasized issues such as the record of violence of the head of the security personnel, that security personnel were unlicensed and untrained, and that they were in possession of illegal weapons.[397] Hudbay argued that some of the facts pled by the plaintiffs would be proven false.[398] However, as a matter of procedural law at the motion to strike stage, the facts are presumed to be true.[399] Considering all these issues, the court observed that by authorizing the use of force during the protest, it could be established during the trial that it was reasonably foreseeable that somebody could be killed or assaulted as a result of Hudbay and SR's authorization during the use of force exercised during the protest.[400]

4.2 Proximity

After foreseeability, the court has to decide as to whether the relationship between the defendant and the plaintiffs is proximate enough to justify the imposition of the duty of care.

[392] Radu Mares, *The UN Guiding Principles on Business and Human Rights- Foundation and Implementation* (Leiden, NL: Boston: Martinus Nijhoff Publishers, 2012) at 180.
[393] *Ibid* at 181.
[394] *Choc, supra* note 5 at para 64.
[395] *Ibid* at para 63.
[396] *Ibid* at para 64.
[397] *Ibid*.
[398] *Ibid* at para 62.
[399] *Ibid*.
[400] *Ibid* at para 65; Pena, *supra* note 3 at 14.

According to *Hercules Managements Ltd v Ernst & Young*[401] proximity refers to the circumstances of relationship of such nature that puts the defendant under an obligation to be mindful regarding the plaintiff's legitimate interests in conducting the defendant's affairs.[402] In assessing this relationship, the Superior Court in *Choc* looked into various factors including the parties' "expectation, representations, reliance, and the property and other interests involved".[403] Assessment of these features would assist the court to decide if it would be just and fair to impose a duty of care.[404] Here, the court sought to ascertain the closeness between the parties and figure out whether imposition of duty would be justified by such closeness.[405] In order to prove that there was proximate relationship between against Hudbay and the plaintiffs, the plaintiffs relied on various public statements made by Hudbay and its subsidiary corporations.[406] More specifically, in *Caal* action the plaintiffs referred to various public statements of Hudbay/SR to the effect that they were willing to engage with the local stakeholders in order to seek solution for the land dispute between them and the local people as a result of the alleged atrocities.[407] Further, they referred to the statement of the SR's CEO which he delivered on the day of the alleged incidents.[408] He mentioned that Hudbay/SR "did everything in its power to ensure that evictions were carried out in the best possible manner while respecting human rights".[409] Similarly, regarding both *Choc* and *Chub* actions plaintiffs indicated numerous statements made by Hudbay that reflected its relationship with the local farmers of the mining project. They also referred to the public declarations of Hudbay where it indicated that for the use of private security force they have adhered to the Voluntary Principles

[401] *Hercules Managements Ltd v Ernst & Young* (1997) 2 SCR 165.
[402] *Ibid* at para 24.
[403] *Choc*, *supra* note 5 at para 69.
[404] *Ibid*.
[405] *Cooper*, *supra* note 383 at para 34.
[406] *Choc*, *supra* note 5 at para 67.
[407] *Caal Statement of Claim*, *supra* note 293 at paras 84-85.
[408] *Ibid* at para 76.
[409] *Choc*, *supra* note 5 at para 67; *Caal Statement of Claim*, *supra* note 293 at para 76.

on Security and Human Rights.[410] Also, in respect of all three actions, the managers and employees were directly in charge for the day-to-day operation and management of the mine, and was directly in change of the land matters, and directly coordinated with the local farmers.[411]

In adjudicating this issue, interestingly, the starting-point of the court was that the making of certain representations does not automatically mean that the corporation is actually abiding by them.[412] Despite this, however, the court emphasized the various public statements and declarations made by the corporations from time to time where they expressed very specific concerns about the local authorities relating to the mine and also stressed on their commitment to not infringe the human rights of these local people.[413] The court observed that such representations created expectations in the plaintiffs and that the defendant's interest in building the mining project established a relationship between them and the members of the local community.[414] All of these established proximity of relationship between the plaintiffs and the defendants. [415]

Regarding the last requirement as to whether there are any public policy reasons to negative or restrict the duty of care, it was observed that at the motion stage, it was not plain and obvious that the *Anns* test would fail on policy reasons.[416] On the other hand, Justice Brown also stated that there are competing policy considerations in recognizing duty of care in such a situation.[417]

[410] *Choc*, *supra* note 5 at para 67.
[411] *Ibid* at paras 27, 67.
[412] *Ibid* at para 68.
[413] *Ibid* at para 69.
[414] *Ibid*.
[415] *Ibid* at para 70.
[416] *Ibid* at para 75.
[417] *Ibid* at para 74.

4.3 Policy Consideration

Policy consideration is going to play a significant role at trial stage of *Choc*. It will be interesting to see how the plaintiffs overcome this hurdle. The orthodox Canadian position regarding policy considerations can be derived from *Haskett v Equifax Canada Inc.*,[418] which stated that, during the motion stage, the courts are reluctant to dismiss a claim as having no reasonable cause of action on policy grounds before there is a record where the courts can the asses the strengths and weaknesses of the policy arguments.[419] In support of their claim, the plaintiffs argued that recognition of a duty of care in this scenario would be in line with Canada's broader efforts of encouraging the corporations to meet "the high standards of corporate social responsibility".[420] Additionally, it will align with Canada's goal of reducing the risk of using private security forces by Canadian corporations operating business abroad that often result in violation of human rights.[421] Moreover, it shall provide an avenue or forum to the sufferers of violation of human rights resulting from the atrocities of business operations.[422]

According to Pena, there are two complex considerations that are going to be vital in determining the policy consideration limb of the *Anns* test.[423] They are

(a) extraterritorial jurisdiction of the Canadian courts and

(b) the principle of the separate corporate personality between the parent and the subsidiary companies.[424]

As far as the question of extra territorial jurisdiction of the Canadian court is concerned, as per the principle of *Van Breda*[425] (discussed above) there is no bar in bringing proceedings against

[418] (2003), 63 OR (3d) 577, (Ont CA).
[419] *Ibid* at para 52.
[420] *Choc*, *supra* note 5 at para 73.
[421] *Ibid.*
[422] *Ibid.*
[423] Pena, *supra* note 3 at 15.
[424] *Ibid.*
[425] *Van Breda*, *supra* note 243.

Hudbay in Canadian courts since it is incorporated in Canada.[426] Therefore, it will not be very difficult for plaintiffs to prove that there was sufficient connection between Ontario and the subject matter of the litigation.[427]

4.3.1 Policy Consideration: Separate Legal Personality

At the preliminary stage of *Choc*, the court did not consider the piercing of corporate veil.[428] This is because the plaintiffs brought allegations of direct liability of the parent company for their own wrongdoing rather than holding the parent company liable for the activities of the subsidiary company.[429] The plaintiffs emphasized that the parent corporation managed and controlled key aspects of subsidiary corporation's operations and exercised certain amount of influence and authority relating to the security policies as well as relations with local communities.[430] Further, it has been alleged that the parent company is well conversant with the law-and-order situation of Guatemala and despite that it did not take any effective step to prevent violation of human rights against the Mayan community.[431]

In *Choc*, the plaintiffs formulated the claim on enterprise liability which represents a viable alternative approach to regulate the conduct of the corporate group.[432] The essence of the enterprise liability is that it views the corporate structure as a singular unit, rather than considering the subsidiary corporations as distinct and separate from the parent corporation.[433] It owes its origin to tort, and focuses on the normative and economic realities of the relationship between the parent corporations and its' subsidiaries.[434] Such formulation avoids the formalistic legal complexities pertaining to the piercing of corporate veil.[435] Such approach is

[426] Pena, *supra* note 3 at 15.
[427] *Ibid.*
[428] *Ibid* at 17.
[429] *Ibid.*
[430] *Ibid.*
[431] *Ibid.*
[432] *Ibid.*
[433] *Ibid.*
[434] *Ibid.*
[435] *Ibid.*

driven by the objective of making all the members of the corporate group accountable for the actions of the entire group.[436]

However, Canada is yet to recognize the enterprise liability model.[437] It has been widely applied in the US under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*,[438] which plays an instrumental role in ensuring that corporations actively respect the international human rights.[439] The UN has also endorsed the enterprise liability model in its Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights.[440] This instrument was the predecessor of the UNGPs. But, the subsequent principles did not advance enterprise liability or any such concept regarding separate legal personality of corporations.[441]

I. Cases after *Choc*

1. *Tahoe Resources*

In *Garcia v Tahoe Resources Inc*[442] seven Guatemalan farmers brought proceedings before British Columbia Supreme Court against Tahoe Resources Inc. (Tahoe) which is the parent company of a Guatemalan company, Minera San Rafael S.A. (MSR). MSR owned the mine.[443] The plaintiffs alleged that on April 27, 2013 they were shot and injured by security personnel of Tahoe when they were peacefully protesting outside the mine.[444] The plaintiffs claimed that the shooting took place at the order of Tahoe's Guatemala Security Manager.[445] The plaintiffs claimed that Tahoe either expressly or impliedly authorized the use of excessive force by the Security Manager and security personnel, or was negligent as it failed to prevent excessive

[436] *Ibid.*
[437] *Ibid.*
[438] *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*, Pub L No 111-203.
[439] Pena, *supra* note 3 at 17.
[440] *Ibid.*
[441] *Ibid.*
[442] *Garcia v Tahoe Resources Inc* 2015 BCSC 2045.
[443] *Ibid* at para 1.
[444] *Ibid.*
[445] *Ibid* at para 7.

force being used. [446] Alternatively, plaintiffs alleged that Tahoe was vicariously liable as MSR authorized the excessive force to be used by security personnel.[447] The plaintiffs claimed that Tahoe owed the plaintiffs a duty of care and breached the duty because it failed to carry out background checks of the security personnel, and, more importantly, failed to monitor the security personnel to make sure that they followed Tahoe's corporate social responsibility policies.[448] The plaintiffs brought three causes of action against Tahoe, which were negligence, direct battery and vicarious liability for battery.[449]

The British Columbia courts have jurisdiction *simpliciter* because court has territorial competence as the action is brought against a corporation which is ordinarily resident in British Columbia at the time when the proceedings started.[450] Tahoe raised the issue of *forum non coveniens.* The British Columbia Supreme Court declined jurisdiction, stating that Guatemala was the more appropriate forum to hear the case.[451]

The plaintiffs appealed the decision to the British Columbia Court of Appeal.[452] Subsequently, the original stay of the plaintiffs' action was reversed on appeal. More importantly, the British Columbia Court of Appeal found that the court below erred in the application of the legal test for determining the risk of unfairness by the foreign judiciary.[453]

The British Columbia Court of Appeal identified three major factors that weighed against finding that Guatemala was the appropriate jurisdiction for hearing the suit. Firstly, the court considered the various difficulties the plaintiffs would face because of the limited discovery

[446] *Ibid*.
[447] *Ibid*.
[448] *Ibid* at para 8.
[449] *Ibid* at para 94.
[450] *Ibid* at para 30.
[451] *Ibid* at para 106.
[452] *Garcia v Tahoe Resources Inc* (2017) BCCA 39.
[453] *Ibid* at para 114.

procedures of the Guatemalan courts.[454] Secondly, the limitation period for bringing a civil suit in Guatemalan law is one year, which was long expired and there was lack of clarity as to whether these plaintiffs would be able bring proceedings in Guatemala.[455] The court attached significant weight to this issue because it was possible that ultimately the plaintiffs would be unable to pursue to a civil suit in Guatemala against Tahoe.[456] Finally, there was significant doubts as to whether the plaintiffs would have received a fair trial under the Guatemalan law especially against "a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state".[457]

Regarding the legal test for risk of unfairness in foreign judiciary, the lower court had considered whether the foreign court was capable of providing justice.[458] However, the British Columbia Court of Appeal found that the correct test was whether there was a real risk of an unfair process in the foreign court.[459] The court clarified that how much weight will be given to this factor will depend on the quality of evidence about the risk of unfairness.[460] The court further explained that "detailed and cogent evidence" of corruption will be given "significant weight" while general submission of corruption will receive limited weight.[461] In this particular case, the judge gave moderate weight considering the quality of the plaintiffs' evidence.[462] The court allowed the plaintiffs' appeal and concluded that Guatemala was <u>not</u> a more appropriate forum than British Columbia. Following this, Tahoe Resources filed an application for leave to appeal, but this was dismissed by the Supreme Court of Canada (SCC).[463]

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[454] *Ibid* at para 128.
[455] *Ibid* at para 129.
[456] *Ibid* at para 96.
[457] *Ibid* at para 130.
[458] *Ibid* at para 114.
[459] *Ibid* at para 115.
[460] *Ibid* at para 125.
[461] *Ibid.*
[462] *Ibid.*
[463] *Tahoe Resources Inc. v. Adolfo Agustin Garcia, et al.* 2017 CarswellBC 1553, 2017 CarswellBC 1554, [2017] S.C.C.A. No. 94 (SCC).

2. ***Araya v Nevsun Resources Ltd***

Araya v Nevsun Resources Ltd [464] is an important landmark case in the Canadian legal system because it is the first time that the Canadian courts permitted a suit against a corporation for the allegations of violations of customary international laws (CIL).[465] It opened a door of possibility of recognizing tort-based liability for breaches of CIL. The case centered around allegations against Nevsun Resources Ltd. (Nevsun) of forced labor by three Eritrean men working at the Bisha mine in Eritrea.[466] At the time of the alleged activities, Bisha mine was owned and operated by Bisha Mining Share Company (BMSC), which is a subsidiary of Nevsun.[467] The law suit began in 2014 and after several appeals to the higher courts to dismiss the case, recently in 2020 the SCC released the judgment allowing the case to go to trial.

2.1 Facts

It was alleged that the plaintiffs were forcibly conscripted to build a gold, copper and zinc mine called the Bisha mine.[468] At the time of the alleged incidents, sixty per cent of the mining project was owned by Nevsun, a Canadian company, and the remaining forty per cent was owned Eritrea government.[469] They alleged that the conscription amounted to forced labor and slavery.[470] Additionally, they alleged grave human rights violations.[471] It was alleged that, as a result of the agreement between Nevsun and Eritrean government, they were forced to work in mine in inhumane conditions.[472] As a result , they brought proceedings directly against Nevsun, for, *inter alia*, breaches of peremptory international law norms (prohibiting forced labor, slavery, torture, inhuman or degrading treatment, and crime against humanity) as incorporated

[464] *Nevsun, supra* note 7.
[465] Sarah Blackwell *et al*, "International Human Rights" (2018) 52 The Year in Review Intl Lawyer 437 at 442.
[466] *Nevsun, supra* note 7.
[467] *Ibid* at para 7.
[468] *Ibid.*
[469] *Ibid.*
[470] *Ibid* at paras 10-11.
[471] *Ibid* at paras 12-13.
[472] *Ibid* at para 8.

into Canadian law.[473] The plaintiffs also claimed domestic torts of conversion, battery, unlawful confinement, conspiracy and negligence.[474]

2.2 British Columbia Supreme Court

Nevsun denied all allegations of mistreatment and brought a series of applications to have the case dismissed. Nevsun brought an application to the British Columbia Supreme Court (BCSC) to strike out the plaintiffs' claim for failing to disclose a reasonable cause of action.[475]

The plaintiffs claimed that Nevsun's active use, directly or through the involvement of the Eritrean government, of forced labor, slavery, torture and crimes against humanity constituted breaches of *jus cogens (*part of CIL).[476] *Jus cogens* has been described as higher-order of international legal principles, which are peremptory norms, from which derogation is not allowed.[477] They also emphasized that the doctrine of 'adoption' made way for invoking private actions for damages through the adoption of *jus cogens* into Canadian domestic law.[478] Altogether, the plaintiffs pleaded for recognition of four new torts premised on CIL, which were the prohibition against torture, slavery, forced labor, and crimes against humanity.[479] They argued that the conduct of the defendant violated the fundamental tenets of international law that are absolute, universal and thus are deemed peremptory CIL norms.[480] As a result, they deserve enforcement under the Canadian tort law.[481]

2.3 Forum *non conveniens*

Nevsun contended that Eritrea was more appropriate forum for the proceedings.[482] The BCSC had presumptive jurisdiction because Nevsun was a British Columbia company.[483] In order to

[473] *Ibid* at paras 60-61.
[474] *Ibid* at para 4.
[475] *Araya v Nevsun Resources Ltd* (2016), 2016 BCSC 1856, 408 DLR (4th) 383 at para 6 [*Nevsun BCSC*].
[476] *Ibid* at para 439.
[477] *Ibid* at para 437.
[478] *Ibid* at para 440.
[479] *Ibid* at para 427.
[480] *Ibid* at paras 437-438.
[481] *Ibid* at para 439.
[482] *Ibid* at para 227.
[483] *Ibid* at para 226.

send the case to Eritrea, Nevsun was required to establish that Eritrea was clearly the more appropriate forum because the burden was on Nevsun.[484] According to Nevsun, Eritrea was more appropriate forum because the alleged incidents took place in Eritrea, many of the witnesses of the plaintiffs are from Eritrea, the plaintiffs fled from Eritrea to Canada and finally, Eritrea has an independent judiciary that independently functions without interference of the government.[485] On the other hand, the plaintiffs provided evidence that there was a real risk that justice will not be served in Eritrea.[486] This included real risk that witnesses would not testify out of fear, judges would be fearful to rule in such a case, military's refusal to cooperate, lack of proper evidence legislation in Eritrea, and lack of legal structure to admit foreign documents and testimony as evidence.[487] The BCSC found that there was sufficient cogent evidence to conclude that there was a real risk of unfair trial in Eritrea as plaintiffs could not find justice in Eritrea.[488] The BCSC decided that Nevsun could not show that Eritrea was the appropriate forum by failing to establish that it more convenient and less expensive to have the trial in Eritrea.[489]

Nevsun denied the court's jurisdiction over the dispute, based on the so-called act of state doctrine.[490] The BCSC observed that act of state doctrine was part of Canadian common law even though no Canadian court has based their decision on this doctrine.[491] The BCSC was of the view that there no reason for Canadian courts not to recognize it, highlighting that this doctrine was well established in England and Australia.[492] Rather, the BCSC believed that the act of state doctrine would be of little help to Nevsun's case.[493] Nevertheless the BCSC found

[484] *Ibid* at para 230.
[485] *Ibid* at para 234.
[486] *Ibid* at para 236.
[487] *Ibid* at para 247.
[488] *Ibid* at paras 258-259.
[489] *Ibid* at para 251.
[490] *Ibid* at para 341.
[491] *Ibid* at para 375.
[492] *Ibid* at para 376.
[493] *Ibid* at para 378.

that the Nevsun's preliminary application asking for stay or dismissal relying on act of state doctrine could not succeed because of the uncertain nature of the application of the doctrine in England and Australia, and more importantly because the doctrine had never been used by Canadian courts.[494] The Supreme Court of Canada has later clarified the issue of the act of state doctrine and this discussion has been addressed below.

Nevsun also argued that the CIL provisions are only applicable to states, inter-governmental organizations, and others who are acknowledged as international actors, as opposed to the corporations.[495] It was further argued that the doctrine of adoption does not automatically create new private law remedies.[496] Rather, Nevsun argued that the adoption of the CIL provisions was to help the growth of the common law.[497]

The BCSC dismissed the motion to strike the claim and thus permitted the action of the plaintiffs to proceed.[498] The court observed that the decision as to whether a private cause of action may sustain for CIL violation can only be determined after a "contextual analysis" at a full trial.[499] Nonetheless, the court acknowledged that previously such claims never succeeded in Canadian courts.[500]

2.4 British Columbia Court of Appeal

Nevsun appealed against this decision before the British Columbia Court of Appeal (BCCA) on several grounds, including the refusal to strike down the plaintiff's CIL based claims, *forum non conveniens* and the act of state doctrine.[501] Regarding *forum non conveniens*, the BCCA accepted that adjudicating this case in Canada would result in numerous logistical difficulties,

[494] *Ibid* at para 419.
[495] *Ibid* at para 443(a).
[496] *Ibid* at para 443(b).
[497] *Ibid* at para 443(b)(i).
[498] *Ibid* at para 429
[499] *Ibid* at paras 429, 477.
[500] *Ibid* at para 445.
[501] *Araya v. Nevsun Resources Ltd.,* 2017 BCCA 401 at para 18 [*Nevsun Appeal*].

but nonetheless affirmed the lower court's decision to proceed to trial because of the serious doubts that pertained as to the availability of fair trial of the victims in Eritrea.[502] Hence, this ground of appeal was dismissed.

In relation to Nevsun's argument that the CIL, as incorporated in Canadian law, provided no reasonable cause of action, the majority in BCCA acknowledged the need for further clarification from the Supreme Court on Canada's existing position with respect to transnational law.[503] Newbury JA of the BCCA distinguished the facts from those of *Bouzari*[504] and *Kazemi*[505], where the attempts to rely on CIL failed on the 'state immunity' ground. She observed that the defendant here is a private party and it is unlikely that it can invoke state immunity.[506] Finally, the BCCA court concluded that Canadian transnational law is still in a developmental state and for this reason, despite plaintiffs' significant legal obstacles, their CIL-based claims were not bound to fail.[507] Furthermore, the BCCA rejected Nevsun's argument that finding liability in such a manner would strain the diplomatic and political relationship between Canada and Eritrea, and may attract criticism for interfering with the judicial system of another sovereign.[508] The BCCA concluded that the act of state doctrine does not apply to the present facts.[509] Various reasons were given, relying on different formulations of the act of state doctrine, which demonstrated the uncertainty regarding the application of the doctrine.[510]

Being aggrieved by the decision of the appellate court, Nevsun brought an appeal before the Supreme Court of Canada on the grounds, *inter alia*, that (a) Canadian courts do not have the

[502] Elise Groulx Diggs, Mitt Regan & Beatrice Parance, "Business and Human Rights as a Galaxy of Norms" (2019) 50:2 Geo J Intl L 309 at 357.
[503] *Nevsun Appeal*, *supra* note 501 at para 177.
[504] *Bouzari*, *supra* note 238.
[505] *Kazemi (Estate) Islamic Republic of Iran* 2014 SCC 62, [2014] 3 SCR 176 [*Kazemi*].
[506] *Nevsun Appeal*, *supra* note 501 at para 188.
[507] *Ibid* at para 197.
[508] Diggs, Regan & Parance, *supra* note 502 at 357.
[509] *Nevsun Appeal*, *supra* note 501 at para 165.
[510] Gib Van Ert, "Canadian Cases in Public International Law in 2017" (2017), 55 Can YB Intl L 571 at 593.

jurisdiction to accommodate CIL and (b) "act of state" doctrine operates to the facts that prevents Canadian courts from judging the sovereign actions of a foreign government.[511] However, the Supreme Court dismissed the appeal, and allowed the case to proceed to trial.

2.5 Importance of *Nevsun*

Nevsun is the first Canadian case where violation of international law was alleged in domestic court.[512] The critical question is whether the corporations can be held liable for the breach of customary laws. In 2016, Abrioux J's refusal in BCSC to strike plaintiffs' case implied a willingness of the Canadian courts to expand the ambit of domestic tort law to potentially cover breaches of CIL.[513] It appears that *Nevsun* provided a unique opportunity for the Canadian courts to take a step forward in holding the Canadian corporations accountable for transnational wrongdoings through the rigorous and expansive application of the CIL. This method can provide an alternative method to ensure accountability of the corporations. The need for Canada to recognize new torts premised on international law was highlighted in the US case *Talisman*.[514] It was observed that Canada's then existing methods of bringing actions for slavery, torture, genocide and war crimes do not correspond with the gravity of the offences.[515] Traditionally, victims of breaches of international laws had no adequate forum to redress within the Canadian justice system.[516]

2.6 Supreme Court of Canada (SCC)

The SCC has shed some light on the possibility of holding corporations liable for atrocities abroad. The SCC provided much needed clarification regarding the act of doctrine and customary international law.

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[511] *Nevsun*, *supra* note 7 at para 26.
[512] Jeffrey Bone, "The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage" (2015) 11:2 JSDLP 357 at 366.
[513] E Samuel Farkas, "*Araya v Nevsun* and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law" (2018) 76:1 UT Fac L Rev 130 at 135.
[514] *Presbyterian Church of Sudan v Talisman Energy, Inc.*, 2003 244 F Supp (2d) 289 (S.D.N.Y. 2003) [*Talisman*] at 337; Farkas, *supra* note 513 at 133.
[515] Farkas, *supra* note 513 at 133.
[516] *Ibid*.

2.6.1 Act of State doctrine

The SCC clarified that the act of state doctrine is not part of Canadian common law.[517] Even though this doctrine is recognized in England and Australia, it has attracted severe criticism.[518] Rather, the courts in Canada decide questions relating to enforcement of foreign laws following ordinary private law principles.[519] This usually means respecting foreign laws, but the judiciary has discretion to refuse enforcement of foreign laws if the foreign laws are contrary to public policy, which includes respecting public international law.[520]

Act of state doctrine consists of two principles.[521] They are the conflict of laws and judicial restraint.[522] The SCC found that, unlike in the UK, these two principles have evolved separately in Canadian law instead of being considered as part of one doctrine.[523] According to the SCC, the principles that form the act of state doctrine have been fully absorbed in the Canadian jurisprudence.[524] The majority was of the view that both the doctrine itself and its two principles do not prevent the plaintiffs' claims against Nevsun.[525]

Canadian courts utilize judicial restraint when they have to discuss questions related to foreign law.[526] Abella J, writing for the majority, explained that Canadian courts will not make findings which purport to be legally binding on foreign countries.[527] However, at the same time, Canadian courts can freely look into questions of foreign law if doing that was necessary or incidental for resolving domestic law disputes.[528]

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[517] *Nevsun*, *supra* note 7 at para 59
[518] *Ibid* at para 28.
[519] *Ibid* at para 45.
[520] *Ibid.*
[521] *Ibid* at para 44.
[522] *Ibid.*
[523] *Ibid.*
[524] *Ibid.*
[525] *Ibid* at para 59.
[526] *Ibid* at para 47.
[527] *Ibid.*
[528] *Ibid.*

Brown and Rowe JJ agreed with the majority's view regarding act of state doctrine.[529] However, Moldaver and Coté JJ disagreed with the majority's analysis of the act of state doctrine regarding both its existence and applicability. They were of the opinion that the plaintiffs' claims were simply not justiciable.[530] Rather, they believed that these claims were in the arena of international affairs and hence, needed to be resolved according to principles of public international law and diplomacy.[531]

Moldaver and Coté JJ did not agree with the majority that the two principles of act state doctrine (choice of law and judicial restraint) were fully absorbed into Canadian common law.[532] They pointed to another element of act of state doctrine, which was the issue of justiciability.[533] They believed that the doctrine of justiciability, either thought of as a branch of act of state doctrine or as a general doctrine, prevents the judiciary from hearing any civil case which is mainly based on allegations that a foreign country has violated public international law.[534] According to them, the plaintiffs' civil claim is rendered non-justiciable, because by hearing such a case, the judiciary will essentially interfere with the work of the executive of Canada's international relations.[535]

Moldaver and Coté JJ were of the view that in order to decide the outcome of this case, courts will have to determine whether Eritrea had carried out internationally wrongful conduct.[536] Courts are permitted to consider the legality of conduct of a foreign country under international law if that issue was incidental to the claim, however, in the instant case, the lawfulness of acts of Eritrea under international law was central to this case.[537] Hence, they believed the claim to

[529] *Ibid* at para 135.
[530] *Ibid* at paras 271, 297.
[531] *Ibid* para 271.
[532] *Ibid* para 275.
[533] *Ibid.*
[534] *Ibid* at paras 272, 276.
[535] *Ibid* at paras 297, 305.
[536] *Ibid* at para 273.
[537] *Ibid* at paras 296, 306, 310.

be non-justiciable.[538] They argued that both the doctrine of justiciability and separation of powers dictate that domestic courts should not adjudicate civil lawsuits between private parties where the judgment will rely on finding that a foreign country is in breach of international law.[539]

2.6.2 Customary International Law (CIL)

The SCC refused to strike out the claim at the preliminary stage for relying on CIL. It is crucial to note that at the preliminary stage, the SCC did not have to decide conclusively whether the plaintiffs would receive damages for the alleged violations of CIL.[540] In a nutshell, SCC allowed the claim to proceed to trial because it found that CIL was indeed part of common law of Canada, and Nevsun, being a Canadian company, is bound by domestic law.

Abella J, wrote the judgment for the majority. Abella J described CIL as the common law of the international legal system which grows and changes slowly but constantly with changing practices.[541] In order for a norm to be identified as CIL there are two essential requirements.[542] Firstly, the norm must be "sufficiently general, widespread, representative and consistent".[543] Secondly, it must be *opinio juris*, "namely the belief that such practice amounts to a legal obligation".[544]

As mentioned earlier, *jus cogens* is a subset of CIL. It is made up of peremptory norms, and there cannot be any derogation from these norms.[545] Abella J found that crimes against humanity, the prohibition against slavery, the prohibition against forced labour, and the

[538] *Ibid* at para 286.
[539] *Ibid* at paras 273, 294.
[540] *Ibid* at para 62.
[541] *Ibid* at para 74.
[542] *Ibid* at para 77.
[543] *Ibid* at para 78.
[544] *Ibid* at para 77.
[545] *Ibid* at para 83

prohibition against cruel, inhuman and degrading treatment have the status of *jus cogens*.[546] Hence, the plaintiffs have relied on breach of *jus cogens*.

Traditionally, CIL has been automatically incorporated into Canadian domestic law through doctrine of adoption if there is no conflicting legislation present.[547] This simply means that CIL is automatically adopted into the Canadian domestic law, and no step from legislature is necessary.[548] Hence, the plaintiffs relied on Canadian common law when they brought the claims to a Canadian court.

Nevsun contended that it is immune from liability of breach of CIL as it is a corporation, and, hence a private party rather than a public one.[549] The majority of the SCC did not agree. Abella J correctly highlighted that, even though traditionally individual countries were the main subjects of international law, the evolution of human rights law in the last 70 years indeed changed the international law from its state-centric approach to one that is human-centric.[550] This is evident by the formulation of various conventions and instruments aimed at upholding human rights.[551] This demonstrates that international law is not only supposed to uphold peace among different countries, but also protect rights of individuals.[552] Hence, international human rights norms apply to private parties as well.[553] In the current era, corporations do not have the luxury of blanket exclusion when faced with direct liability for being in breach of "obligatory, definable and universal norms" of CIL.[554]

[546] *Ibid* at paras 100-103.
[547] *Ibid* at para 90.
[548] *Ibid* at para 86.
[549] *Ibid* at para 104.
[550] *Ibid* at paras 106-108.
[551] *Ibid* at para 170.
[552] *Ibid* at para 111.
[553] *Ibid* at para 112.
[554] *Ibid* at para 113.

Abella J also discussed the issue of remedy concentrating on whether common law can provide appropriate remedies for the breaches of CIL.[555] Generally, if there is a right, there must be remedy for its breach.[556] Moreover, Canada, being a party of International Covenant on Civil and Political Rights and many other treaties and instruments, has an international obligation to have remedies available for victims.[557] Abella J observed that it is imperative to establish civil remedies in domestic law for the breach of CIL as CIL was already part of common law.[558] She believed that there could be multiple methods of providing compensation to the plaintiffs for being victims of breach of adopted CIL.[559] One way would be recognizing the new torts.[560] Another theory suggested by her was a more direct approach.[561] She claimed that, as CIL was part of Canadian common law and a Canadian corporation was in breach, this could be directly remedied by relying on the breach of CIL.[562] We have yet to find out how this novel issue will be handled by the courts at trial. Brown and Rowe JJ were not on the same page as the majority regarding application of CIL.[563] Moldaver and Côté JJ also dissented following the reasoning of Brown and Rowe JJ regarding CIL.[564] Brown and Rowe JJ were of the view that both the theories suggested by the majority will fail in the future.[565]

The first theory of the majority was that the plaintiffs could bring a claim asking a domestic court to recognize a cause of action for breach of CIL.[566] The dissenting judgement described this as a tort claim because the plaintiffs' would be seeking compensation of the breach of

[555] *Ibid* at para 117.
[556] *Ibid* at para 120.
[557] *Ibid* at para 119.
[558] *Ibid* at paras 118, 122.
[559] *Ibid* at para 127.
[560] *Ibid.*
[561] *Ibid.*
[562] *Ibid.*
[563] *Ibid* at para 135.
[564] *Ibid* at para 267.
[565] *Ibid* at para 137.
[566] *Ibid* at para 137(a).

CIL.[567] Brown and Rowe JJ agreed that prohibitive norms of CIL could become part of Canadian domestic law if there is not any legislation to the contrary.[568] However, they believed that the prohibitive norms of CIL could not give rise to a remedy because of the very nature of CIL.[569] They explained that international law did not require each country to deliver a civil remedy in case of breach of prohibitive norms.[570]

The majority's reasoning relied on CIL as requiring individual countries to produce a civil remedy for violation of prohibitive CIL norms.[571] However, the dissenting judgments expressed that an individual country has the freedom to uphold its international law obligation in a manner the country chooses.[572] For example, CIL may require all countries to prohibit slavery but it does not choose the form of the prohibition.[573] Countries uphold prohibitive norm via criminal law and administrative penalties.[574] Civil liability rule is one of the many options. The legislature is supposed determine which method should be used.[575] Citing *Kazemi*[576], they explained that CIL could be developed in such a manner as the majority wanted, but this has not been done.[577]

Brown and Rowe JJ were of the opinion that tort remedy was not necessary.[578] They agreed that where there is right, there must also be a remedy.[579] However, they explained that the right to remedy does not mean there is a right to a specific type of remedy.[580] Parliament may choose

[567] *Ibid* at para 153.
[568] *Ibid.*
[569] *Ibid.*
[570] *Ibid* at para 172.
[571] *Ibid* at para 196.
[572] *Ibid* para 197.
[573] *Ibid.*
[574] *Ibid*.
[575] *Ibid*.
[576] *Kazemi*, *supra* note 505 at para 153.
[577] *Nevsun*, *supra* note 7 at para 197.
[578] *Ibid* at para 214.
[579] *Ibid.*
[580] *Ibid*.

other remedies, for example judicial review or criminal penalties.[581] Brown and Rowe JJ were of the view that there were causes of action available in Canadian law because they believed that the domestic torts available were sufficient to deal with grave human rights violations.[582] They explained that if the causes of action were assault and battery, the court in its judgment could stress that the wrong acts were indeed human rights abuses.[583] The court could also highlight how strongly it condemns this kind of wrongful acts through punitive damages award.[584] The Justices contended that the majority's desire for a stronger response for human rights violations will practically result in a new tort with the same remedy.[585]

Brown and Rowe JJ contended that the doctrine of adoption did not change a prohibitive norm into a liability rule.[586] Rather, CIL imposes prohibitions on individual countries and not private actors, as countries have duty under CIL.[587] The minority argues that the path taken by majority will wrongly give doctrine of adoption horizontal effect to CIL.[588] The *Charter*[589] itself does not have horizontal effect and CIL cannot have horizontal effect.[590] They expressed that the courts could not change doctrine of adoption in order to make civil liability rule for violations of CIL.[591] Parliament and the provincial legislatures are capable of making such changes.[592] However, the courts can only develop the common law incrementally.[593] Brown and Rowe JJ held that the majority's way also meant recognizing a private law cause of action for a simple violation of customary international public law.[594] Brown and Rowe JJ argued that this should

[581] *Ibid.*
[582] *Ibid* at para 220.
[583] *Ibid.*
[584] *Ibid* at 221.
[585] *Ibid.*
[586] *Ibid* at para 204.
[587] *Ibid* at para 205.
[588] *Ibid* at para 210.
[589] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[590] *Nevsun, supra* note 7 at para 210.
[591] *Ibid* at para 224.
[592] *Ibid* at para 225.
[593] *Ibid.*
[594] *Ibid* at para 211.

not be done because there was not any private law cause of action for a simple breach of statutory Canadian public law.[595]

Brown and Rowe JJ differentiated the US's approach of establishing civil liability to redress international law violations because the US courts, unlike Canadian courts, can apply their legislation, Alien Tort Statute.[596] The dissenting judgment held that the majority's path would result in Americanizing the doctrine of adoption of Canada.[597]

Brown and Rowe JJ agreed with the majority's view that prohibition against crimes against humanity, slavery, the use of forced labor, and cruel, inhuman, and degrading treatment are CIL and have the status of *jus cogens*.[598] However, they have believed that corporations do not have civil liability in Canada if they are in violation of CIL.[599] They expressed that CIL has not recognized corporate liability for violations of human rights.[600] They criticized the majority for proposing this kind of corporate liability with the support of a single law review essay by Professor Harold Koh.[601] This academic writing had stated that it did not make sense that international law may impose criminal liability but not civil liability on corporations.[602] Firstly, the dissenting judgement mentioned that just because there are international criminal liability rules, it does not mean it is necessary to establish domestic tort.[603] More importantly, they contended that the essay cannot be evidence of CIL as one essay cannot be state practice or opinion juris.[604] They pointed out that there was not any case worldwide where a corporation

[595] *Ibid.*
[596] *Ibid* at para 212.
[597] *Ibid.*
[598] *Ibid* at para 185.
[599] *Ibid* at para 188.
[600] *Ibid.*
[601] *Ibid.*
[602] *Ibid* at para 199.
[603] *Ibid* at para 212.
[604] *Ibid* at para 199.

was found liable in a civil claim for breaching CIL.[605] They mentioned, citing *Kazemi*,[606] that this sort of corporate liability is rather equivocal.[607] CIL cannot be binding if the norm is equivocal.[608] Furthermore, they also referred to a UN report[609] and a book by a judge[610] where it was expressed that corporate liability for violations of human rights were still not recognized under CIL.[611]

The other theory of the majority is that courts may recognize four new torts, which are use of forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[612] Brown and Rowe JJ analyzed when courts may not recognize new nominate torts, and reached the conclusion that this method will probably fail as well.[613] A difference only of damages or the extent of harm will not be enough for the courts to establish a new tort.[614] They referred to three rules for when a Canadian court would not recognize a new nominate tort.[615] The first rule, also called the necessity test, is that the courts will not recognize a new tort where there are adequate alternative remedies.[616] This rule mentions at least three alternative remedies that could make it unnecessary to recognize another new tort.[617] These remedies were another existing tort, an independent statutory scheme and judicial review.[618] The second rule is where it does not reflect and address a wrong visited by one person upon another.[619] This can be seen

[605] *Ibid* at para 188.
[606] *Kazemi*, *supra* note 505.
[607] *Nevsun*, *supra* note 7 at para 189.
[608] *Ibid*.
[609] United Nations General Assembly's Report of the Special Representative of the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, U.N. Doc. A/HRC/4/035, February 9, 2007.
[610] James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019) at 178.
[611] *Nevsun*, *supra* note 7 at para 190.
[612] *Ibid* at para 137(b).
[613] *Ibid* at para 234.
[614] *Ibid* at para 239.
[615] *Ibid* at para 237.
[616] *Ibid*.
[617] *Ibid* at para 238.
[618] *Ibid.*
[619] *Ibid* at para 237.

from courts' reluctance to establish strict or absolute liability regimes.[620] The third scenario is where the change brought in the legal system would be indeterminate or substantial.[621] The third rule demonstrates that courts understand the doctrine of parliamentary supremacy and that the courts should make sure that common laws is stable and predictable.[622]

Brown and Rowe JJ expressed that the two torts of 'cruel, inhuman or degrading treatment', and 'crimes against humanity' would fail the test.[623] The new tort of cruel, inhuman or degrading treatment failed the necessity test.[624] This is because battery and intentional infliction of distress can already capture the actions of this proposed tort.[625] The new tort of crimes against humanity should not be created as it was "too multifarious a category".[626] However, Brown and Rowe JJ were of the opinion that the torts of 'slavery' and 'use of forced labor' may pass the test of recognizing a new tort.[627]

In addition to the above analysis, the dissenting judgment stressed that courts should not create new torts for the very first time in a case which is regarding actions that took place in a foreign country.[628] This is because the actions in a foreign land will not be generally regulated by Canadian law.[629] The minority emphasized the practical and institutional problems if court attempts to develop domestic common law based on conduct that took place abroad.[630] The practical complication is that the law that is suitable for governing a foreign country may not be the same law that is proper for Canada.[631] Courts would also be exceeding their institutional

[620] *Ibid* at para 241.
[621] *Ibid* at 237.
[622] *Ibid* at para 242.
[623] *Ibid* at para 244.
[624] *Ibid* at para 245.
[625] *Ibid.*
[626] *Ibid* at para 246.
[627] *Ibid* at para 247.
[628] *Ibid* at para 251.
[629] *Ibid* at para 252.
[630] *Ibid* at para 254.
[631] *Ibid* at para 255.

competence by behaving in such a manner.[632] The executive, rather than the courts, has the institutional competence of taking decisions in the foreign relations sector.[633] The court is better suited to resolve cases inside the country between Canadian residents.[634]

2.6.3 Analysis

Each of the CIL prohibitions that Nevsun allegedly violated has been recognized by the Canadian courts as a qualifying *jus cogens* norm.[635] The minority judgment of the SCC in *Nevsun* is also in agreement with this view. Therefore, in *Nevsun*, the critical question is not whether the defendant is liable under CIL for breach of customary norms, but rather whether the Canadian courts recognize customary norms such as slavery and other breaches of human rights as forming a new cause of tortious action.[636] However, this principle is not used in the Canadian jurisprudence to formulate private cause of action. US jurisprudence has substantially developed in this area where the courts readily expand the tort law to create civil cause of action for breaches of CIL. A closer observation of the US approach would provide a useful guideline as to how Canadian courts may enforce violations of CIL.

In *Xuncax v Gramajo*[637] District Judge Woodlock of the US District Court for the District of Massachusetts observed that the tenets of international law should be considered and relied upon in finding a cause of action for allegations of torture, summary execution and disappearances.[638] Furthermore, in *Aldana*[639], there were allegations that the corporate defendant conspired with private security forces and held the plaintiffs hostages in order to force them to concede in labor dispute under the threat of death.[640] The Court of Appeals for

[632] *Ibid* at para 256.
[633] *Ibid*.
[634] *Ibid* at para 259.
[635] Farkas, *supra* note 513 at 137.
[636] Alan Franklin, "Corporate Liability under Customary International Law: Is the Tail Wagging the Dog" (2019) 25:2 ILSA J Intl & Comp L 301 at 305.
[637] *Xuncax v Gramajo* (1995) 886 F Supp 162 at 183.
[638] Farkas, *supra* note 513 at 142.
[639] *Aldana v Del Monte Fresh Produce, NA, Inc*, 416 F(3d) 1242 (11th Cir 2005) [*Aldana*].
[640] *Ibid* at 1245.

the Eleventh Circuit acknowledged the forum of private right of action under the Alien Tort Statute where the alleged conduct violated international law.[641] The court observed that the tortious claim may be brought against corporate defendants for violation of CIL provisions based on 'indirect liability' and 'accomplice liability'.[642] Similarly, in *Sarei*[643] there were allegations that a corporate defendant co-operated with Papua New Guniea's military forces in using violence.[644] Ultimately, the Court of Appeals of the Ninth Circuit held that corporate defendants may be liable for breaching CIL prohibitions against genocide and war crimes.[645]

Here, the courts need to adopt a pro-active role as suggested by Abella J. She emphasized that court is one of notable institutions which can determine and develop the law in the right direction.[646] The impetus for the change can be traced through various judgments. For example, in *Jones v Tsige*[647] the Ontario Court of Appeal observed that the courts should not shy away from recognizing new torts, especially when doing so would amount to an incremental step that is consistent with the changing needs of the society.[648] It was considered that the courts are ready to expand the law, in particular where the facts cry out for remedy.[649] There, it was observed that the opinions of academics should be taken into account while considering the expansion of the common law.[650] However, Brown and Rowe JJ, as discussed above, repeatedly emphasized in their dissenting judgment that advancing the common law as suggested by the majority would be a major change rather than an incremental development. The better view is the one stated by Abella J because she has focused more on finding remedies for violations of international human rights law. Contemporary international human rights law

[641] *Ibid* at 1250.
[642] *Ibid* at 1248.
[643] *Sarei v Rio Tinto, PLC*, 487 F (3d) 1193 (9th Cir 2007) [*Sarei*].
[644] *Ibid* at 825.
[645] Farkas, *supra* note 513 at 147.
[646] *Nevsun, supra* note 7 at para 2.
[647] *Jones v Tsige*, 2012 ONCA 32, 108 OR (3d) 241.
[648] *Ibid* at para 65.
[649] *Ibid* at para 69.
[650] *Ibid* at paras 16-19.

has been powerfully described by Abella J in *Nevsun* as "the phoenix that rose from the ashes of World War II and declared global war on human rights abuses".[651]

Further, even if the Canadian courts take a progressive leap towards recognizing tort liability based on CIL prohibitions, it will be interesting to see as to whether and how corporate defendants, as opposed to states or individual, can be held liable for international law breaches. As discussed above Brown and Rowe JJ of the Supreme Court of Canada have already highlighted this issue in their dissenting judgment. It is highly likely that Nevsun is going to further press on this issue at trial. This has been a highly contentious issue even in the US jurisprudence. There is a volume of contrary US District Court rulings on this issue and there is no guidance from the US Supreme Court.[652]

Nonetheless, academic opinions may provide the jurisprudential thrust that may facilitate the court in formulating liability in novel situation like *Nevsun*. In *Somwar*[653], while emphasizing on the importance of academic writings in formulating new tort of invasion of privacy, the Ontario Superior Court observed that the existing tort rules in Canada have failed to keep pace with the evolving societal changes and social realities.[654] Similarly, the courts have failed to hold Canadian corporations accountable for their transnational wrongdoings. Former Supreme Court of Canada Justice Binnie has been a pioneer in advocating for the expansion of tort law to cover breaches of CIL norms.[655] He addressed that sometimes corporations can exert immense power and influence that often exceed that of the state in which they operate.[656] However, they do not have the associated public law responsibilities, and that raises challenges for the international community to formulate remedies for harms that may arise from these

[651] *Nevsun*, *supra* note 7 at para 1.
[652] Farkas, *supra* note 513 at 148.
[653] *Somwar v McDonald's Restaurants of Canada Ltd* (2006), 79 OR (3d) 172.
[654] *Ibid* at paras 29-30.
[655] Farkas, *supra* note 513 at 151.
[656] Ian Binnie, "Legal Redress for Corporate Participation in International Human Rights Abuses: A Progress Report" (2009) 38:4 Brief 44 at 45; Nevsun BCSC, *supra* note 475 at para 467.

corporations' breach of human rights obligations.[657] Further, his Lordship emphasized the globalization of business and its effect on domestic economy, and observed that tort law should be fairly spread to provide some avenue of redress especially to the victims of the third world countries.[658] Binnie's observation offers a reasonable foundation on which tortious liability for violation of a CIL prohibition can be established.[659]

Fairley and Sumakova observed that in *R v Hape*[660], the SCC laid down the impetus for holding the corporations liable in domestic courts for the violation of international laws, although Canada lacks statutory vehicle of doing that like the Alien Tort Statute of the US.[661] Penelope Simons emphasized on the need to formulate liability of the Canadian mining corporations for human rights violations to preserve the reputation of the Canadian extractive industry, and to indirectly incentivize the corporations to engage in a proactive, comprehensive and thorough human right due diligence regime.[662] Further, Caroline Davidson neatly laid out the justifications for formulating the tort route in addressing the human rights violations.[663] According to her, tortious remedies is more credible than imposition of criminal liability because it provides a measure of justice where the criminal law does not provide sanctions.[664] Secondly, in tort law individuals have an upper hand as they can initiate a suit, and they do not

[657] *Ibid*, Binnie.
[658] Ian Binnie, "Judging the Judges: 'May They Boldly Go Where Ivan Rand Went Before'" (2013) 26:1 Can JL & Juris 5 at 16.
[659] Farkas, *supra* note 513 at 152.
[660] *R. v. Hape* 2007 SCC 26 (CanLII), [2007] 2 SCR 292, <https://canlii.ca/t/1rq5n> [*Hape*].
[661] H Scott Fairley & Anastasija Sumakova, "Tort Liability at Home for Alleged Wrongs Abroad: The Common Law Goes Extraterritorial?" (2 December 2014). Mondaq (blog), online:<http://www.mondaq.com/canada/x/357576/>.
[662] Penelope Simons, "Canada's Enhanced CSR Strategy: Human Rights Due Diligence and Access to Justice for Victims of Extraterritorial Corporate Human Rights Abuses" (2015) 56:2 CBLJ 167 at 203.
[663] Caroline Davidson, "Tort Au Canadien: A Proposal for Canadian Tort Legislation on Gross Violations of International Human Rights and Humanitarian Law" (2005), 38:5 Vand J Transnat'l L 1403 at 1422.
[664] *Ibid* at 1422.

have to rely on the mercy of the state actors as in criminal cases.[665] Further, in tort claims, plaintiffs are in more control as to how they redress their grievances.[666]

The majority view of the SCC in *Nevsun* was that CIL became part of common law through doctrine of adoption. Hence, plaintiffs could rely on CIL to bring a claim. However, the dissenting judgment pointed out that a prohibitive rule did not transform into liability rule through the doctrine of adoption.[667] The dissenting judgment stated that courts were not capable of changing the doctrine of adoption to formulate civil liability rules for breach of CIL.[668] The dissenting judgment's further criticism was that the majority's view would give horizontal effect to CIL.[669] Nevsun may follow this line of argument at trial in the future. It will be interesting to see how the trial court deals with these arguments. However, Canadian courts have previously established new common law rules relying on the adoption of CIL.[670] More recently in *R v Hape*[671], the SCC reaffirmed this position. This was also cited by the majority in SCC in *Nevsun.*[672] In *Hape*, it was observed that in the absence of any express derogations, the courts may look into the prohibitive rules of customary international law to aid the development of the common law.[673] Further, CIL is directly incorporated into the domestic law through the common law without the need for a legislative vehicle.[674]. This view was further supported in *Bouzari*[675] and *Mack.*[676]

[665] *Ibid* at 1423
[666] *Ibid* at 1424.
[667] *Nevsun*, *supra* note 7 at para 204.
[668] *Ibid* at para 224.
[669] *Ibid* at para 210.
[670] Farkas, *supra* note 513 at 154.
[671] *Hape*, *supra* note 660.
[672] *Nevsun*, *supra* note 7 at para 90.
[673] *Hape*, *supra* note 660 at para 39.
[674] *Ibid* at para 36.
[675] *Bouzari*, *supra* note 238.
[676] *Mack v Canada (Attorney General)* (2002), 60 OR (3d) 756 (Ont CA).

Further, the doctrine of adoption also gained academic endorsements. For example, Larocque is of the view that the adoption doctrine provides an inherent jurisdiction to the Canadian courts to recognize novel causes of action for tort of torture for breaches of CIL.[677] Further, Jones explores the ambit of the judiciary.[678] He notes that courts do not have a quasi-legislative role as to formulate new tort out of thin air, but courts can find tort liability for violation of CIL prohibition due to doctrine of adoption.[679] It is thought that the combination of the doctrine of adoption, along with the societal needs, and coherent academic support could create the perfect artillery for the Canadian courts to create novel torts for violation of CIL norms.[680]

Expansion of torts to cover breaches of CIL could mark an important landmark in the process of incremental development of making the Canadian corporations liable for their transnational atrocities.[681] To derive the fruits from *Nevsun*, the trial judge will have an important role to play. They need to take a pro-active approach in recognizing civil causes of actions for breaches of CIL provisions.[682] It is often argued that Canada should follow the lead of the American jurisprudence, which recognized novel torts for the breach of CIL.[683] The US cases of *Aldana*[684] and *Sarei*[685] indicate that formulation of novel torts for violation of CIL provision can provide the much-needed avenues to redress the damage done to individuals who are wronged by transnational misconduct.[686]

[677] Francois Larocque, "Recent Developments in Transnational Human Rights Litigation: A Postscript to Torture as Tort" (2008) 46:3 Osgoode Hall LJ 605 at para 58.
[678] Oliver Jones, "The Doctrine of Adoption of Customary International Law: A Failure in Conflicting Domestic Law and Crown Tort Liability" (2010), 89:2 Can Bar Rev 401 at 426.
[679] *Ibid.*
[680] Farkas, *supra* note 513 at 138.
[681] *Ibid* at 134.
[682] *Ibid*.
[683] *Ibid* at 131.
[684] *Aldana*, *supra* note 639.
[685] *Sarei*, *supra* note 643.
[686] Farkas, *supra* note 513 at 148.

CIL based tort liability provides an alternative forum to seek redress for breaches of international norms. Devising liability in such manner has substantial academic and jurisprudential support for the existing Canadian framework. It is a commonly understood that the tenets of CIL automatically becomes part of the domestic legal system.[687] Further, the UNGPs may also be considered when discussing CIL. This is because the provisions of the UNGPs provisions arguably achieved the status of CIL, and thus they have been automatically been integrated into the tort law of legal system of many countries.[688] The standards provided in the UNGPs can provide a working criterion in determining the standards when considering such cases.[689] Further, UNGPs vest an indispensable duty on the courts to play an instrumental role in rectifying the shortcomings that arise to ensure access to justice to the victims of the transnational corporate human rights violations.[690] However, there are also constitutional limitations where it is thought, because of the democratic mandate, that the legislature, as opposed to the judiciary is better suited to make changes to the law.

[687] Christopher Greenwood, "Sources of International Law: An Introduction" (2008), online (pdf): <legal.un.org/avl/pdf/ls/greenwood_outline.pdf>.
[688] Franklin, *supra* note 636 at 327.
[689] *Ibid*.
[690] Amnesty International, "Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy" (7 March 2014) at 27, online: *Amnesty International* <www.amnesty.org/en/documents/pol30/001/2014/en/>.

CHAPTER 4: A FEASIBLE METHOD OF HOLDING THE CORPORATION ACCOUNTABLE FOR ATROCITIES

In this chapter, we look at the feasibility of the different methods of holding corporations accountable.

A. Tort liability

In *Choc* action only, the claimant alleged both direct responsibility of Hudbay under tort theory and also that corporate veil should be lifted or that vicarious liability should be found against Hudbay.[691] In *Choc*, Amnesty International was granted intervener status by the court.[692] In support of finding direct liability against the parent corporation, it argued that finding direct tortious liability of the parent corporation is not alien to Canadian jurisprudence.[693] More specifically, it referred to the case laws such as *United Canadian Malt Ltd v Outboard Marine Corp of Canada Ltd*[694] and *Dreco Energy Ltd v Wenzel Downhole Tools Ltd*[695] where previously, Canadian courts acknowledged imposition of liability of the parent company for the actions of their subsidiaries.[696] Considering these, along with international standards, it was submitted that a reasonable cause of action may exist against the parent company where they have knowledge of potential risks and have a degree of control over the response to such risks.[697]

In *Choc*, the court considered not only the proportion of responsibility amongst the defendant parent and subsidiary corporations but also its responsibility in finding the wrongdoers liable. Here, the plaintiffs alleged that the parent corporation, Hudbay, was liable for negligence in failing to prevent harms committed by the security personnel they hired. There was no

[691] Choc v Hudbay Minerals Inc, Second Amended Fresh as Amended Statement of Claim, Court File no CV-10-411159 at paras 4-5, online:<www.chocversushudbay.com/wp-content/uploads/2010/11/Second-Amended-Fresh-as-Amended-Choc-v.-Hudbay-Filed.pdf>.
[692] *Choc*, *supra* note 5 at para 3.
[693] *Ibid* at para 37.
[694] (2000), 48 O.R. (3d) 352 (Ont. S.C.J).
[695] 2008 ABQB 419, [2008] A.J. No. 758 (Alta. Q.B.)
[696] *Choc*, *supra* note 5 at para 37.
[697] *Ibid* at paras 37-38.

established duty of care in such situation. Therefore, as discussed above, the court needs to apply the *Anns* test in order to find a duty of care in the novel situation.

In *Choc*, the court found a *prima facie* duty of care. Here, the court took into account various factors while finding duty of care. First, the court considered that Hudbay had knowledge that violence was frequently used by the security personnel that was previously involved in evictions.[698] Further, the security personnel did not have license or adequate training but were carrying unlicensed and illegal firearms.[699] Here, the court's attempt to formulate a novel duty of care accords with the approach taken by the UK High Court of Justice (Queens Bench Division) in *Guerrero v Moterrico Metals Plc.*[700] This case was also referred by the Amnesty International in *Choc*.[701] There, the defendants were a mining company incorporated in the UK which had subsidiary company in Peru.[702] Plaintiffs claimed that the particular site was a huge undeveloped copper resource.[703] The defendants wanted to build an open pit mine.[704] Plaintiffs participated in a protest against the development of the mine.[705] Plaintiffs alleged that police detained and tortured 28 protesters, sexually abused some women and caused death of one of the protesters.[706] The plaintiffs alleged direct liability against the parent company situated in the UK on the basis that it directly participated in the aforementioned abuses through its personnel.[707] It was further alleged that the specific responsibility of risk management of the Peruvian subsidiary was expressly retained by Board of Directors of the parent company in UK.[708] Plaintiffs alleged that the parent company in UK had "effective control over the management" of the subsidiary and therefore they owed a duty of care to take reasonable steps

[698] *Choc*, *supra* note 5 at paras 63-64.
[699] *Ibid* at para 61.
[700] *Guerrero v Moterrico Metals Plc* 2009 EWHC 2475 (QB) [*Guerrero*].
[701] *Choc*, *supra* note 5 at para 37.
[702] *Guerrero*, *supra* note 700 at para 3.
[703] *Ibid*.
[704] *Ibid*.
[705] *Ibid* at para 7.
[706] *Ibid*.
[707] *Ibid* at para 8.
[708] *Ibid*.

to avoid foreseeable harm to the plaintiffs.[709] The UK parent failed to adopt adequate risk management mechanisms relating to the operation of the mine.[710] The court found an arguable case against the UK parent because there was no clear-cut evidence to exonerate the company completely from the legal liability arising out of the alleged torture committed by the police.[711] There is academic support for imposition of liability based on a new duty of care in order to address the atrocities committed by the corporations. It is thought by Pena that claiming direct negligence against the parent corporation, Hudbay, is a viable alternative for holding the Canadian corporations accountable for human rights violations when operating abroad.[712]

Madeleine Conway has observed that the vehicle of tort for finding liability should be expanded through modification of the traditional test for negligence so that it aligns with the developments in tort law.[713] She further observed that the 'duty of care' route would promote more effective supply chain human rights due diligence.[714] Here, tort law may play an important role in ensuring accountability of the parent corporations for the atrocities committed by their transnational subsidiaries.[715] According to Douglass Cassel, recognition of a novel duty of care for the potential human rights impacts of the exercise of business would be the best way for states and businesses to fulfil the remedial goals of the UNGPs.[716] According to him, victims of atrocities may bring proceedings in negligence if they can establish that the injuries they sustained were reasonably foreseeable by the exercise of due diligence.[717] The underlying principle of such duty is that legal duty is created whenever the parent owns, creates,

[709] *Ibid.*
[710] *Ibid* at para 11.
[711] *Ibid* at para 27.
[712] Pena, *supra* note 3 at 19.
[713] Madeleine Conway, "A New Duty of Care- Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains" (2015) 40:2 Queen's LJ 741 at 784.
[714] *Ibid* at 785.
[715] *Ibid.*
[716] Douglass Cassell, "Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence" (2016) 1:2 Bus & Hum Rts J 179 at 182.
[717] *Ibid* at 180.

or allows a subsidiary to operate that ultimately causes harm to the non-contesting third party.[718] However, this would be contrary to separate legal personality. Perhaps the greatest advocate for imposing parental duty of care has been Radu Mares. According to Mares, the parent corporation may be held liable for the acts of its' subsidiary on the basis of its' behaviour.[719] Devising such liability is required, especially for the high-risk countries that lack effective legal systems.[720] According to him, the parent company should be held responsible for due diligence where it sets up a separate entity for making profits.[721] Otherwise, it would create unreasonable risks that may amount to an affirmative wrong under the law.[722] He observed that classic tort theory may be used here to impose liability on the parent company for the foreseeable risk that may arise as a result of their business operations.[723]

1. Criticism of the tort-based approach

There are certain limitations with tortious liability, parent companies and the acts of subsidiary. First, such duty operates within very tight limits and the situations are very fact-specific. Such liability is not fit for the situation where the parent simply creates or buys a subsidiary in a high-risk environment, makes profit from that, and transfers the risk to the community.[724] Further, the tortious approach taken both in *Chandler* and *Choc* indicate that, to attract tortious liability of the parent company there has to be evidence of either some superior level of knowledge or some involvement of the parent corporation.[725] Accordingly, it will be very difficult to impose parental liability where the parent maintains a separate relationship with the subsidiary but receives financial benefits from it.[726] Thirdly, Skinner observed that Mares approach of finding tortious liability underestimates the doctrine of limited liability that is

[718] Gwynne Skinner, "Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law" (2015) 72:4 Wash & Lee L Rev 1769 at 1831.
[719] Mares, *supra* note 392 at 176-178.
[720] *Ibid* at 177.
[721] *Ibid.*
[722] *Ibid*.
[723] *Ibid* at 181.
[724] Skinner, *supra* note 718 at 1841.
[725] *Ibid*.
[726] *Ibid*.

deeply entrenched into the legal landscape.[727] He further observed that the approach suggested by Mares underestimates not only the difficulty of establishing a duty of care for third party actions under the narrow and limited exceptions for liability for third-party conduct but also in establishing breach that the third-party actor acted in a manner that was not consistent with what a reasonable person would do.[728]

B. Criminal Liability

Under international law, there is no hurdle regarding the jurisdiction of the national courts regarding the crimes that took place in other countries.[729] It is hoped that the risk of criminal sanctions shall motivate more responsible corporate behaviour. There is a school of thought that observes that criminal liability may be more viable in such cases.[730] For example, Professor James G. Stewart observes pursuing the criminal liability model represents a better course of action for redressing "unimaginable atrocities that deeply shock the conscience of humanity".[731] He further observes that imposition of civil liability in any manner shall only result in compensation.[732] According to him, punishment in monetary form does not redress the barbarous acts committed by the corporations.[733] He views this in commercial context in that pecuniary damages shall allow the corporations to absorb the cost of the responsibility that they will pass the expenses ultimately to consumers.[734] In this way, Stewart observes that, the multinational corporations are purchasing massive human rights violations.[735] However, according to him, victims of the atrocities should have the option open for their pursuing civil liability or criminal liability against the corporations.[736]

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[727] *Ibid* at 1842.
[728] Skinner, *supra* note 718 at 1842.
[729] James Yap, "Corporate Civil Liability for War Crimes in Canadian Courts" (2010), 8:2 J Int'l Crim Just 631 at 632.
[730] Duffy, *supra* note 2 at 25.
[731] James G Stewart, "The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute" (2014) 47 NYU J of Intl L and Politics at 53.
[732] *Ibid* at 53.
[733] *Ibid* at 54.
[734] *Ibid.*
[735] *Ibid*.
[736] *Ibid* at 55.

Moreover, Nwapi observed that extra-territorial criminal prosecution jurisprudence may ensure effective access to justice before the Canadian courts for the atrocities.[737] Criminal prosecution is free from the pre-trial challenges (such as *forum non conveniens)* which causes great hurdles in cross-border civil suits.[738] Generally, finding extra-territorial liability is the exception rather than the rule in Canada.[739] In *Libman*[740], the Supreme Court of Canada laid down the test of 'real and substantial link' in determining the subject matter jurisdiction.[741] This implies that in order to decide whether a crime should be prosecuted in a particular area in transnational cases, the critical question to consider is whether there is a real and substantial link that connected the crime to that jurisdiction.[742] Further, La Forest J observed that Canada has legitimate interests in prosecuting persons for the actions that occurred in foreign land but have unlawful consequences in Canada.[743] Here, the necessary nexus can be established in various ways. For example, nexus would be established if it could be shown that the preparation for the atrocities was taken in the corporate office in Canada although it was later executed abroad.[744] In parent-subsidiary relationships, to prosecute the parent, it has to be shown that the parent somehow implicated the conduct of the subsidiary.[745] However, there has been a lack of the states' interest to regulate extraterritorial corporate criminal conduct in such manner.[746] There have been diverse academic views on this matter.

[737] Chilenye Nwapi, "Accountability of Canadian Mining Corporations for Their Overseas Conduct: Can Extraterritorial Corporate Criminal Prosecution Come to the Rescue" (2016), 54 Can YB Intl Law 227 at 231 [Nwapi, "Accountability of Canadian"].
[738] *Ibid* at 232.
[739] *Ibid* at 239.
[740] *R v Libman* [1985] 2 SCR 178.
[741] Nwapi, "Accountability of Canadian" *supra* note 737 at 239.
[742] *Libman*, *supra* note 740 at para 21; Nwapi, "Accountability of Canadian" *supra* note 737 at 240.
[743] *Libman*, *supra* note 740 at para 67; Nwapi, "Accountability of Canadian" *supra* note 737 at 241.
[744] Nwapi, "Accountability of Canadian" *supra* note 737 at 249.
[745] *Ibid*.
[746] *Ibid* at 231.

C. Lifting the Veil

Generally, by virtue of the principle of separate legal personality, a parent corporation cannot be held liable for the conduct of its subsidiaries, including conduct relating to human rights violations.[747] This doctrine ensures legal invisibility and enable the corporation to maintain separation between itself and its subsidiaries.[748] However, in very limited situations corporate veil between the parent and subsidiary corporation may be pierced if the subsidiary is the alter ego of its parent or where the subsidiary is used for any wrongful purpose.[749]

The doctrine of lifting the veil is not free from criticism. Piercing the corporate veil is described as an unprincipled and arbitrary area of law.[750] The situations where the veil is pierced is often considered vague and inconsistent. Empirically the grounds are very difficult to satisfy. Further, it is almost impossible to hold the parent corporation liable for the action of the subsidiary unless there are strong evidences that the parent controlled the subsidiary.[751] It is further observed that victims of human rights violations and environmental disasters have rarely been able to pierce the corporate veil.[752] Collins described the problems of limited liability and difficulties of piercing the veil as the 'capital boundary problem'.[753] According to him, the owners of capital enjoy unrestricted freedom in determining the shape and size of the legal personalities that bear the burden of legal personality.[754] Collins explained that in actuality the separate legal personalities make up an integrated productive organization.[755]

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[747] John F Sherman, "Should a Parent Company Take a Hands-off Approach to the Human Rights of Its Subsidiaries" (2018) 19:1 Bus L Intl 23 at 28.
[748] Vivian Grosswald Curran, "Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations" (2016) 17:2 Chicago J Intl L 403 at 408.
[749] Skinner, *supra* note 718 at 1773.
[750] Jason Harris & Anil Hargovan, "Cutting the Gordian Knot of Corporate law: Revisiting Veil Piercing in Corporate Groups" (2011), 26 Aus J of Corp L 39 at 43.
[751] Meredith Dearborn, "Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups" (2009) 97 Cal L Rev 195 at 204.
[752] Skinner, *supra* note 718 at 1798.
[753] Hugh Collins, "Ascription of Legal Responsibility to Groups in Complex Patterns of Economic Integration" (1990) 53 Mod L Rev 731 at 744.
[754] *Ibid*.
[755] *Ibid*.

However, they often adopt various patterns of vertical disintegration for productive activities in order to avoid obligations or restrict another's rights.[756] As a result, it is considered that piercing the corporate veil does not provide adequate solution to hold the parent corporation liable for the atrocities committed especially by their transnational subsidiaries.[757]

Recent studies indicate that corporate veil is pierced in parent-subsidiary situations only in 20.56% of the cases.[758] This implies that corporations have clearly strategically sought to limit the ability of victims to sue parent.[759] Curran observes that the situation of the victims of the atrocities is significantly different from the contract creditors of the corporation.[760] According to him, the jurisprudential basis of limited liability was to encourage investment and protect investors so that they are not held liable for the liabilities of the corporation.[761] Therefore, Curran observed that the limited liability doctrine was formulated to provide protection against the corporate creditors as opposed to the victims of the violation of human rights.[762] Their position is different because they are involuntary participant in tort and had no prior opportunity to withdraw themselves from the interaction.[763] Therefore, it is thought that the doctrine of limited liability should not be used to frustrate the claims of the tort victims.[764] From *Choc*, it is apparent that the Canadian judges are rethinking the existing legal doctrines in granting relief, especially to the victims of transnational violation of human rights, including the doctrine of piercing the veil of incorporation.[765]

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[756] *Ibid*.
[757] Skinner, *supra* note 718 at 1799.
[758] John H Matheson, "Why Courts Pierce: An Empirical Study of Piercing the Corporate Veil" (2010), 7 Bekerley Bus LJ 1 at 15.
[759] Luke D Anderson, "An Exception to Jesner: Preventing U.S. Corporation and Their Subsidiaries from Avoiding Liability for Harms Caused Abroad" (2020), 34:4 Emory Intl L Rev 997 at 1010.
[760] Curran, *supra* note 748 at 409.
[761] *Ibid.*
[762] *Ibid.*
[763] *Ibid.*
[764] *Ibid*.
[765] Stimpson, *supra* note 4 at 305.

It appears that the lifting the veil situations are very fact specific. From the discussion above, it is apparent that strict application of separate legal personality may leave the victims of atrocities with no forum of redress. As a result of this potential unfairness, there is often an academic debate for imposing unlimited liability of shareholders in all circumstances or at least for the parent corporations.[766] Moreover, some advocate for a broader enterprise liability of corporations where parent corporations shall be liable for its subsidiary's activities whenever it functionally operates it.[767] Under the enterprise liability thesis, the entire corporate enterprise remains liable for the harm of its subsidiaries.[768] In such situations, the limited liability doctrine does not operate within the group of the subsidiaries and the parent corporation. However, enterprise liability does not offer a viable solution for certain reasons.[769] First, it requires a degree of functional, behavioral control of the parent over the subsidiary.[770] Secondly, often the corporate structures are complex and the parent corporations' required control may serve as a disincentive for the parent to maintain due diligence over the subsidiaries' actions.[771] It would indirectly allow the parent corporation to distance themselves as much as possible, albeit theoretically, from the operations of their subsidiaries.[772] Moreover, it does not present a coherent requirement of the control necessary to find liability.[773] Further, imposition of such liability depends on the control exercised by the parent corporation, rather than considering the extent to which the parent receives benefit from the business of the subsidiary at the expense of the non-consenting victims.[774]

[766] Henry Hansmann & Reinner Kraakmaan, "Towards Unlimited Shareholder Liability for Corporate Torts" (1991), 100 Yale LJ 1879 at 1882-1883.
[767] Robert B Thompson, "Unpacking Limited Liability: Direct and Vicarious Liability for Corporate Participants for Torts of the Enterprise" (1994), 47 V and L Rev 1 at 15.
[768] *Ibid*.
[769] Skinner, *supra* note 718 at 1822.
[770] *Ibid* at 1823.
[771] *Ibid*.
[772] *Ibid*.
[773] *Ibid*.
[774] *Ibid*.

There is also academic support for finding liability based on the 'due diligence' approach. At the heart of this approach lies the presumption that the parent corporations are liable for the extra-territorial acts of subsidiaries. This approach imposes a duty on the parent corporation to monitor the activities of its subsidiary especially in connection with human rights activities.[775] However, the parent corporations may rebut this presumption if they can establish that they have engaged in 'due diligence' efforts to ensure that their subsidiaries operated consistently with the best practices of human rights and environmental standards, and were otherwise unaware of the alleged abuses.[776] Further, the expected standard of "due diligence" is not clear and it would provide leeway to the parent corporation simply to "go through the motions" and "check off boxes" with regards to certain actions of procurement and supply chain regulations.[777] Even after all these, if a duty of care can be established, it will be very difficult to establish breach of duty of the parent corporation. Typically, courts are reluctant to find breach of duty especially when the company adheres to normal business practices.[778] Further, it will be very difficult to establish factual link between the subsidiary and the parent because the corporations will have control over the information.

In *Jesner*[779], it was observed that imposition of such liability may hinder global investments in developing countries.[780] It was further observed that lifting the veil in such situations may effectively limit the free flow of trade and investment because the parent corporations will not be inclined to invest in subsidiaries.[781] On the other hand, Dearborn advocates for imposition of enterprise liability solely based on economic control.[782] The essence of this doctrine is that parent corporation should be liable for the conduct of its subsidiaries if there is evidence that

[775] *Ibid* at 1825.
[776] *Ibid*.
[777] *Ibid* at 1829.
[778] *Ibid* at 1845.
[779] *Jesner v. Arab Bank PLC* (2018) 138 S. Ct. 1386 [*Jesner*].
[780] *Ibid* at 1405.
[781] *Ibid* at 1436.
[782] Dearborn, *supra* note 751 at 252.

the business of the subsidiary corporation benefits the parent corporation as part of a unified economic scheme or structure.[783] This economic control approach accords with the nomenclature endorsed by the UNGPs.[784]

Before the *Choc* is decided on merits, it is impossible to ascertain as to whether the parent corporations can be held to have owed duty of care for the torts committed by its' subsidiaries. However, if established, this may have significant implications. First, formulating liability in such manner would broaden exposure to liability for Canadian corporations doing business abroad. Here, not only the extractive business sector would be prone to increased liability but also the other sectors such as banking, manufacturing, retail, and so on.[785]

D. Liability Through Necessity

Nwapi calls for imposition of liability against the corporations for violation of human rights through the mechanism of doctrine of necessity.[786] He believes that this approach may play an instrumental role in promoting accountability of the transnational corporation. He argues that it would provide a new jurisdictional tool to seek justice to the victims of transnational corporate human rights violations.[787] In essence, under this formulation the court, which does not have jurisdiction, may hear the case provided that there is no other court where the dispute may be heard or where the plaintiffs may reasonably be able to bring an action.[788] However, it deals with civil liability only as opposed to criminal liability.[789] It appears to be a counter-theory of the *forum non conveniens* doctrine. The underlying rationale behind the doctrine of necessity is that victims of violation of human rights should not be denied access to justice

[783] *Ibid*.
[784] Skinner, *supra* note 718 at 1782.
[785] Anderson, *supra* note 759 at 1022.
[786] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 24.
[787] *Ibid* at 25.
[788] *Ibid* at 24.
[789] *Ibid at 25*.

merely on the ground of lack of jurisdiction of the court.[790] This would apply only to scenario where refusing jurisdiction would result in complete denial of justice for the plaintiffs.[791] This doctrine should be applied as the 'safety valve' in situations to avoid a total denial of justice.[792] This approach cannot be measured in light of the other jurisdictional doctrines. Rather, it provides a flexible attitude regarding jurisdiction that keeps in mind and provides proper weight to the subject matter of the case rather than concentrating too much on the territorial connections.[793] Such formulation can remedy the denial of justice that may occur for the lack of jurisdiction. In Canada, the use of necessity as a method of holding the corporations accountable was raised in *Van Breda v Village Resorts Ltd*. Nwapi observed that in this case, the Ontario Court of Appeal in *Van Breda v Village Resorts Ltd*[794] took the opportunity to reformulate the real and substantial connection test in order to meet the demands of justice.[795] It also laid the impetus for 'forum of necessity' as a jurisdictional tool which is to be applicable in situations where there is no other forums in which the plaintiff could reasonably seek relief.[796] Specifically, he referred to the para 100 of the judgment of *Van Breda* where the court observed that the forum of necessity doctrine recognizes some exceptional situations that justify the assumption of jurisdiction despite the absence of the real and substantial connection test.[797] Here, the overriding concern for assuming jurisdiction is to ensure access to justice. The court further mentioned this as "significant jurisdictional doctrine" that operates as a residual basis for assumption of jurisdiction in the absence of real and substantial connection test.[798]

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[790] *Ibid.*
[791] *Ibid* at 24.
[792] John P McEvoy, "Forum of Necessity in Quebec Private International Law:CcQ Article 3136" (2005), 35 Rev General 61 at 90.
[793] Francois Larocque, *Civil Actions for Uncivilized Acts: The Adjudicatory Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (Toronto: Irwin Law, 2010) at 173.
[794] (2010), 98 OR (3d) 721 [*Van Breda ONCA*].
[795] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 30.
[796] *Ibid.*
[797] *Ibid.*
[798] *Van Breda ONCA, supra* note 794 at paras 54, 100*;* Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 30.

Traditionally, the doctrine of jurisdiction by necessity has its origins in the civil law traditions.[799] Further, Article 6(1) of the *European Convention of Human Rights*[800] also emphasized on the rights of access to justice.[801] One of the earliest formal adoptions of this doctrine can be traced from Article 2 of the *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments*, 1985.[802] This Convention stated, inter alia, that the courts may assume jurisdiction in order to avoid denial of justice as a result of the absence of a competent judicial or other adjudicatory authority.[803] Further, Swiss Federal law statutorily adopted this doctrine.[804] Article 3 of the *Swiss Federal Code on Private International Law*, 1987[805] states that in situations where the Code does not provide jurisdiction and it is not possible to bring proceedings abroad, Swiss judicial and administrative bodies can assume jurisdiction, provided the facts are sufficiently connected. Moreover, support for this method can be seen from the dictum of the Privy Council in *AK Investments CJSC v Krygyz Mobil.*[806]

This represents a new jurisdictional possibility to assert for the victims of the violation of human rights. To invoke jurisdiction by way of necessity, the plaintiffs generally need to satisfy five elements.[807] Nwapi has summarized these elements neatly.[808] They are (a) absence of jurisdiction in the forum seized of the matter; (b) the requirement of some connection with the forum; (c) the impossibility of bringing action in other forums; (d) the reasonableness of

[799] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 31.
[800] Council of Europe, The European Convention on Human Rights: Strasbourg: Directorate of Information (1952).
[801] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 31.
[802] 24 May 1984, 24 ILM 468 (1985).
[803] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 31.
[804] *Ibid*.
[805] Swiss Federal Code on Private International Law 1987 (Switzerland), online (pdf): <https://www.rwi.uzh.ch/dam/jcr:ffffffff-fc61-e805-0000-0000115fcc32/PILA.pdf>.
[806] [2011] UKPC 7.
[807] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 40.
[808] *Ibid*.

requiring the plaintiff to bring proceedings in that foreign forum and finally; (e) the absence of fair trial in the foreign forum.[809]

E. Contractual Liability

There are some scholars who observe that contractual liability can be a valuable option for corporate liability and such formulation can be adopted to hold the corporations accountable for the violation of human rights. MacPherson and Pozios observe that the approach adopted by the court in *Choc* is too broad.[810] They applaud the decision but are skeptic about the route the court adopted. They referred the method as "too circuitous".[811] In this regard, they provide a narrower and streamlined basis of liability of the Canadian corporations.

CGN may also be held responsible by following the contractual pathway. As mentioned earlier, CGN was wholly controlled and 98.2% owned subsidiary of Hudbay.[812] In August, 2011, after the alleged incident, Hudbay sold both CGN and the Fenix Mining project.[813] However, as part of the sale agreement Hudbay expressly agreed to be responsible for and retain control over in respect of any litigation against CGN for these alleged incidents.[814] Further, it was agreed that Hudbay would control the conduct of the litigation against CGN regarding the death of Adolfo Ich. [815] Here, MacPherson and Pozios emphasized on the wordings of the sale agreement. According to them, typically the parties could have agreed that the current directors would control the litigation and if they incur any liability or costs arising out the litigation, they would recover it from Hudbay by way of an agreed third-party claim.[816] However, the parties did not do this.[817] Rather, it was expressly agreed between the parties that Hudbay would have control

[809] Nwapi, "Jurisdiction by Necessity" *supra* note 16 at 40.
[810] 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-ART 103 at 103.
[811] *Ibid* at 105.
[812] *Choc*, *supra* note 5 at para 10.
[813] *Ibid*.
[814] *Ibid*.
[815] *Ibid*.
[816] MacPherson & Pozios, *supra* note 810 at 107.
[817] *Ibid* at 108.

over the litigation even after the sale.[818] This indicated that, Hudbay wanted to have control over the litigation in question.[819] Since they wanted to have control, they cannot shy away from the responsibilities associated with the litigation.[820]

The next critical question is whether the plaintiffs should be allowed to enforce this specific contractual provision for litigation.[821] This issue requires wider consideration of the doctrine of privity of contract. Generally, contracts only be enforced by the parties to the contract.[822] However, there are certain exceptions to this general rule.

The SCC in *London Drugs Ltd v Kuehne & Nagel International Ltd*[823] and *Fraser River Pile and Dredge v Can-Dive Services Ltd*[824] observed that the doctrine of privity of contract was formulated to serve a functional purpose.[825] It was not to burden people with the over-rigid principles and restricting the non-party to bring proceedings on a contract made for its benefits.[826] In *London Drugs*[827] the SCC allowed employees to rely on a limitation clause despite that they were not party to the contract.[828] In that case, the court succinctly observed that the contractual provision contemplated protection of the third-party employee and the employee was carrying out the contractual obligations of the employer in the course of his duty.[829] As a result, the employee ought to be protected by the limitation of liability clause.[830]

[818] *Ibid*.
[819] *Ibid*.
[820] *Ibid.*
[821] *Ibid.*
[822] *Dunlop Pneumatic Tyre Co v Selfridge & Co* [1915] AC 847 (UKHL).
[823] *London Drugs Ltd v Kuehne & Nagel International Ltd* [1992] 3 S.C.C.R. 299 [*London Drugs*].
[824] *Fraser River Pile and Dredge v Can-Dive Services Ltd* [1999] 3 S.C.R. 108 [*Fraser Rive*r].
[825] MacPherson & Pozios, *supra* note 810 at 108.
[826] *Ibid*.
[827] *London Drugs*, *supra* note 823.
[828] *Ibid* at paras 240-246
[829] MacPherson & Pozios, *supra* note 810 at 109.
[830] *Ibid*.

Moreover, in *Fraser River* initially the insurance contract was subject to a "no subrogation" clause.[831] Pursuant to that insurance contract, the respondent chartered a boat which subsequently sank while under his control.[832] Meanwhile, the parties to the insurance contract decided to amend the insurance contract to remove that "no subrogation" provision.[833] If they could successfully amend the contract accordingly, they could bring proceedings against the respondent.[834] However, the respondent argued that he was entitled to be benefited from the "no subrogation" provision, which existed at the time when the boat sank.[835] On the other hand, the appellant invoked the doctrine of privity of contract.[836] The court observed that it would adopt a more functional approach especially where the traditional exceptions to the privity of contract were not present.[837] Accordingly, Justice Iacobucci laid down the two-tier test.[838] Firstly, did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on contractual provision and secondly, are the activities performed by the third party seeking to rely on the contractual provision in particular, again as determined by reference to the intention of the parties?[839]

Relying on the functional and practicality of approach of the privity, MacPherson and Pozios observe that the only practical purpose of the contract was to provide absolute control to Hudbay and to make it responsible for the litigation arising out of the atrocities of Guatemala.[840] Here, at the time of the contract the parties objectively intended to affect the responsibility of the litigation.[841]

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[831] MacPherson & Pozios, *supra* note 810 at 109.
[832] *Ibid.*
[833] *Ibid.*
[834] *Ibid.*
[835] *Ibid.*
[836] *Ibid.*
[837] *Fraser River*, *supra* note 824 at para 27.
[838] *Ibid* at para 32.
[839] *Ibid.*
[840] MacPherson & Pozios, *supra* note 810 at 109.
[841] *Ibid.*

The contractual approach in holding corporations liable for human rights violations is not new. A quasi-contractual method to address the human rights violations arising out of the Human Rights Undertaking was seen in British Petroleum led Baku-Tbilisi-Ceyhan (BTC) Pipeline Company in the Baku-Tbilisi-Ceyhan project.[842] There the BTC corporations provided undertakings regarding human rights, health, safety and environmental considerations.[843] Further, Clause 3(a) of the Undertaking marked the document as a legal, valid and binding obligation.[844] As a result, this unilateral deed and the pledge was sufficient to impose liability.[845] However, there are debates as to the nature of the remedies the undertaking offers.[846] Basically, the undertaking dealt with the state-investor relationship that created enforceable obligations and acknowledged corporate accountability for violation of human rights.[847] This instrument indicate that the corporations can be held responsible for violation of human rights provided that the contractual instrument has clear provisions to that effect.[848]

This contractual model may represent a conceptual shift and has the potential to address, cure or mitigate the existing circumstances arising from the absence of remedial and responsibility regimes for the adverse impacts of extractive industries.[849] The contractual approach to liability provides a streamlined approach. Imposition of a duty in such manner can avoid the need to go to satisfy the complex legal matrix of shareholding and relationship between parent and subsidiary. As a result, this method provides a direct approach regarding liability, which may avoid the potential jurisprudential pitfalls arising out of other methods of imposing liability.

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[842] "The Baku-Tbilisi-Ceyhan Pipeline Company, BTC Human Rights Undertaking' (22 September, 2003), online (pdf): <www.thecornerhouse.org.uk/sites/thecornerhouse.org.uk/files/Human%20Rights%20Undertaking.pdf>; Gathii & Ayanu, *supra* note 12 at 80.
[843] Gathii & Ayanu, *supra* note 12 at 80.
[844] *Ibid.*
[845] *Ibid.*
[846] *Ibid.*
[847] *Ibid.*
[848] *Ibid.*
[849] *Ibid* at 70.

1. Amalgamation between Hudbay and SR

According to MacPherson and Pozios, Hudbay/SR may be held accountable due to the amalgamation rather than imposing a 'novel' duty of care of direct liability.[850] They contend that Hudbay may incur liability by virtue of the amalgamation process. In *Choc*, the court indicated at the time of the alleged *Caal* action, the mining project was owned and operated by SR (previously named as HMI Nickel Inc).[851] Later, HMI Nickel amalgamated with Hudbay and now Hudbay was legally responsible for all the legal liabilities of Skye Resources.[852] Section 186(c) through (f) of the *Canada Business Corporation Act* provide that the corporation that emerges from the amalgamation bears the responsibilities of the corporations that were amalgamated.[853] Thus, in the *Choc* case, amalgamation of the corporations does not absolve liabilities of SR that was committed prior to the amalgamation. Further, the statements of claim indicated that the amalgamation occurred after the proceedings were filed. Considering this, MacPherson and Pozios observe that there is no need to stretch the issue of direct liability for negligent supervision of the employees of the subsidiary.[854] This is simply because after the amalgamation the employees of SR became the employees of Hudbay by operation of law.[855] Under such circumstances, it is futile to take the path of direct liability of a parent for the subsidiary actions.[856] This is because, following the amalgamation, automatically the liabilities of both corporations reside at the same place and thus there is no such need for construing the mechanism of direct liability as adopted in *Choc*.[857]

[850] MacPherson & Pozios, *supra* note 810 at 107.
[851] *Choc*, *supra* note 5 at para 9.
[852] *Ibid*.
[853] *Canada Business Corporations Act*, *supra* note 269, s 186(c)-(f).
[854] MacPherson & Pozios, *supra* note 810 at 107.
[855] *Ibid*.
[856] *Ibid*.
[857] *Ibid*.

CHAPTER 5: LAW OF DIFFERENT JURISDICTIONS

Some insight about methods of establishing corporate liability in relation to foreign subsidiaries can be drawn from the laws of other jurisdictions. In this chapter, the recent developments in France, UK, Germany, Switzerland, Netherlands, European Union and United States are discussed. This is followed by a brief discussion of modern slavery legislation in different countries.

A. France

France established a duty of vigilance through Law 2017-399 of March 27, 2017, titled "Duty of Vigilance of Parent and Instructing Companies".[858] Corporations are now required to make and carry out vigilance plans.[859] Commensurate with the due diligence approach, recently France created a presumption of parent company liability for the atrocities committed by its subsidiaries abroad. However, the parent corporation can overcome the liability if they can establish that they have engaged in human rights 'due diligence' regarding the alleged acts of the subsidiaries.[860] By virtue of this, the French law created a statutory duty of care for parent companies regarding the actions of their subsidiaries.[861] In order to satisfy the 'due diligence' requirement and thus overcome the presumption of the liability, the parent corporations should evaluate the risk of violations, enact procedures for regular monitoring and evaluation of its subsidiaries, subcontractors, and suppliers.[862] Moreover, they need to take adequate steps to mitigate the risks of, or prevent, serious harm.[863] In situations where the parent corporations cannot rebut the liability, they remain liable to repair the damages that the performance of those obligations would have prevented.[864]

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[858] *Code de commerce*, JO, 29 March 2017, art L225-102-4.
online: <www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006133176/2017-03-29/#LEGISCTA000006133176> [*Code of Commerce*].
[859] *Ibid*, art L225-102-4.
[860] Skinner, *supra* note 718 at 1826.
[861] *Code of Commerce*, *supra* note 858 at art L225-102-4.
[862] *Ibid*.
[863] *Ibid.*
[864] *Ibid*, art L225-102-5.

At first glance the ambit of the statute may seem far-reaching but it is actually limited by explicitly mentioning "severe" violations of human rights.[865] This approach of focusing on more serious violations is also evident in UNGPs.[866] Principle 17 of the UNGPs suggests that the multinational corporations are to identify the areas where risk of human rights violations are most significant and prioritize human rights due diligence in those areas.[867] Hence, it is likely that courts will accept a vigilance plan which demonstrates measures which will slowly but steadily work towards preventing risks of human rights breaches.[868]

The use of the word "reasonable" regarding vigilance measures in the French legislation shows that the policy makers wanted to strike a balance between the necessity to protect human rights with the competing interest of doing international business, which inevitably requires a multinational corporation to work with, and rely on, many foreign parties in a supply chain.[869] These competing interests were also discussed in *Choc* when commenting on policy considerations regarding formulating a duty of care.[870]

The statute provides guidelines for vigilance plans. According to the statute, a parent company will have to identify risks of violations; make procedures for regularly assessing subsidiaries, subcontractors and suppliers; and take steps to mitigate risks or prevent serious violations.[871] Furthermore, companies must have a mechanism for being attentive to reports of the risks, and a mechanism for checking the effectiveness of the measures that the company took.[872] Besides making and implementing the vigilance plan, companies will have to publish their plans and make reports on its implementation; both the plan and report have to be included in the annual

[865] *Ibid*.
[866] Diggs, Regan & Parance, *supra* note 502 at 354.
[867] UNGP, *supra* note 57 at Principle 17.
[868] Diggs, Regan & Parance, *supra* note 502 at 354.
[869] *Ibid* at 353.
[870] *Ibid*.
[871] *Code of Commerce*, *supra* note 858, art L225-102-4.
[872] *Ibid*.

management report.[873] Unlike other French reporting obligations, this statute in fact makes an obligation to act which practically cannot be satisfied by box ticking, while in comparison, the former reporting requirements were seen to be fulfilled as mere checklist exercise.[874] Moreover, as the vigilance plan has to be public, stakeholders can scrutinize it and point out if the measures in the vigilance plan is sufficient to address the corresponding risks.[875]

The law is directed toward big corporations. This new law applies to two categories of corporations. Firstly, any company which has registered office in France and, which for two consecutive years, employs at least 5,000 employees directly or in its subsidiaries.[876] The second category is any company, which for two consecutive years, employ at least 10,000 employees directly or in its subsidiaries which has their registered office in France or elsewhere.[877]

This one-of-a-kind legislation does not impose liability for every single human rights abuse by its subsidiaries, subcontractors and suppliers. Rather, it forces a company to use an analytical procedure.[878] If a company breaches it obligation of the vigilance plan required by the statute, it will be responsible for the damage that could have been avoided had the corporation fulfilled that plan.[879] Plaintiffs, who suffered due to breach of duty of vigilance, may file a case under French tort law.[880] Plaintiffs have the burden of proving that the harm took place due to breach of the obligations in the statute.[881] Other than this, court may be asked to issue an order for a

[873] Stephane Brabant and Elsa Savourey, "Respecting human rights: a snapshot of the French law on the corporate duty of vigilance" (31 October 2017), online: *Herbert Smith Freehills* <www.herbertsmithfreehills.com/latest-thinking/respecting-human-rights-a-snapshot-of-the-french-law-on-the-corporate-duty-of>.
[874] Diggs, Regan & Parance, *supra* note 502 at 352.
[875] Sandra Cossart & Lucie Chatelain, "What lessons does France's Duty of Vigilance law have for other national initiatives?" (27 June 2019), online (blog): *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/blog/what-lessons-does-frances-duty-of-vigilance-law-have-for-other-national-initiatives>.
[876] *Code of Commerce*, *supra* note 858, art L225-102-4.
[877] *Ibid*.
[878] Diggs, Regan & Parance, *supra* note 502 at 353.
[879] *Code de Commerce*, *supra* note 679, art 225-102-5.
[880] Diggs, Regan & Parance, *supra* note 502 at 313.
[881] *Ibid*.

company to follow the legal requirements.[882] These judicial mechanisms and sanctions are vital to ensure compliance.[883] All the existing soft law measures are not backed by sanctions and have practically proven to be insufficient in stopping human rights violations.

However, the vigilance plans published in 2018 and 2019 were brief, and some merely stated that the corporation abides by the five measures mentioned in the legislation.[884] The weak implementation of the law has earned criticism.[885] There is not any official government body to monitor whether corporations adequately implemented the legal requirements.[886] However, civil society groups launched a website, which compiled a list of corporations covered by the law, and the vigilance plans of the corporations, for public scrutiny.[887] In spite of these deficiencies, the legislation serves as a new mechanism to prevent human rights violations caused by French corporations and their supply chains.[888] It is expected that many cases will be filed to compel corporations to fulfill their vigilance requirements with more conviction or otherwise pay compensation.[889] Hence, concerned parties and victims have a brand-new tool to get a remedy.[890]

The statute is landmark and strengthens the general implementation of corporate social responsibility in France. It is believed that the duty of vigilance will eventually necessitate a multinational corporation to embrace an international perception of corporate social responsibility regarding activities of its subsidiaries, subcontractors and suppliers.[891] This

[882] Cossart & Chatelain, *supra* note 875.
[883] *Ibid.*
[884] *Ibid.*
[885] Almut Schilling-Vacaflor, "Putting the French Duty of Vigilance Law in Context: Towards Corporate Accountability for Human Rights Violations in the Global South?" (2021) Hum Rights Rev 109 at 116. online: *Springer Link* <link.springer.com/article/10.1007/s12142-020-00607-9>.
[886] Cossart & Chatelain, *supra* note 875.
[887] See "Duty of vigilance radar- list of companies subject to the duty of vigilance" online: *vigilance plan org* <vigilance-plan.org>.
[888] Cossart & Chatelain, *supra* note 875.
[889] *Ibid.*
[890] *Ibid.*
[891] Diggs, Regan & Parance, *supra* note 502 at 352.

recent French law is definitely a step in the right direction, because it directly attempts to hold the multinational companies responsible for activities of its subsidiaries and subcontractors, even though they have separate legal personality.[892]

France is the first country to establish compulsory human rights due diligence requirements.[893] So far, no common law jurisdiction has recognized this kind of duty of parent corporations to take initiative to reduce the risks of human rights violations by both subsidiaries and suppliers.[894] It is sincerely hoped that the common law jurisdictions will take inspiration from the French legislation to create a category of duty of care owed by parent corporations regarding the risks of human rights breaches by their subsidiaries, subcontractors and suppliers.

B. United Kingdom

Recently, the UK courts began to formulate a theory of 'direct liability' of the parent corporations for the human rights violation committed by its subsidiaries.[895] Under 'direct liability', the parent corporation attracts liability neither because the subsidiary corporation is its alter ego nor that the subsidiary corporation was used for any wrongful purpose.[896] Here, liability arises when there is substantial evidence that the parent corporation assumed *de facto* control over the business operation of the subsidiary or where it was so closely involved in the business of the subsidiary that caused the violation of human rights.[897] Application of such theory was succinctly applied in the UK in *Chandler v Cape PLC*[898] where it was held, for the first time in the UK, that the parent company owed a legal duty of care to the plaintiffs who were injured by the actions committed by its foreign subsidiary.

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[892] *Ibid* at 313.
[893] Legal Briefings, "Supply Chain Law in Germany: Current steps towards a mandatory human rights due diligence law" (22 July 2020) online: *Herbert Smith Freehills* <https://www.herbertsmithfreehills.com/latest-thinking/supply-chain-law-in-germany-current-steps-towards-a-mandatory-human-rights-due>.
[894] Diggs, Regan & Parance, *supra* note 502 at 326.
[895] Sherman, *supra* note 747 at 28.
[896] *Ibid.*
[897] *Ibid*.
[898] *Chandler v Cape PLC* [2012] EWCA (Civ) 525 [*Chandler*].

In *Chandler*, the plaintiffs brought proceedings against the UK parent company for injuries they sustained due to the exposure of asbestos while working for its subsidiary company.[899]

There, the England and Wales Court of Appeal found that, in some situations, a parent company could directly owe a duty of care regarding the health and safety of the subsidiary' employees, because there the parent company had assumed responsibility for the health and safety of the subsidiary' employees.[900] The parent company was held to have a duty of care because, amongst other things, it hired a scientific officer and a medical officer who had the responsibility to ensure health and safety of all the employees of its subsidiaries.[901] Moreover, the board of the subsidiary company, Cape Products, always had one or more directors of the parent company on it and most of the meetings of the subsidiary took place in the parent company's head office.[902] Further, there was sufficient evidence that the parent company, as opposed to the subsidiary, was responsible in outlining the policies regarding the health and safety of the employees.[903] Moreover, minutes of Cape Product's board meetings showed that the decisions of the board were subject to the approval by the board of the parent company.[904] From this, the court concluded that the parent company "retained responsibility for ensuring" that its employees "were not exposed to risk of harm through exposure to asbestos".[905] Further, according to the court, the parent company owed a duty of care because it had "superior knowledge about the nature and management of asbestos", and it was in a position to give instructions to the subsidiaries as to how to tackle such problems.[906] The reasoning in *Chandler* provides useful insights because it indicated that, provided some factual elements are satisfied,

[899] *Ibid* at para 1.
[900] *Ibid* at paras 62-78.
[901] *Ibid* at para 31.
[902] *Ibid.*
[903] *Ibid.*
[904] *Ibid.*
[905] *Ibid.*
[906] *Ibid* at para 78.

the parent company may be directly held liable for the acts of its subsidiary even when it might not have actual control over the specific operation at issue.[907]

In *Chandler*, Arden LJ emphasized the proximity element of the three-tier test as envisaged in *Caparo Industries Plc v Dickman.*[908] Arden LJ held that, for liability it is not necessary to establish that the parent company had absolute control over the subsidiary.[909] There, the court found that there was sufficient or relevant control of the subsidiary, Cape Products, by the parent company through the practice of issuing instructions to the subsidiary and parent's decision making authority for the conduct of the subsidiary.[910]

In addition to the control issue, Arden LJ found four factors that justified the imposition of direct duty of care of the parent company for the acts of its subsidiary. These are:

(a) both the parent and subsidiary were involved in the same business;

(b) the parent company possessed superior knowledge with respect to health and safety issues in the industry;

(c) the parent knew or ought to have known that the subsidiary's system of work was unsafe; and

(d) the parent either knew or ought to have foreseen that the subsidiary or its employees would rely on its superior knowledge for the employees' protection.[911]

[907] Skinner, *supra* note 718 at 1835.
[908] [1990] UKHL 2.
[909] *Chandler*, *supra* note 898 at para 66.
[910] *Ibid* at para 73.
[911] *Ibid* at para 80.

From this approach, it appears that, in *Chandler* the court took a broad view to delve into the relationship between the parent and subsidiary while determining whether the parent should be held to owe a direct duty of care.[912]

Similarly, in *Thompson v The Renwick Group Plc*[913] the court emphasized the requirement of the parent having the expert or superior knowledge and exercise of control in determining as to whether the parent company can be held directly liable.[914] Unlike *Chandler*, there the parent and the subsidiary were not engaged in similar businesses.[915] The parent company only had holding shares in the subsidiary company.[916] The parent appointed a director in the subsidiary company for health and safety issues.[917] The issue in front of the court was whether a parent had duty of care to employees of its subsidiary regarding health and safety issues because the parent had appointed the director in the subsidiary.[918] The court decided that the parent did not have such a duty because the health and safety director was acting pursuant to his fiduciary duty to the subsidiary and did not act on behalf of the parent company.[919] Moreover, the court stressed that neither the parent engaged in similar business of the subsidiary nor it had special expertise in asbestos issues.[920] They had shared resources and their resources often intermingled.[921] However, the court concluded that such a business practice did not dismantle the separate legal personalities of the entities.[922]

[912] Marilyn Warren, "Corporate Structures, the Veil and the Role of the Courts" (2016) 40:2 Melbourne UL Rev 657 at 682.
[913] [2014] EWCA Civ 635.
[914] *Ibid* at paras 31-32, 37.
[915] *Ibid* at para 20.
[916] *Ibid* at paras 14, 20.
[917] *Ibid* at para 24.
[918] *Ibid.*
[919] *Ibid* at paras 25, 26.
[920] *Ibid* at para 37.
[921] *Ibid* at para 38.
[922] *Ibid*.

More recently, in *Vedanta Resources Plc & Anor v Lungowe & Ors* [923] the UK Supreme Court allowed 1,826 Zambian villagers to bring proceedings against a UK parent company, Vedanta Resources Plc (Vedanta Resources), for the water pollution allegedly caused by its Zambian subsidiary, Konkola Copper Mines Plc (KCM).[924] Vedanta Resources owns 79.42% of KCM while the remaining 20.58% is owned by the Government of Zambia.[925] It was alleged that the claimants suffered personal injury, damage to property, loss of income and loss of amenity as a result of the alleged water and environmental pollution caused by the copper mine owned by KCM.[926] Allegations against the subsidiary, KCM, were brought for causes of action in negligence, nuisance, breach of the rule in *Ryland v Fletcher*[927], trespass, and liability under Zambian statutes.[928] Moreover, the claim against Vedanta was brought alleging negligence in the breach of its duty of care to ensure that KCM's operations did not harm local communities.[929] There the link between the parent and the subsidiary corporations was made, because the plaintiffs alleged that Vedanta had a duty of care due to the high level of control it exercised over the affairs of the subsidiary, KCM and KCM's compliance with the health, safety and environmental standards.[930]

Vedanta contested the suit unsuccessfully by filing the motion that the court lacked jurisdiction to hear the case and Supreme Court of UK dismissed the appeal. The UK Supreme Court stated that the critical question was whether Vedanta had sufficiently interfered in the management of the mine owned by KCM to bring upon itself a common law duty of care to the claimants.[931] The Supreme Court found that it was well arguable at trial after full disclosure that Vedanta

[923] [2019] UKSC 20 [*Vedanta UKSC*].
[924] *Ibid* at para 1.
[925] *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA (Civ) 1528 at para 10 [*Vedanta EWCA*].
[926] *Lungowe v. Vedanta Res. PLC* [2016] EWHC (TCC) 975 at para 1.
[927] [1868] UKHL 1.
[928] *Vedanta EWCA*, *supra* note 925 at para 26.
[929] *Ibid* at para 20.
[930] *Ibid.*
[931] *Vedanta UKSC*, *supra* note 923 at para 44.

had a sufficient level of intervention in the conduct of operations at the mine.[932] The court relied on the published materials where Vedanta asserted its own assumption of responsibility for maintaining proper standards of environmental control over the KCM's activities, particularly at the mine, and Vedanta, not only mentioned, but also materialized those standards by training, monitoring and enforcement.[933]

Vedanta had submitted that such a duty of care was a novel and controversial extension of the tort of negligence which needed a detailed investigation of the claim but the lower courts had not done.[934] However, UK Supreme Court rejected this argument. Rather, the UK Supreme Court observed that parent corporation's liability for the activities of its subsidiary was not a distinct category of liability in common law negligence.[935] Direct or indirect ownership by one corporation of all or majority of shares of another corporation may allow the parent corporation to take control of the management of the business of the subsidiary corporation but it does not impose any duty on the parent to do so.[936] The court highlighted that it depends on to what extent parent took the opportunity to "take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary".[937]

Lord Biggs in *Vedanta Resources* referred to Sales LJ's finding in *AAA v Unilever plc*[938] that parent may incur a duty of care to third parties harmed by the activities of the subsidiary in two scenarios: (a) where the parent has effectively taken over the management of the subsidiary's actions, and (b) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.[939] Lord Biggs expressed that he was reluctant to limit

[932] *Ibid* at para 61.
[933] *Ibid.*
[934] *Ibid* at paras 46-47.
[935] *Ibid* at para 49.
[936] *Ibid.*
[937] *Ibid.*
[938] [2018] EWCA Civ 1532.
[939] *Vedanta UKSC, supra* note 923 at para 51.

parent corporations' liability into specific categories like that.[940] Instead he stated that there was "no limit to the models of management and control which may be put in place within a multinational group of companies".[941]

Vedanta contended that there was a general principle that a parent corporation could never attract a duty of care for subsidiary corporation's activities by merely laying down group-wide policies and guidelines, and expecting the subsidiary to follow them.[942] The Supreme Court of UK rejected this argument. Lord Biggs pointed out that this kind of group guidelines may have systemic errors and if implemented by the subsidiary corporation, can cause harm to third parties.[943] Lord Biggs further explained that even if group-wide policies did not give rise to a duty of care to third parties, a duty may arise if the parent corporation took active steps, through training, supervision and enforcement, to ensure that the subsidiary corporation executed them.[944] Lord Biggs was of the view that the parent corporation may have a duty to third parties if it mentioned in published material that it had a degree of control and supervision of subsidiary corporations even if it did not in fact do that.[945] This line of argument supports the claimants in *Choc* case.

The UK Supreme Court in *Vedanta Resources* considered whether there is a real risk that substantial justice will not be obtainable in the foreign jurisdiction, Zambia.[946] The two determining factors were, first, it was practically impossible to fund the group claims because the claimants were extremely poor and, secondly, there was not any experienced legal team in Zambia which could effectively deal with such a huge and complex litigation.[947] Hence, the

[940] *Ibid*.
[941] *Ibid*.
[942] *Ibid* at para 52.
[943] *Ibid*.
[944] *Ibid* at para 53.
[945] *Ibid*.
[946] *Ibid* at para 88.
[947] *Ibid* at para 89.

claimants were allowed to bring proceedings in UK because they would have been denied access to justice in Zambia.[948]

In January 2021, Vedenta Resources and KCM settled the claims.[949] However, this case indicates the UK courts' approach that the parent corporations may incur liability for human rights violations committed by their foreign subsidiaries.[950] This approach promotes human-rights-related corporate accountability.[951] However, there are concerns that the corporations would adjust their business structure in order to not to fall within the decision's scope in the future.[952]

C. Germany

Since 2019 Germany has been in the process of drafting to create a mandatory human rights due diligence law.[953] In June 2021, the *Supply Chain Due Diligence Act*[954] was passed by the German parliament.[955] The new legislation will enter into force in 2023.[956] The *Supply Chain Due Diligence Act* refers to UNGPs.[957] German companies are under obligation to fulfill their due diligence responsibilities in their supply chains regarding internationally recognized

[948] *Ibid* at para 103.
[949] Business & Human Rights Resource Centre, "Vedanta & Konkola Copper Mines settle UK lawsuit brought by Zambian villagers for alleged pollution from mining activities" (19 January 2021), online: *Business & Human Rights Resource Centre* < https://www.business-humanrights.org/en/latest-news/vedanta-konkola-copper-mines-settle-uk-lawsuit-brought-by-zambian-villagers-for-alleged-pollution-from-mining-activities/>.
[950] Anderson, *supra* note 759 at 1016.
[951] Danielle Anne Pamplona & Franz Christian Ebert, "Business and Human Rights: Taking Stock of Trends in International Governance and Domestic Litigation" (2019) 16:3 Brazilian J of Intl L 2 at 7.
[952] *Ibid*.
[953] Business & Human Rights Resource Centre, "German Development Ministry drafts law on mandatory human rights due diligence for German companies - Business & Human Rights Resource Centre" (11 February 2019), online: *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/latest-news/german-development-ministry-drafts-law-on-mandatory-human-rights-due-diligence-for-german-companies>.
[954] *Supply Chain Due Diligence Act* (9 June 2021), online (pdf): <https://dserver.bundestag.de/btd/19/305/1930505.pdf>.
[955] Business & Human Rights Resource Centre, "German parliament passes mandatory human rights due diligence law" (16 June 2021), online: *Business & Human Rights Resource Centre* < https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>.
[956] Initiative Lieferkettengesetz, "What the new SUPPLY CHAIN ACT delivers – and what it doesn't" (11 June 2021) at 2, online (pdf): <lieferkettengesetz.de/wp-content/uploads/2021/06/Initiative-Lieferkettengesetz_Analysis_What-the-new-supply-chain-act-delivers.pdf>.
[957] *Ibid*.

human rights and some environmental standards.[958] Companies will have to establish effective risk management, conduct systemic risk analysis for their own business and direct suppliers, and on an *ad hoc* basis for indirect suppliers.[959] The law received criticism for not requiring comprehensive due diligence for indirect suppliers as companies will only have to conduct risk analysis for indirect suppliers when they gain "substantiated knowledge" of a potential human rights abuse.[960] This is not in line with the UNGPs as UNGPs suggest preventive measures, and many human rights violations take place at the start of supply chains who are the indirect suppliers.[961]

The *Supply Chain Due Diligence Act* will be initially applicable for companies with 3,000 or more employees, and from 2024 it will cover companies with 1,000 or more employees.[962] The legislation is under criticism for only covering small number of companies because small and medium-sized companies can also have serious adverse human rights impacts if they work in a risk sector.[963] According to the previous draft of the legislation it was going to apply to corporations with over 250 employees and more than 4 million Euros annual turnover.[964]

Supply Chain Due Diligence Act is backed by sanctions. The Federal Office for Economic Affairs and Export Control (BAFA) can fine companies who violate the due diligence responsibilities based on how serious the offence was and taking into account the total turnover of the company.[965] Complainants can tell BAFA if their rights are violated or if they are directly affected because a company failed to follow the due diligence obligations.[966] BAFA must

[958] *Ibid.*
[959] *Ibid* at 3.
[960] *Ibid* at 4.
[961] *Ibid.*
[962] *Ibid* at 2.
[963] *Ibid* at 5.
[964] German Development Ministry drafts law, *supra* note 953.
[965] Initiative Lieferkettengesetz, *supra* note 956 at 3.
[966] *Ibid.*

investigate the breach and aim to stop it.[967] BAFA is a federal body under the supervision of the Federal Ministry for Economic Affairs and Energy. It has been suggested that there needs to be regulations to make sure that BAFA is independent from the political influence of Federal Ministry for Economic Affairs and Energy.[968]

The biggest criticism of the new law is that it does not create a new civil cause of action to hold companies liable for the damages that resulted due to the company's failure to fulfill their due diligence obligations.[969] Hence, affected individuals cannot resort to German civil courts to redress their concerns.[970] The new law brings a much needed shift from voluntary CSR to legally binding human rights responsibility.[971] However, it has received its fair share of criticism for its shortcomings.

D. Switzerland

Switzerland held a referendum in November 2020 regarding formulating mandatory human rights and environmental due diligence law called the Responsible Business Initiative.[972] The initiative failed to pass by a small margin. Majorities in both the popular vote and cantonal (regional) vote is required for an initiative to pass.[973] The initiative passed a majority of popular support, as it received 50.7% of the popular vote.[974] However, the initiative failed to pass a majority of the cantons. It achieved only 8.5 of the minimum 12 cantonal votes needed.[975] The consequence is that Switzerland will go forward with a milder government counter-proposal, which contains reporting requirements and limited due diligence, but does not impose liability

[967] *Ibid* at 3.
[968] *Ibid* at 5.
[969] *Ibid* at 4.
[970] *Ibid.*
[971] *Ibid* at 6.
[972] Business & Human Rights Resource Centre, "Switzerland: Responsible Business Initiative rejected at ballot box despite gaining 50.7% of popular vote" (28 November 2020), online: *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/latest-news/swiss-due-diligence-initiative-set-for-public-referendum-as-parliament-only-opts-for-reporting-centred-proposal>.
[973] *Ibid.*
[974] *Ibid.*
[975] *Ibid.*

on the parent companies.[976] However, the result of the referendum indicates that the general public in Switzerland is concerned about human rights violations abroad perpetuated by Swiss corporations.

E. The Netherlands

Another country that has embraced mandatory due diligence legislation, albeit focusing on one limited issue of human rights, is the Netherlands. In May 2019, the Dutch Senate adopted the *Child Labour Due Diligence Act* to create a duty of care to prevent child labour.[977] The new legislation applies to all companies, regardless of size and jurisdiction of registration, that provide goods or services to Dutch consumers, both natural person and artificial.[978] According to this statue, companies must investigate and determine whether there is a reasonable suspicion that child labour has been used in their supply chains to produce goods or services.[979] If a corporation finds a reasonable suspicion of the use of child labour in their supply chain, then they must formulate a plan of action to stop it and prevent it from happening again.[980] The legislation does not force a corporation to end a contract with a supplier if the supplier has used child labour but the corporation must make a plan to stop child labour in the future.[981] Besides mandatory reporting requirements, the law is backed by administrative fines and criminal penalties to ensure compliance.[982]

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[976] Brenna Hughes Neghaiwi, "Swiss firms narrowly avoid 'Responsible Business' liability as vote divides nation" (29 November 2020), online: *Reuters* <www.reuters.com/article/idCAKBN2890EM?edition-redirect=ca>.
[977] Business & Human Rights Resource Centre, "Dutch Senate votes to adopt child labour due diligence law" (14 May 2019) online: *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/latest-news/dutch-senate-votes-to-adopt-child-labour-due-diligence-law/#:~:text=The%20%E2%80%9CChild%20Labour%20Due%20Diligence,investigation%20and%20plan%20of%20action.>.
[978] Child Labour Due Diligence Act, Gazette 2019, 401 (24 October 2019), art 3.2, online: Official Gazette of the Kingdom of the Netherlands <zoek.officielebekendmakingen.nl/stb-2019-401.html> [*Child Labour Due Diligence*].
[979] *Ibid*, art 5.1.
[980] *Ibid*.
[981] Allen & Overy, "Mandatory human rights due diligence laws: the Netherlands led the way in addressing child labour and contemplates broader action" (2 September 2020) online: *Allen & Overy* <www.allenovery.com/en-gb/global/news-and-insights/publications/mandatory-human-rights-due-diligence-laws-the-netherlands-led-the-way-in-addressing-child-labour-and-contemplates-broader-action>.
[982] *Child Labour Due Diligence*, *supra* note 978, arts 7, 9.

It is pertinent to clarify that the legislation did not establish a direct civil cause of action for third parties to bring a claim against the corporation.[983] Victims or any stakeholder can complain with evidence of child labor to a regulatory body, and this regulatory body has not been decided yet.[984] The corporation will have 6 months to find a solution and in the event of failure to do, the regulatory body will act as a mediator to deal with the matter.[985] The regulator will direct the corporation to take necessary steps if the regulator finds that the corporation is in breach of the statute.[986] If the corporation does not abide by the regulator's orders within a limited time, the corporation will have to pay significant fines, and in the event of repeated fines, directors can face up to two years of imprisonment.[987]Although the statute does not provide victims of child labour a new avenue to directly sue the corporation, the vigorous sanctions, which for the very first time include criminal penalties, should ensure that corporations follow the law.[988] From the text of the statute, it seems that Netherlands has devised a strong enforcement mechanism but it is yet to be seen how effective the statute will be in combatting child labour in the supply chain of multinational corporations.[989] The statute will come into force in 2022 providing corporations ample time to closely look into their supply chain.[990]

F. <u>European Union</u>

The EU Commissioner announced in a webinar in April 2020 that the Commission will present a legislative proposal on mandatory human rights and due diligence in 2021.[991] In March 2021, European Parliament voted for new mandatory law regarding human rights and environmental

[983] Allen & Overy, *supra* note 981.
[984] *Child Labour Due Diligence*, *supra* note 978 at art 3.2.
[985] *Ibid*, art 3.4.
[986] *Ibid*, art 3.
[987] *Ibid*, art 7.
[988] Allen & Overy, *supra* note 981.
[989] *Ibid*.
[990] *Ibid*.
[991] Responsible Business Conduct, "European Commission promises mandatory due diligence legislation in 2021" (29 April 2020), online: <responsiblebusinessconduct.eu/wp/2020/04/30/european-commission-promises-mandatory-due-diligence-legislation-in-2021>.

standards.[992] Previously, in 2019, European Commission had conducted an extensive study on due diligence which recognized that voluntary initiatives by companies and soft law regulatory measures have not been sufficient in preventing human rights violations in their supply chains, and hence, confirmed that a mandatory law for all EU companies will provide redress.[993] The study also found that some large multinational corporations are in support of mandatory human rights due diligence.[994] One harmonized law will provide the EU companies with legal certainty, which the majority of companies (75.37%) in the survey believed will be beneficial to them because companies are increasingly facing different legal risks and lawsuits in different countries.[995] Companies will have more leverage when negotiating with other companies in the supply chain if there is a mandatory law requiring due diligence.[996]

The survey included opinions of many stakeholders including companies of all sizes, business associations and industry organizations, civil society organizations, trade unions and more.[997] Stakeholders were mostly of the view that the new legislation should be based on a standard of care and should not be some procedural criteria, which has been previously seen to have been fulfilled as a "tick box" exercise.[998] At the same time, stakeholders also hoped that a company would be able to avoid liability by demonstrating that it had undertaken the legally binding due diligence requirements.[999] It is not surprising that civil society organizations and industry organizations have opposing views on mandatory due diligence, with the former in favor and

[992] European Parliament, "European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability" (10 March 2021), online: *European Parliament* <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html#title2> [Recommendations].
[993] European Commission, "Study on due diligence requirements through the supply chain Final Report" (January 2020) at 218-225, online: *Publications Office of European Union* <op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>.
[994] *Ibid* at 142.
[995] *Ibid* at 142-144.
[996] *Ibid* at 17.
[997] *Ibid* at 44.
[998] *Ibid* at 17.
[999] *Ibid.*

the latter disapproving it.[1000] Multinational companies did not have the same views as industry organizations, because companies were on the side of introduction of legal mechanism, even though it was hard to see agreement on the details of liability or enforcement methods.[1001]

The EU Parliament Committee on Legal Affairs published its own Draft Report in September 2020 and provided its recommendations to the European Commission with the request to formulate a legislative proposal.[1002] In March 2021, EU Parliament updated and published its Recommendations.[1003] The Draft Report and Recommendations indicate what the European Parliament might pass as new legislation but it is yet to be seen which provisions ultimately succeed in becoming the law. It has been indicated that the scope of the draft directive is very wide.[1004] In order to keep the discussion brief, I have focused on the requirements related to human rights and avoided environmental standards and other related issues.

Article 2 of Draft Report of 2020 mentioned that it will cover all companies in the EU.[1005] However, the Recommendations of 2021 provide that it will apply to large EU companies, and all publicly listed small and medium-sized companies, as well as high-risk small and medium-sized companies.[1006] According to the Recommendations it will also apply to non-EU companies (large companies, publicly listed small and medium-sized companies, high-risk small and medium-sized companies) doing business in the EU.[1007] Unlike the French and German legislation which apply to only larger corporations, the upcoming EU legislation will

[1000] *Ibid.*
[1001] *Ibid.*
[1002] European Parliament Committee on Legal Affairs, "Draft Report" 2020/2129(INL (11 September 2020) online (pdf): <www.europarl.europa.eu/doceo/document/JURI-PR-657191_EN.pdf> [Draft Report].
[1003] Recommendations, *supra* note 992.
[1004] Marlen Vesper-Gräske & Iris Hammerschmid "EU mandatory supply chain due diligence – European Parliament publishes draft directive" (16 October 2020) *online: Freshfileds Bruckhaus Deringer* <sustainability.freshfields.com/post/102gicn/eu-mandatory-supply-chain-due-diligence-european-parliament-publishes-draft-dir> [Vesper-Gräske, "EU mandatory supply chain due diligence"].
[1005] Draft Report, *supra* note 1002 at art 2.
[1006] Recommendations, *supra* note 992, arts 2.1-2.2.
[1007] *Ibid*, art 2.3.

likely cover high-risk small and medium-sized companies. The Draft Report notes that smaller companies who are likely to have less risk, may carry out narrower due diligence and hence, a proportional approach considering sector, size, business model can be useful.[1008]

The strategy is that EU Member States must formulate domestic laws to ensure that companies carry out the due diligence regarding human rights, environment and governance risks.[1009] The text of the Recommendations now includes due diligence with respect to "potential and actual" adverse human rights impact, which was absent in the Draft Report.[1010] The requirements are similar to those in UNGPs, except that the law will be mandatory in nature. The due diligence requirements will comprise of identifying and assessing whether the company's operations and business relationship "cause or contribute to or are directly linked" to any "potential or actual adverse impact".[1011] It seems the Recommendations have tried to impose a wide responsibility because the text of the Draft Report was confined to human rights "risks".[1012] If a company finds that it has not caused or contributed, or is not directly linked to potential or adverse human rights impacts, then it must publish a statement stating this, and must include its risk assessment as well, which can be used if any risk arises in the future.[1013] On the other hand, if a company finds that there are human rights issues, it must formulate and follow a due diligence strategy.[1014] The due diligence strategy must include the following: (a) the severity and urgency of the potential or actual adverse human rights impacts; (b) detailed information such as name, location etc.; (c) the steps that company will take to resolve the issues; (d) make a prioritization policy based on Principle 17 of UNGPs in case the company cannot deal with all the potential or actual adverse impacts at the same time.[1015] Companies

[1008] Draft Report, *supra* note 1002 at 7.
[1009] *Ibid*, art 4.1.
[1010] Recommendations, *supra* note 992 at art 4.1.
[1011] *Ibid*, art 4.2
[1012] Draft Report, *supra* note 1002 at art 4.2.
[1013] Recommendations, *supra* note 992 at art 4.3.
[1014] *Ibid*, art 4.4.
[1015] *Ibid*.

must also make sure that their business strategy and policies align with their due diligence strategy.[1016] Further, subsidiaries must follow the due diligence strategy if the parent company mentions the subsidiaries in the parent's due diligence strategy.[1017] Furthermore, companies must undertake value chain due diligence which is proportionate to "the likelihood and severity of their potential or actual adverse impacts".[1018]

Another notable point addressed in the Recommendations is that parent companies must ensure that their business relationships (subsidiaries and suppliers, sub-contractor etc. directly linked to the company's business) have human rights policies that are in line with their due diligence strategy.[1019] The suggested methods to do this are framework agreements, contractual clauses, codes of conducts and independent audits.[1020] Parent companies will have to regularly verify that their suppliers and subcontractors continue to uphold these responsibilities.[1021] The Draft Report mentions that the EU Commission will publish non-binding practical guidelines to aid the companies to satisfy the due diligence requirements in the directive.[1022]

The sanctions described in the Recommendations, although not sufficiently detailed at this stage, are essentially what add the mandatory element to the due diligence mechanism. Article 18 directs the Member States of EU to formulate sanctions that "shall be effective, proportionate and dissuasive" taking into account the severity and repetition of infringements.[1023] Some suggestions mentioned in the Recommendations are fines depending on the company's turnover; temporary or indefinite exclusion from public procurement, state aid, public support schemes; and seizing commodities.[1024] The Draft Report 2020 had

[1016] *Ibid*, art 4.5.
[1017] *Ibid*, art 4.6.
[1018] *Ibid*, art 4.7.
[1019] *Ibid*, art 4.8.
[1020] *Ibid*.
[1021] *Ibid*, art 4.9.
[1022] Draft Report, *supra* note 1002 at art 16.1.
[1023] Recommendations, *supra* note 992 at art 18.1.
[1024] *Ibid*, art 18.2

suggested that if a company repeatedly breaches the rules "intentionally or with serious negligence" then it will constitute as a criminal offence.[1025] However, it seems that the EU Parliament chose to leave out criminal liability in their 2021 Recommendations. The willingness to impose criminal liability goes further than the current French and German legislation as both countries have stopped at civil liability and administrative fees.[1026]

Regarding civil liability, the Recommendations explain that companies will not be absolved from any liability under domestic law of the country by only upholding its due diligence responsibilities.[1027] EU Member States must have a liability regime in its domestic legal system which can hold companies liable and provide remedies for the harm due to potential or actual adverse human rights impacts.[1028] However, companies will not be liable if they can prove that that they undertook the due care in the EU directive to avoid the human rights violation or the violation would have taken place even if all due care were taken.[1029]

The EU Parliament has addressed the practical need of keeping an eye on companies. Member States of EU must have "competent authorities" to investigate whether companies are indeed following the due diligence requirements, which include scenarios where companies have stated that they have not faced any potential or actual adverse impacts.[1030] If there is a possibility of irreparable harm resulting from failure to comply with the directive, such an authoritative body can order the company to take specific measures and even order temporary suspension of ongoing business tasks.[1031]

[1025] Draft Report, *supra* note 1002, art 19.
[1026] Vesper-Gräske, "EU mandatory supply chain due diligence" *supra* note 1004.
[1027] Recommendations, *supra* note 992 at art 19.1.
[1028] *Ibid*, art 19.2.
[1029] *Ibid*, art 19.3.
[1030] *Ibid*, art 13.1.
[1031] *Ibid*, art 13.6.

One hopeful element in the Draft Report is that it states that, regarding access to remedy for victims, it wants EU courts to extend its jurisdiction to hear business-related civil claims against EU companies for alleged human rights violations caused within their value chain which includes suppliers, sub-contractors and others.[1032] If this recommendation is enacted it would potentially include harms in developing countries caused by subsidiaries of parent corporation.[1033] The Draft Report also suggests that it is imperative to introduce a *forum necessitates* in EU law, recognizing that victims often do not get any access to justice.[1034] Addressing the practical reality of victims being unable to get justice in their home country, the Draft Report suggests that victims should be able to choose "a legal system with human rights standards", and this could be the country where the headquarters of the parent company is situated.[1035] These suggestions if implemented, could create a new avenue for remedy for victims who previously were deprived of any route towards justice.

It will be clear in the future which of these provisions become a part of the legislative proposal in 2021, and eventually the EU legislation. The EU envisages that in the future, there will be "a global standard for responsible business conduct".[1036] The recent steps taken by EU to establish binding legislation for EU companies is evidence of the necessity to regulate multinational companies for actions they commit abroad. Taking inspiration from this ongoing monumental development in EU law, Canadian courts should not shy away from imposing liability on Canadian parent corporations for alleged abuse of their subsidiaries on foreign soil.

[1032] Draft Report, *supra* note 1002, at 8, s 14.
[1033] Suzanne Spears and Camille Leroy, "A first step towards EU-wide legislation on mandatory human rights due diligence" (29 October 2020), online: *Allen & Overy* <https://www.allenovery.com/en-gb/global/news-and-insights/publications/a-first-step-towards-eu-wide-legislation-on-mandatory-human-rights-due-diligence#:~:text=The%20concept%20of%20mandatory%20supply,the%20EU%20level%20in%202020.&text=The%20EP%20Draft%20Directive%20would,Human%20Rights%20(the%20UNGPs).>.
[1034] Draft Report, *supra* note 1002 at 8, s 14.
[1035] *Ibid* at 8, s 15.
[1036] *Ibid* at 11, s 9.

G. United States

For the very first time in the US, a draft bill seeking comprehensive human rights information disclosure called the Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019 (CHRRA Act) was introduced in the US House of Representatives in July 2019.[1037] It has not been passed by the Senate yet. All publicly listed corporations that have to file annual disclosures with US Securities and Exchange Commission (SEC) are under the ambit of this bill.[1038] Corporations must annually identify human rights risks and impacts in both their own operations and those in their value chain.[1039] Corporations must rank these risks and impacts depending on how severe they are, having regard to the gravity and extent of the risks and impact, and the challenges in resolving the harm.[1040] Furthermore, corporations have to add a human rights section in their annual report.[1041] This must include information about the supply chain, description of the annual analysis of human rights risk and impact, point out the steps taken by the corporation to resolve the risks and impact, and explain the measures the corporation has taken to stop the risks.[1042] Even though corporations can be liable for not following the human rights due diligence, this legislation will not create liability for the human rights violations and the victims cannot bring a claim under it.[1043] One praise worthy point is that US corporations will have to conduct the due diligence not only for its own activities but also the entire value chain.[1044] The term "value chain", includes both downstream business

[1037] Business & Human Rights Resource Centre, "USA: Discussion draft of mandatory human rights disclosure legislation introduced in US Congress" (9 August 2019), online: *Business & Human Rights Resource Centre* <www.business-humanrights.org/en/latest-news/usa-discussion-draft-of-mandatory-human-rights-disclosure-legislation-introduced-in-us-congress/>.
[1038] Draft Corporate Human Rights Risk Assessment, Prevention, and Mitigation Act of 2019, 116th Congress, 1st Sess at s 3, online (pdf): <financialservices.house.gov/uploadedfiles/bills-116pih-corphuman.pdf> [Draft Corporate Human Rights Risk Assessment].
[1039] *Ibid.*
[1040] *Ibid.*
[1041] *Ibid.*
[1042] *Ibid.*
[1043] Amal Bouchenaki, Benjamin Guthrie and Antony Crockett, (25 July 2019), "Mandatory human rights due diligence on the cards in the US?" online: *Herbert Smith Freehills* <www.herbertsmithfreehills.com/latest-thinking/mandatory-human-rights-due-diligence-on-the-cards-in-the-us>.
[1044] *Ibid.*

partners such as suppliers and subcontractors, and upstream business partners which can be any company that gets the products or services except for consumers for personal use.[1045]

The bill is under review by different committees, and it is possible that it may fail altogether or the current provisions may change significantly, making it less stringent.[1046] The CHRRA Act notes the necessity of a legislation for availability of proper information, so that both investors and consumers may avoid inadvertently promoting human rights violations by engaging with public corporations involved in human rights abuse.[1047] In the backdrop of the US's general reluctance to impose stronger non-financial reporting obligations, it is hoped that even if CHRRA Act is not passed, a new bill with requirements akin to the CHRRA Act will be formulated in the future.[1048] Similar suggestions have already been made in international instruments such as UNGPs, OECD Guidelines for Multinational Enterprises among others.

1. Alien Tort Statute

It is crucial to discuss the rise and fall of Alien Tort Statute (ATS) litigation because it is likely that similar arguments will be drawn into Canadian cases. Canadian courts may consider ATS when deciding on the issue of 'policy consideration' regarding establishing a duty of care in *Choc*. The evolution of ATS has been like a roller coaster ride. After being almost left untouched for many years, the judiciary started using the statute frequently. However, recently, the US Supreme Court halted its widespread use with significant limitations. The ATS gives original jurisdiction to federal courts to hear civil lawsuits brought by a non-US citizen for torts committed in violation of the law of nations (*i.e.* international law) or a treaty of US.[1049] It is important to note that ATS is a jurisdictional statute and it does not expressly create any

[1045] *Ibid.*
[1046] Maria Piontkovska, "All Roads Lead to Corporate ESG Disclosures" (14 January 2020), online: *Global Supply Chain Compliance* <supplychaincompliance.bakermckenzie.com/2020/01/14/update-on-the-corporate-human-rights-risk-assessment-act>.
[1047] Draft Corporate Human Rights Risk Assessment, *supra* note 1038 at 4.
[1048] Maria Piontkovska, *supra* note 1046.
[1049] 28 USCS § 1350.

independent cause of action.[1050] ATS was passed in 1789.[1051] At that time, there were three main offences regarding international law that ATS was probably supposed to cover as identified in Blackstone.[1052] These were violation of safe conducts, infringement of ambassadors' rights, and piracy.[1053]

Initially, this statute was barely used. To be precise, ATS was invoked only twice in the 18th century and just once in the next 167 years.[1054] The very first case where a claim was brought under ATS for human rights violations was in 1980s in *Filartiga v Pefia-Irala*[1055]. The plaintiffs, citizens of the Republic of Paraguay who applied for political asylum in US, brought a claim and sought damages alleging that the defendant, another citizen of Paraguay in the US on a visitor's visa, had caused the death of the plaintiff's son's by torture in Paraguay few years earlier.[1056] It was held that the federal court had jurisdiction under ATS. The court found that torture violated norms of international law of human rights.[1057] The court specified that the constitutional basis for ATS was law of nations, *i.e*. international law and this was always a part of the federal common law.[1058] The court mentioned that it was not exceptional for courts to hear a tort claim which arose outside its own territorial jurisdiction.[1059] The court emphasized that in the twentieth century the international community realized how dangerous it was to disregard human rights.[1060] This landmark case led the way for future claims related to human rights violations. After *Filtargia,* big groups of foreign plaintiffs were able to file cases against

[1050] *Kiobel v Royal Dutch Petro. Co.* (2013) 133 S. Ct. 1659 at 1660 [*Kiobel*].
[1051] *Ibid*.
[1052] *Ibid* at 1661.
[1053] *Ibid*.
[1054] *Ibid* at 1663.
[1055] *Filartiga v. Pefia-Irala* 630 F (2d) 876 (2nd Cir 1980).
[1056] *Ibid* at 878.
[1057] *Ibid* at 885.
[1058] *Ibid*.
[1059] *Ibid.*
[1060] *Ibid* at 890.

foreign corporations in the US under ATS for alleged human rights abuses in other countries.[1061]

The US Circuit Court of Appeals were torn when it came to imposing liability on corporations under ATS.[1062] The different courts of appeals had opposing views when it came to whether corporations can be held liable under ATS.[1063] Lower courts had often decided cases involving ATS without precisely ruling whether corporations could be held liable under ATS.[1064] Time and again, courts assumed corporate liability without further discussion on the matter, and sometimes courts had expressly mentioned that they assumed that corporations could be liable in such scenario.[1065]

Eventually, the US courts had to consider when and how they might find new enforceable international norms for bringing a claim under ATS. The US Supreme Court in 2004 in *Sosa v. Alvarez-Machain*[1066] decided that any new claim under ATS based on the current international law must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms".[1067] In deciding the standard, the court held that for new causes of action based on international law there must be violation of a "specific, universal and obligatory" norm.[1068] The court further explained that when deciding whether a norm is sufficiently definite to support a new cause of action, judiciary should consider the practical consequences of having that cause for future

[1061] Mara Theophila, "'Moral Monsters' under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute after *Kiobel v Royal Dutch Petroleum*" (2011), 79(6) Fordham L Rev 2859 at 2864.
[1062] *Ibid* at 2881.
[1063] *Ibid*.
[1064] *Ibid*.
[1065] *Ibid*.
[1066] *Sosa v. Alvarez-Machain*, (2004)542 U.S. 692 [*Sosa*].
[1067] *Ibid* at 724.
[1068] *Ibid* at 732.

claims.[1069] The court was vocal in highlighting that cases under ATS brought serious concerns about separation of powers and foreign relations.[1070]

The more restrictive approach of the US judiciary was seen in *Kiobel v Royal Dutch Petro. Co.*[1071] In *Kiobel* a group of Nigerian-born plaintiffs living in USA brought proceedings against Royal Dutch Petroleum, Shell Transport and Trading Company, and Shell Petroleum Development Company of Nigeria, alleging that these corporations aided the Nigerian government to commit acts that amounted to gross human rights violations.[1072] There, the defendant corporations were incorporated in the Netherlands, the United Kingdom and Nigeria, but not in the US.[1073] More specifically, the plaintiff alleged that those corporations assisted the Nigerian government in violent suppression of peaceful opposition of the expanded oil development project of that region because of its environmental effect.[1074] The plaintiffs alleged that Nigerian military and police beat, raped, killed and arrested residents, and destroyed or looted their property.[1075] The plaintiffs further alleged that the corporations actively aided, abetted the atrocities by providing food, transportation and also allowed the military force to use corporations' properties to stage grounds of attack.[1076] It was alleged that the defendant corporations aided and abetted the Nigerian government in stopping the local people from protesting against the defendant corporations' oil exploration and production in the area.[1077] After the alleged atrocities took place, the plaintiffs went to US where they received political asylum and became legal residents of US.[1078]

[1069] *Ibid*.
[1070] *Ibid* at 727-728.
[1071] *Kiobel*, *supra* note 1050.
[1072] *Ibid* at 1662.
[1073] *Ibid*.
[1074] *Ibid*.
[1075] *Ibid*.
[1076] *Ibid* at 1662-3.
[1077] *Ibid*.
[1078] *Ibid at* 1663.

The legal issue was whether the US federal court could adjudicate on human rights violations under the ATS in respect of the alleged violations occurred in Nigeria.[1079] The majority opinion of Court of Appeals in *Kiobel* was that ATS did not apply to international law violations by a corporation. Judge Cabranes placed reliance on mainly how international criminal tribunals restricted their jurisdiction to natural persons rather than corporations.[1080] Judge Leval was of the opinion that foreign corporations could be liable under ATS.[1081] Although Judge Leval agreed that international law does not impose civil liability on corporations, he was of the view that the question of whether corporation should be liable is actually for individual countries.[1082] The Court of Appeals in *Kiobel* essentially decided that US courts can never hold any corporation liable for international law violations under ATS.

The case went to the US Supreme Court, the highest court in USA. The Supreme Court of the US wanted to answer the question "Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States".[1083] As discussed above, previously, there had been some disagreement within the U.S. Circuit Courts of Appeals as to whether non-U.S. corporations could be held liable under the ATS in the US for violation of human rights committed abroad.[1084]

Ultimately, the Supreme Court of the United States declined jurisdiction on the ground that the customary international laws do not recognize liability of the corporations.[1085] Interestingly, in *Kiobel* the court reinforced the presumption against extraterritorial application of the US law including the ATS statute. According to this presumption, when a statute does not give clear

[1079] *Kiobel v Royal Dutch Petro. Co.,* 621 F.3d 111 at 117 (2nd Cir. 2013).
[1080] *Ibid* at 132-137.
[1081] *Ibid* at 183.
[1082] *Ibid*.
[1083] *Kiobel*, *supra* note 1050 at 1663.
[1084] Theophila, *supra* note 1061 at 2881.
[1085] Pena, *supra* note 3 at 16.

indication of extraterritorial application, it does not have such application.[1086] The court explained that this presumption served to protect against "unintended clashes between our laws and those of other nations which could result in international discord".[1087] The court further clarified that this presumption against extraterritorial application aids the court not to mistakenly interpret US law in a manner which was clearly not intended by political institutions.[1088] The court stressed how there is a greater risk of unwanted interference by courts in the conduct of foreign policy regarding ATS.[1089] The court also recognized that it is possible for Congress to indicate that it wants federal law to apply to actions taking place outside the US.[1090] The court explained that in order to rebut the presumption, the ATS must show "a clear indication of extraterritoriality".[1091] The plaintiffs argued that even if the presumption against extraterritoriality applied, the text, history and purpose of ATS rebut the presumption.[1092] However, the court stated that the text of ATS does not expressly or impliedly suggest extraterritorial reach.[1093] The court found the historical background of ATS does not rebut the presumption.[1094] The court emphasized that nothing suggested that ATS was formulated to make US a special forum which would enforce international norms.[1095] The court recognized that long ago US was embarrassed by its potential inability to give judicial remedy to foreign officials who suffered injuries in the US, such as offences committed against ambassadors.[1096] The court explained how ATS was in place so that US could provide a forum to resolve such matters in its courts.[1097] However, the court found that this historical context does not hint that

[1086] *Kiobel supra* note 1050 at 1664.
[1087] *Ibid*.
[1088] *Ibid*.
[1089] *Ibid*.
[1090] *Ibid* at 1665.
[1091] *Ibid*.
[1092] *Ibid*.
[1093] *Ibid* at1666.
[1094] *Ibid.*
[1095] *Ibid* at 1667.
[1096] *Ibid* at 1668.
[1097] *Ibid*.

Congress wanted federal common law under ATS to provide a cause of action for incidents that took place in another country.[1098] The court stressed that in order to overcome the presumption, a claim must touch and concern the territory of US with sufficient force to displace the presumption against extraterritorial application.[1099] The court pointed out that the entire incident in *Kiobel* occurred outside the US and concluded that mere corporate presence was not sufficient to overcome the presumption as many corporations are present in different countries.[1100] However, Anupam Chander observed that the connection requirement in effect could mean that the foreign corporations are not normally likely to fall under the ATS but the American corporations are more likely to satisfy the connection test.[1101]

If the court in *Choc* adopt the rationale of *Kiobel*, it would provide a certain degree of leeway to the corporations engaged in such atrocities. It would be very difficult to hold them accountable for their acts. On the other hand, it may be argued that although *Kiobel* disfavored bringing actions against the corporations for the atrocities committed abroad, it did not preclude such actions altogether.[1102] This implies that *Kiobel* does not stand for the proposition that the corporations cannot be held liable for the torts committed by its subsidiaries.[1103] It merely imposes a presumption against extraterritorial jurisdiction but does not indicate any absolute bar, and corporations do not have blanket immunity under ATS.[1104]

As far the potential impact of *Kiobel* in the final outcome of the *Choc* is concerned, it further appears that *Kiobel* involved proceedings in relation to corporations which were incorporated

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[1098] *Ibid*.
[1099] *Ibid* at 1669.
[1100] *Ibid*.
[1101] Anupam Chander, 'Unshackling Foreign Corporations: Kiobel's Unexpected Legacy' (2013) 107 American Journal of International Law 829 at 830.
[1102] Katie Redford, 'Commentary: Door Still Open for Human Rights Claims after *Kiobel'* (17 April, 2013) online: *SCOUTSblog* <www.scotusblog.com/2013/04/commentary-door-still-open-for-human-rights-claims-after-kiobel/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+scotusblog%2FpFXs+%28SCOTUSblog%29>.
[1103] *Ibid*.
[1104] *Ibid*.

in three separate jurisdictions, but not in the US, where the action was brought. The alleged incidents occurred outside US and the plaintiffs initiated proceedings in the US just because the plaintiffs subsequently moved to the US. As a result, they could not establish the real and substantial connection test in relation to the subject matter of the proceedings. On the other hand, in *Choc* actions if the rationale of the *Kiobel* is applied, it appears that it will not be much difficult for the plaintiffs to establish real and substantial connection between Hudbay and the alleged atrocities in Guatemala.

The US took an even more restrictive approach in the 2018 case *Jesner v Arab Bank*[1105]. In *Jesnser* it was held that foreign corporations may not be defendants in claims brought under the ATS.[1106] The court found that it was inappropriate for the judiciary to extend ATS liability to foreign corporations without any specific direction from the Congress because the court believes that legislature is in a better position to create new substantive legal liability.[1107] The court highlighted concerns related to the principle of separation of powers and foreign policy in explaining why they took a back seat in the matter.[1108]

The plaintiffs in this case were non-US citizens who were allegedly injured, captured or killed in Israel, the West Bank and the Gaza Strip by various terrorist acts.[1109] The plaintiffs claimed that a foreign bank, Arab Bank plc, financed or facilitated those terrorist activities by allowing money transfers to terrorist groups in the Middle East.[1110] The plaintiffs claimed that the terrorists received money through electronic transfers facilitated by currency clearances and bank transactions by the bank's New York offices.[1111] The plaintiffs claimed that the foreign corporation, Arab Bank, is liable under ATS for the conduct of its chairman and management

[1105] *Jesner, supra* note 779.
[1106] *Ibid* at 1389.
[1107] *Ibid* at 1390.
[1108] *Ibid*.
[1109] *Ibid* at 1393.
[1110] *Ibid*.
[1111] *Ibid*.

officials.[1112] Arab Bank was a massive financial institution in Jordon with branches all over the world.[1113]

Justice Kennedy found that at present international law did not extend civil or criminal liability to corporations or other artificial entities for violation of human rights.[1114] In reaching this conclusion, Justice Kennedy referred to how various charters of international criminal tribunals (such as the Charter for the Nuremberg Tribunal, and the Rome Statute of the International Criminal Court[1115]) limited their jurisdictional reach to natural persons only and did not extend their jurisdiction to include corporations.[1116] Hence, there was not any "specific, universal and obligatory" norm of corporate liability.[1117] To this, Justice Sotomayor responded critically, saying that this was only evidence for the fact that to date most countries "often focused on natural rather than corporate defendants".[1118] Justice Kennedy recognized that in US corporations are frequently liable for the conduct of employees and "it may seem necessary and natural" to hold corporations liable under ATS.[1119] He further understood that corporations should be liable for the crimes of their "human agents" but argued that international community did not take that step in the "specific, universal and obligatory" way as needed by *Sosa*.[1120]

On the other hand, Justice Sotomayor dissented arguing that Justice Kennedy misunderstood how international law worked when he enquired whether there is specific norm of corporate liability.[1121] She explained that international law imposed specific obligations that should tell how a country and private entities behave.[1122] These specific obligations involve prohibiting

[1112] *Ibid*.
[1113] *Ibid* at 1394.
[1114] *Ibid* at 1400.
[1115] Rome Statute, *supra* note 38.
[1116] *Jesner*, *supra* note 779 at 1400.
[1117] *Ibid*.
[1118] *Ibid* at 1423.
[1119] *Ibid* at 1402.
[1120] *Ibid*.
[1121] *Ibid* at 1420.
[1122] *Ibid*.

acts in violation of human rights, for example genocide, torture etc.[1123] According to her, in order to satisfy *Sosa's* specific norm requirement one should look at whether there is in international agreement regarding these prohibitions.[1124] According to Justice Sotomayor's interpretation, *Sosa* did not ask for international consensus about the way of enforcement of norm because customary international law did not dictate methods of enforcement.[1125] The specific way of enforcing an international law norm is actually left to individual countries.[1126] By way of example given by her, acts of genocide are prohibited by international law norms, and individual countries will decide who will be liable which can include both private and government entities.[1127]

Emphasizing the importance of upholding the principle of separation of power, Justice Kennedy strongly mentioned that the legislative branch, rather than the judicial branch, should be the one making the call of holding corporations liable under ATS, as the political branch has both the responsibility and the ability to make decisions with foreign-policy implications.[1128] Without any instruction from the Congress, Justice Kennedy found that it was not appropriate to extend liability to foreign corporations under the ATS.[1129] He explained that Congress might decide that foreign corporations might be liable under ATS under some preconditions so that the US can maintain good relationship with government of other countries.[1130]

Justice Kennedy explained that if US courts held foreign corporations liable under ATS, then other countries might hold US corporations liable in their courts in the same manner.[1131] This

[1123] *Ibid*.
[1124] *Ibid*.
[1125] *Ibid*.
[1126] *Ibid*.
[1127] *Ibid* at 1421.
[1128] *Ibid* at 1402.
[1129] *Ibid* at 1403.
[1130] *Ibid* at 1407.
[1131] *Ibid* at 1405.

would in turn deter US corporations from investing in the developing countries, which can provide a much-needed boost to the economies of those countries.[1132] Reminding readers that the ATS was formulated to promote harmony in international relations, Justice Kennedy pointed out that the ATS was being used to produce the exact opposite outcome because that case went on for 13 years and generated grave diplomatic tensions with Jordan, who is the US's ally in fighting terrorist activity of the Islamic State in Iraq and Syria (ISIS).[1133] Jordan had expressed its disapproval regarding the case, claiming it is offensive to a sovereign country.[1134] This shows that the judiciary is not best equipped to take decisions regarding corporate liability under ATS because one needs to take into account serious policy considerations.[1135]

Justice Alito referred to the importance of separation of powers as well. Justice Alito pointed out that, even though federal courts have the authority to create a new cause of action, a cause of action against foreign corporations as defendants should not be created, because such a cause of action against foreign corporations would initiate diplomatic friction, whereas ATS's main objective was to avoid diplomatic friction.[1136] Justice Alito also mentioned that customary international law did not generally require corporate liability, which meant that another country would not complain about it.[1137]

Justice Gorsuch was of the view that no new cause of action under ATS should be created because, applying the *Sosa* guideline[1138], the "practical consequence" of making such law would involve the court in matters related to foreign affairs and national security, which were better suited for political institutions.[1139] Justice Gorsuch believed that the ATS required a

[1132] *Ibid*.
[1133] *Ibid* at 1406.
[1134] *Ibid* at 1407.
[1135] *Ibid*.
[1136] *Ibid* at 1392.
[1137] *Ibid*.
[1138] *Sosa*, *supra* note 1066 at 732 (there must be violation of a specific, universal and obligatory norm).
[1139] *Jesner*, *supra* note 779 at 1392.

domestic defendant and pointed out in that case one foreigner brought a case against another foreigner over the meaning of international norms.[1140] Justice Thomas was of the same view as well.[1141]

The only alleged connection to US was the transactions at the New York branch of Arab Bank.[1142] However, the Court of Appeals did not address this issue and the Supreme Court refused to answer whether those allegations were enough to satisfy the "touch and concern" test set by *Kiobel*.[1143] It is likely that in *Jesner*, the alleged conduct of the defendant corporation did not have sufficient connection with the US. However, the same cannot be said about activities of a wholly owned subsidiary of a Canadian corporation like in the scenario in *Choc*, where the Canadian corporation itself was allegedly sufficiently involved in the decision making of the subsidiary who committed the human rights violations.

Justice Sotomayor in her judgment drew attention to the fact that the language of the ATS clearly limits the plaintiffs to aliens (non-US citizens).[1144] But it does not restrict the category of defendants.[1145] Justice Sotomayor examined other sections of the same statute and pointed out that Congress restricted the category of defendant in other places, and this indicated that Congress intentionally did not put any limitation for defendants under the ATS.[1146] The ATS also applied to ships for the offence of piracy even though ships were not natural persons.[1147] Justice Sotomayor believed that modern day "pirates" were the ones who commit torture and other types of human rights abuses.[1148] She explained that the US should not only provide remedy when US citizens violate international law, but that the US should also prevent itself

[1140] *Ibid*.
[1141] *Ibid* at 1408.
[1142] *Ibid* at 1406.
[1143] *Ibid*.
[1144] *Ibid* at 1426.
[1145] *Ibid*.
[1146] *Ibid*.
[1147] *Ibid* at 1427.
[1148] *Ibid.*

from acting as "a safe harbor for today's pirates".[1149] Justice Sotomayor noted that forbidding foreign corporate liability is akin to using "a sledgehammer to crack a nut" because a blanket ban of this sort was a disproportionate response to a significant problem, which should rather have a case-specific solution.[1150] By preventing any ATS suit against foreign corporations, the US courts safeguard the corporations, no matter how heinous the human rights abuses committed by the foreign corporations.[1151] Justice Sotomayor mentioned that the executive branch, of both the Obama and Trump administrations, had asked the court at two different times to hold corporations liable under the ATS.[1152]

It is important to note that US courts have largely treated corporations as "natural persons" by giving corporations many of the same rights and responsibilities as a person.[1153] Hence commentators have pointed out that, as US courts have given corporations many rights, corporations should also be subject to more responsibilities.[1154] This sort of blanket ban regarding foreign corporate liability has been criticized by most academics. In US articles, reference has been made to *Choc* and *Nevsun* highlighting that the upcoming norm should be to hold corporations liable for atrocities committed abroad, and there have been repeated suggestions from commentators that US courts should hold corporations in the same manner.[1155]

It has been suggested that the courts or Congress should create an exception under the ATS for suing foreign subsidiaries of US domestic corporations regarding the restrictions imposed by the Supreme Court of US in *Kiobel* and *Jesner*, because those barriers significantly hinder the

[1149] *Ibid* at 1428.
[1150] *Ibid* at 1431.
[1151] *Ibid* at 1436.
[1152] *Ibid* at 1431.
[1153] Theophila, *supra* note 1061 at 2861.
[1154] *Ibid*.
[1155] Anderson, *supra* note 759 at 1006.

victims from getting access to justice.[1156] While *Kiobel* requires claims to "touch and concern" the US to rebut the presumption of extraterritoriality, *Jesner* further prevents any foreign corporation from being sued under the ATS, even if the foreign corporation was wholly owned by a US corporation.[1157] The practical result of these barriers is that "almost no harms to aliens caused by corporations will be judiciable in US courts".[1158] Hence, it has been proposed that the judiciary or the legislative branch of the US government should create an exception for the foreign subsidiaries of domestic corporations.[1159]

H. Modern Slavery Legislation

Apart from the state-centric developments discussed above, the modern slavery legislations in different countries show the need to better regulate corporate behaviour. The International Labour Organization of the United Nations estimated that in 2016 around 40.3 million people around the world, including children, were victims of some type of modern slavery.[1160] It is high time for the developed nations to find out exactly where the abuses are taking place in the supply chains of products used by the developed economies, and take measures to put an end to these human rights atrocities.[1161]

Many countries have disclosure or reporting requirements to deal with specific heinous human rights issues. For example, UK's *Modern Slavery Act 2015* (MSA) focuses on eradicating slavery, servitude, forced labor, trafficking and other similar practices.[1162] Under this statute, corporations must make an annual slavery and human trafficking statement, which enumerates the steps being taken to ensure no slavery or human trafficking is taking place in the

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[1156] *Ibid* at 998.
[1157] *Ibid* at 997.
[1158] *Ibid* at 1027.
[1159] *Ibid*.
[1160] International Labour Office (ILO) & Walk Free Foundation, "Methodology of the global estimates of modern slavery: Forced labour and forced marriage" (2017) at 9, online (pdf): <www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_575479.pdf>.
[1161] Kate Hodal, "One in 200 people is a slave. Why?" (25 February 2019), online: *The Guardian* < www.theguardian.com/news/2019/feb/25/modern-slavery-trafficking-persons-one-in-200>.
[1162] *Modern Slavery Act 2015* (UK), s 1 online: <www.legislation.gov.uk/ukpga/2015/30/contents>.

corporation's supply chain.[1163] However, the independent review of the MSA highlighted its ineffectiveness, explaining how corporations have indulged in a mere tick-box exercise, and alarmingly, approximately 40% of the required companies did not comply with the reporting requirement at all.[1164] The enforcement of the reporting requirement of MSA is weak because it is voluntary. The available sanctions are injunction and specific performance but no injunction has ever been issued to companies that failed to comply.[1165] Stronger sanctions, such as fines and director disqualification, have been recommended.[1166]

Taking inspiration from the UK, Australia has enacted similar legislation called the Australian Modern Slavery Act 2018 but unlike the UK, it imposes mandatory reporting requirement.[1167] Recently in 2020, the UK government expressed that it wishes to make the reporting topics mandatory because currently corporations have discretion on whether they want to include all the information suggested in the statute.[1168] The US has similar legislation called the California Transparency in Supply Chains Act[1169] which requires retailers and manufacturers in California with $100 million or more in global revenue to disclose their efforts to eradicate human trafficking in their supply chains.[1170] However, there is a lack of specific guidelines, and the statute is a lax in the sense that corporations do not receive any penalty in the event of non-compliance.

[1163] *Ibid*, ss 54(1), 54(4).
[1164] Secretary of State for the Home Department, "Independent Review of the Modern Slavery Act 2015: Final Report" (May 2019) at 14, online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf>.
[1165] *Ibid* at 43.
[1166] *Ibid*.
[1167] *Modern Slavery Act* 2018 (Australia), 2018/153, ss 13-16 online: <https://www.legislation.gov.au/Details/C2018A00153>.
[1168] Home Office, "Transparency in supply chains consultation Government response" (22 September 2020) at 6 online (pdf): <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/919937/Government_response_to_transparency_in_supply_chains_consultation_21_09_20.pdf>
[1169] California Transparency in Supply Chains Act, S.B. 657, 2010 Cal. Stat. 556 (codified at CAL. CIV. CODE § 1714.43).
[1170] *Ibid*, s 1714.43 (a) (2) (A).

Some countries like the UK, the US and Australia have imposed statutory reporting requirements of varying strengths, whereas others like France, Netherlands and Germany have taken a step forward by making statutory requirements for corporations to create human rights due diligence plans. The reporting requirements only focus on disclosure, whereas due diligence plans include positive measures to stop and prevent the human rights violations.[1171]

Canada does not currently have any modern slavery disclosure legislation. However, Bill S-216, An Act to enact the Modern Slavery Act and to amend the Customs Tariff, was introduced in the Canadian Senate in October 2020.[1172] In March 2021, Bill S-216 was adopted at second reading and was referred to Standing Senate Committee on Banking, Trade and Commerce for further scrutiny.[1173] The bill shows Canada's willingness to participate in the global battle against both child labour and forced labour in the supply chain of big corporations by prescribing reporting requirements.[1174]

The bill imposes an obligation to make an annual modern slavery report.[1175] The bill mandates the certain information that corporations must include in the reports. This includes information with respect to:

(a) the entity's structure and the goods that it makes or imports into Canada;

(b) its policies regarding forced and child labour;

[1171] Meaghan Farrell & Carole Gilbert, "Bill S-216: Canada moves forward to combat modern slavery" (19 November 2020), online: *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en-ca/knowledge/publications/a160af52/bill-s-216-canada-moves-forward-to-combat-modern-slavery?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration>.

[1172] Bill S-216, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 2nd Sess, 43rd Parliament, 2020 online: *Parliament of Canada* <https://www.parl.ca/DocumentViewer/en/43-2/bill/S-216/first-reading> [*Bill S-216*].

[1173] "Bill S-216, An Act to enact the Modern Slavery Act and to amend the Customs Tariff", 2nd Reading, *Senate Debates*, 43-2, vol 152 issue 34 (30 March 2021) online: *Senate of Canada* <https://sencanada.ca/en/content/sen/chamber/432/debates/034db_2021-03-30-e?language=e#75>.

[1174] Bill S-216, *supra* note 1172, s 2.

[1175] *Ibid*, s 7(1).

(c) the operations of the entity that carry a risk of forced or child labour being used and the measures it has taken to evaluate and resolve that risk;

(d) steps taken to redress forced or child labour; and

(e) the training given to employees on forced and child labour.[1176]

Transparency is emphasized by requiring the report to be made publicly available by setting it out in a "prominent place" on the corporation's website.[1177] This ensures that consumers and investors will have the information available at their fingertips. Furthermore, government will also have a publicly accessible electronic registry containing all the reports.[1178]

The bill applies to entities (corporation or a trust, partnership or other incorporated organization) that produce or sell goods in Canada or abroad, and import goods to Canada that were produced abroad.[1179] Entities that directly or indirectly control another entity involved in such operations will also fall under the ambit of this bill.[1180] The bill has defined "control" in a wide manner. By way of example, if Corporation A controls Corporation B, then A will be deemed to control subsidiaries of B, and also any subsidiaries of the subsidiaries of B.[1181] Legislators have tried to broaden the application of the bill to include most entities involved in the complicated business structure of a multinational corporation. During the Parliamentary debate, it was stressed that the bill focuses on corporations "that have direct or indirect control over other entities involved in the production chain".[1182] This bill has been essentially described as "supply chain transparency legislation" during the second reading stage.[1183]

[1176] *Ibid*, s 7(2).
[1177] *Ibid*, s 8.
[1178] *Ibid*, s 9.
[1179] *Ibid*, ss 2, 5.
[1180] *Ibid*, s 6.
[1181] *Ibid*, s 6(2).
[1182] "Bill S-216, An Act to enact the Modern Slavery Act and to amend the Customs Tariff" 2nd reading, *Senate Debates*, 43-2, vol 152, issue 10, (5 November 2020) at 1800 (Senator Miville-Dechene) online: *Senate of Canada* <https://sencanada.ca/en/content/sen/chamber/432/debates/010db_2020-11-05-e?language=e#68> [Senator Miville-Dechene].
[1183] *Ibid.*

If a corporation fails to provide modern slavery reports, the Minister of Public Safety and Emergency Preparedness may order any necessary measure to ensure compliance.[1184] Unlike its American, British and Australian counterparts, the Canadian bill is backed by stronger sanctions to ensure that corporations comply with the reporting requirements. Failure to comply with the requirement of the statute will result in a criminal offence, and a fine of maximum $250,000 can be imposed.[1185] If a person or entity makes a false or misleading statement or information, they will face criminal conviction, in addition to a fine of maximum $250,000.[1186] Directors, officers or agents of the corporation involved in the act can be found liable, even if the corporation has not been prosecuted or convicted.[1187] Furthermore, when a defendant corporation is facing a criminal trial because it failed to make the report or publish it, as required by the statute, it will be sufficient to get conviction by providing proof that an employee or agent committed the offence unless the defendant can show that it exercised due diligence to prevent its commission.[1188] It can be seen that the Canadian bill has more "teeth" when compared with the modern slavery legislation of UK and Australia.[1189]

It is sincerely hoped that Bill S-216 will result in the Modern Slavery Act. The previous identical bills, Bill S-211[1190] and Bill C-423[1191] did not succeed. However, it is likely that Bill S-216 will reach its passage with the support of the All-Party Parliamentary Group to End Modern Slavery and Human Trafficking, which includes members from the Liberal, Conservative, and NDP parties.[1192] During the second reading stage of Bill-S-216, Hon. Julie

[1184] *Bill S-216*, *supra* note 1172, s 14.
[1185] *Ibid*, s 16(1).
[1186] *Ibid*, s 16(2).
[1187] *Ibid*, s 17.
[1188] *Ibid*, s 18.
[1189] Senator Miville-Dechene, *supra* note 1182.
[1190] Bill S-211, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 1st Sess, 43rd Parliament, 2020 (First Reading).
[1191] Bill C-423, *An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff*, 1st Sess, 42nd Parliament, 2018 (first reading).
[1192] Farrell, *supra* note 1171.

Miville-Dechêne emphasized that this bill is about compassion for humanity and hence, it will hopefully go beyond the division of different parties.[1193]

In light of the modern slavery bill, Canadian multinational corporations should now actively evaluate whether there is any risk of modern slavery in their supply chains.[1194] Directors and officers involved in the decision-making process of multinational corporations, should be cautious when it comes to fulfilling the reporting requirements, because they can be held personally liable.[1195] Canadian parent corporations should also gain a thorough understanding of the steps in the manufacturing process of their subsidiaries in foreign jurisdictions.[1196] Corporations should also think about adding adequate policies against forced labour and child labour, if they have not already done so.

The introduction of BillS-216 near the end of 2020 and Supreme Court's judgment of *Nevsun Resources Ltd. v Araya et al* towards the beginning of the same year, show that both the Parliament and the court have strong desire to continue the battle against human rights atrocities committed abroad.

It appears that many countries have begun to develop their unique theories of holding corporations liable for transnational atrocities committed by their subsidiaries. The different approaches taken by these countries indicate that there is no universal resistance to find the corporations, or their subsidiaries liable, for their actions committed abroad.[1197] If the approaches of the countries are closely observed it can be seen that there are different prominent pathways to find liability of the corporations in such situations. These include both

[1193] Senator Miville-Dechene, *supra* note 1182 at 1750.
[1194] Farrell, *supra* note 1171.
[1195] *Bill S-216*, *supra* note 1172, s 17.
[1196] Farrell, *supra* note 1171.
[1197] Anderson, *supra* note 759 at 1014.

the due diligence method followed by France and Germany, and the duty of care approach followed by both by the UK and Canada.

CHAPTER 6: CONCLUSION

From the above discussion, it is apparent that there are two different methods of holding the corporations for their atrocities. The first approach is the voluntary, non-binding code of conduct. The second approach encompasses the formulation of various national and international regulations.

In recent times, there has been a significant increase in the voluntary practice nomenclature within the multinational corporations. Such an approach provides certain benefits to gain the acceptance and cooperation of those entities because it is not desirable that the corporations would engage in atrocities or human rights violations.[1198] In *Choc* court took into account the non-binding statements made by the corporate defendants as part of the analysis of the duty of care.[1199] This suggests that one approach may help the support the other.

Problems still occur despite various methods of voluntary standards implemented both across industries or by individual multinational corporations.[1200] It appears that non-binding voluntary codes have so far failed to address the realities of the sufferings and the adverse consequences of the extractive industries. They provide limited effective remedies for individual victims of the atrocities.

Strict home state regulation can be very effective in regulating corporations.[1201] Strict legislation can curb out the enforcement problems that significantly hinder the implementation of the voluntary methods.[1202] These methods open new possibilities in holding the corporations liable, as they open both legal and policy spaces of contestation of extractive industry activities.[1203]

[1198] Duffy, *supra* note 2 at 23.
[1199] *Choc*, *supra* note 5 at para 67-68.
[1200] Duffy, *supra* note 2 at 23.
[1201] Penelope Simons and Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (London/New York: Routledge, 2014) at 179.
[1202] *Ibid*.
[1203] Gathii & Ayanu, *supra* note 12 at 74.

There are consequences to strict home state legislations. Most of the extracting corporations operate their business abroad and typically the mines are situated in the developing and most of the least developed countries. Often, those countries have weak legal systems and lack effective control and supervision over the operation of corporations. Sometimes to attract foreign investment that purposively do not implement strict regimes.

Even if the countries provide strong home state regulations, the corporations operate their businesses through various other subsidiary corporations and in other foreign jurisdictions that make it practically impossible for citizens affected by the business operation to invoke such rights in the home state. At present, unlike USA, Canada does not have any legislation such as the Alien Tort Statute that allows the alien, *i.e.* nationals of foreign jurisdiction, to challenge violations of human rights. Although previously, there were some attempts by way of private members bills to import similar provisions into the Canadian jurisprudence, none of them were enacted. Further, the recent US decision of *Kiobel* and *Jesner* showed that the US courts restricted the application of the ATS. This would be a potential obstacle for any future implementation plans of a regime in Canada.

Choc indicates that corporations would be able to enjoy the benefits derived from the separate legal personality only if they respect the sanctity of the separation both in theory and practice.[1204] The attitude of the courts indicate that merely conducting business abroad by using a subsidiary corporation would not automatically absolve the potential liability of the parent corporation.[1205] For that, they need to implement a carefully structured foreign operations and act in a manner that do not dismantle the derived benefits of the foreign subsidiaries.[1206]

[1204] Alison Gray, Justin Lambert & David Wahl, "Potential Liability for Canadian Corporations with Foreign Affiliated Corporate Entities" (2014) 30 B.F.L.R. 147 at 152.
[1205] *Ibid.*
[1206] *Ibid.*

It is apparent that, as of the date of writing, Canada does not have any concrete legislation that would hold corporations liable for the atrocities committed by their subsidiary corporations operating abroad. The failure to properly regulate corporate activity may make Canada accountable under international law for violation of human rights committed by multinational corporations registered in its jurisdiction.[1207] As a result, it is thought that Canada should find solution by adopting domestic or indirect measures to effectively meet its goals of upholding international human rights obligations and duties, and also to prevent the violation of human rights.[1208] Moreover, while commenting on the larger issue of corporate accountability, Canadian Supreme Court Justice Ian Binnie observed that eventually the courts have to face up the fact that in any responsible legal system, people cannot be denied their right to a day in the court.[1209] If the only available court is in Canada, that is where the problem should be faced.[1210]

Irrespective of its final outcome, *Hudbay* is likely to have a significant impact on the Canadian jurisprudence. Among various interesting issues raised therein, the crucial one is the reliance on direct tort liability against the parent company rather than pleading vicarious liability.[1211] At present, it seems that primarily the plaintiffs could be able to establish direct liability. However, it will be interesting to see how the plaintiffs can establish direct liability against Hudbay at the trial.

As mentioned above, neither Bill C-300 and Bill C-354 were enacted. This alone can be seen as an indicator of Parliament's intention to oppose the extraterritorial jurisdiction of the Canadian courts.[1212] For example, Bill C-300 was defeated by a mere six votes.[1213] This narrow

[1207] Pena, *supra* note 3 at 4.
[1208] *Ibid*.
[1209] Public Radio International, 'Guatemalan Villagers Make Long Journey to Canada in Search of Justice' (3 December 2012), online <https://www.pri.org/stories/2012-12-03/guatemalan-villagers-make-long-journey-canada-search-justice>.
[1210] *Ibid*.
[1211] Nwapi, "Resources Extraction" *supra* note 8 at 134.
[1212] *Ibid* at 143.
[1213] *Ibid*.

margin indicates the division in Parliament about the appropriate corporate accountability measures.[1214] However, this division should not be interpreted as a determining factor in rejecting judicial approaches to corporate responsibility in extractive sector.[1215] Here, the lack of progress may not indicate government's intention to reject judicial actions in this regard.[1216] Moreover, both the bills were private members' bills, which were sponsored by the member of the Opposition.[1217] As a result, it is almost inevitable that such Bills would not be widely embraced by the majority party.[1218] This is mainly due to inherent difference of political ideology between the ruling party and the opposition. [1219] The lack of progress regarding specific legal provision in this area can be rather seen as a dilemma for the government in formulating the best approach as to how to hold the Canadian corporations operating abroad liable for these atrocities.[1220]

The final outcome of *Choc* could have significant impact on the overall extraction business of Canada. This is the first major case where proceedings brought against mining companies for this type of activity has been permitted to proceed to trial stage. Irrespective of the outcome of the case, it appears that the approach taken by the court at the motions stage may hopefully be sufficient to trigger corporations operating abroad to be more vigilant in assessing the risks associated with such choices in the future, including risk of legal liability. Moreover, they are likely to be more inclined to adhere to and promote due diligence activities, especially relating to the operation of the subsidiaries situated abroad. The preliminary approach taken by the Ontario Superior Court indicates a potential shift in the Canadian jurisdictional landscape.[1221] It seems that the courts may be more willing to pierce the corporate veil or use other techniques

[1214] *Ibid*.
[1215] *Ibid*.
[1216] *Ibid*.
[1217] *Ibid*.
[1218] *Ibid*.
[1219] *Ibid*.
[1220] *Ibid* at 144.
[1221] Gray, Lambert & Wahl, *supra* note 1204 at 147.

to ensure that justice is available in certain circumstances. One such circumstance exists where there is evidence that the corporation is trying to shirk or minimize its social responsibility by using the complex web of subsidiary entitles or through some other affiliated corporate entities. *Choc* provides a unique opportunity where the court can play an active role in ameliorating Canada's position in securing, protecting and promoting human rights and act as a state committed to the protection of international human rights.[1222] Courts of different jurisdictions are adopting various routes to finding liability, and academics are also trying to maneuver the existing legal principles in order to establish a coherent body of jurisprudence that adequately address the atrocities committed by corporations outside their "home" jurisdictions.[1223] Here, the courts need to establish a firm plank based on which stable jurisprudence may be created and developed.

The trial of *Choc* is still pending.[1224] However, the approach of the court at the motion-to-strike stage indicates that it has expanded the possibilities of novel claims to be brought in Canada. It is the first time that a Canadian court in a human rights case has accepted the possibility of civil liability of human rights violations of a parent company for the atrocities allegedly committed by its foreign subsidiary.[1225] The approach adopted by the court provided an important model when considering whether the parent is liable for the atrocities of its subsidiaries in certain circumstances.[1226] However, the approach does not automatically call for imposition of duty of care of the parent corporation merely because it purchased the subsidiary and is aware that the subsidiary is or may be engaged in operations that may cause harm to third parties.[1227] Here, something more will be required.[1228] For example, in *Choc*, the

[1222] Pena *supra* note 3 at 19.
[1223] Duffy, *supra* note 2 at 41-42.
[1224] See *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415 (CanLII), <https://canlii.ca/t/j4sjb> (plaintiffs were granted leave to amend the statement of claim).
[1225] Curran, *supra* note 748 at 441.
[1226] Skinner, *supra* note 718 at 1832.
[1227] *Ibid* at 1833.
[1228] *Ibid.*

court underlined the importance of various public commitments made by the parent company that dealt with the conduct applicable to the operations of its security guards and the corporation's subscription to the voluntary principles regarding security and human rights.[1229] The court considered these voluntary statements of the parent corporation as a factor in indicating a *prima facie* proximate relationship for the purposes of the law of negligence between Hudbay and the plaintiffs.

It will be interesting to see how the case is resolved in the trial.[1230] This is because it has the potential to provide another fascinating plank in the jurisprudence of imposing direct liability of parent company for the acts of the subsidiary.[1231] Finally, if the duty of care is found, it is going to have a significant impact on the mining and extractive industry of Canada and on other Canadian parent companies with foreign subsidiaries.[1232] In particular, the decision could have an immense impact on both the working conditions of the subsidiary and on parent subsidiary relationships.

In practice, it will be interesting to observe the extent to which the courts will be willing to recognize a novel duty based on the tort approach, especially given the strong policy reasons behind limited liability and the standard of duty of care expected from the corporations. By contemplating the potential liability of the parent company, the judges demonstrated that the concept of duty of care is very malleable standard that could enable them to take a leap and actually find a company liable.[1233] Even if the courts are willing to accept jurisdiction, they may face practical difficulties while assigning responsibility to corporations for human rights violations in their supply chain. This may include questions about the duty of care that

[1229] Mathilde Hautereau Boutonnet, "The Duty of Care of Parent Companies: A Tool for Establishing a Transnational Environmental Civil Liability" (2019) 16:1 Brazilian J of Intl L 289 at 294.
[1230] Warren, *supra* note 912 at 676.
[1231] *Ibid.*
[1232] *Ibid.*
[1233] Boutonnet, *supra* note 1229 at 293.

corporations have to their suppliers (and vice versa) , and about the precise degree of control or influence that is required to impose liability of the parent corporation.[1234] *Choc* promised a glimpse of the opening of the window for Canada as a likely forum of transnational human rights litigation.[1235] It is a first-of-its-kind decision and thus, it will likely be a constant reference point relating to any future case dealing with transnational human rights litigation against corporations in Canada.[1236]

Upon a careful review of *Choc*, and an exploration of other methods by which the parent corporations can be held accountable for atrocities at the subsidiary level, it appears that the contractual approach may provide an important supplement to the toolkit. It seems to be the least cumbersome, streamlined and direct approach to create enforceable obligations for them. Formulating liability on a contractual basis is devoid of the jurisprudential gaps that arise in other routes such as tortious or criminal liability. It appears that development of contractual jurisprudence in holding the corporations accountable for their atrocities may provide fruitful insights in effectively addressing the adverse human rights, safety, health or environmental aspects.

At present, the mechanisms through which the corporation can be held liable for their atrocities is not settled but it is certain that the approach taken by the courts in recent cases are having a practical effect on the business operation of the multinational corporations.[1237] Some Canadian law firms have addressed in their advisories what sort of activities could drag the multinational corporations to the court.[1238] For example, in its commentary Bennett Jones observed that the approach taken by the court in *Choc* marks a crucial reminder for the Canadian corporations

[1234] Pamplona & Ebert, *supra* note 951 at 7.
[1235] Nwapi, *supra* note 8 at 159.
[1236] *Ibid*.
[1237] Duffy, *supra* note 2 at 26.
[1238] *Ibid* at 40.

with foreign subsidiaries.[1239] The commentary further warns that the associated benefits of separate legal personality could be undermined if the parent corporation is directly involved in the operation of the foreign subsidiary, including developing its policies, speaking on its behalf and getting directly involved in its day-to-day activities.[1240] According to the commentary, the parent corporation will remain protected from the separate legal personality only when it observes it both theoretically and practically.[1241] Irrespective of the final outcome of the case, *Choc* marks a cautionary tale for the Canadian transnational corporations.[1242] Now, they will be under the impression that they will not be completely immune from liability for the atrocities committed by their subsidiaries operating abroad.

On another note, it appears that even if *Choc* succeeds, practically it will be very difficult, if not impossible, for the foreign victims to bring proceedings into the domestic court of the parent corporations. For instance, the Choc claims were initiated in 2013 and the discovery continued until 2018 and even at present the matter is pending for the trial. As has often been said "Justice delayed is justice denied".[1243]

1. Directions to Consider

I believe that properly crafted legislation, as opposed to the courts being innovative in defining formulating legal avenues, would be the most appropriate response to the transnational atrocities committed by Canadian corporations.[1244] A statutory enactment would eliminate the problems pertaining to extraterritorial liability of the parent corporations. The need for legislative intervention in this area was expressed by Abrioux J in the judgment in Nevsun's case at the Supreme Court of British Columbia where he indicated that the duty of making

[1239] Justin R Lambert, "A Warning for Canadian Corporations with Foreign Subsidiaries" (30 July 2013), online: *Bennet Jones* <www.bennettjones.com/Publications-Section/Updates/A-Warning-for-Canadian-Corporations-with-Foreign-Subsidiaries>; Duffy, *supra* note 2 at 40.
[1240] *Ibid*.
[1241] *Ibid*.
[1242] Duffy, *supra* note 2 at 40.
[1243] Tania Sourdin & Naomi Burstyner, "Justice Delayed is Justice Denied" (2014) 4 Victoria U L & Just J 46.
[1244] Farkas, *supra* note 513 at 160.

substantial changes to the law is reserved for the legislature.[1245] It accords with the constitutional democracy that legislature should assume the responsibility to reform the areas of laws especially that goes to the core policy concerns such as foreign affairs and human rights.[1246] Similarly, Professor Neyers observed that there should be some specifically defined criteria that would provide adequate guidance as to the situations that justify the piercing the veil and the legislature can provide such guidance.[1247] Statutory intervention is demanded because the current trajectory of law makes it very unpredictable whether the courts should act in finding liability of the parent corporation for the atrocities of the subsidiary.

Nevsun provided an alternative method of holding the corporations liable through expansive interpretation of CIL. This approach accords with the US approach in *Talisman.*[1248] Some believe that finding novel CIL-based torts is one of many legal developments that is needed as part of the complete overhauling of the system of holding the corporations accountable for their foreign transgressions.[1249] Here, it will be interesting to see whether the Canadian courts will be prepared to accept breach of CIL as a sufficient cause of action.

The call for legislative intervention was raised in *Jesner*, where the plurality argued that the issue of finding corporate liability in such manner raises a political question as opposed to legal ones and thus the issue should be left to the political machinery of the government *i.e.* the legislature.[1250] Similarly, the court observed that the legislature has both the responsibility and institutional mandate to weigh such foreign policy concerns.[1251] Further, according to Skinner, limited liability of the parent corporation for the breach of CIL should be disregarded in certain

[1245] *Nevsun BCSC, supra* note 475 at para 479.
[1246] *Watkins v Olafson* [1989] 2 SCR 750 at para 14.
[1247] Jason W Neyers, "Canadian Corporate Law, Veil Piercing and the Private Law Model Corporation" (2000) 50 U Toronto L.J. 173 at 177.
[1248] *Talisman, supra* note 514.
[1249] Farkas, *supra* note 513 at 161.
[1250] Anderson, *supra* note 759 at 1026.
[1251] *Jesner, supra* note 779 at 1403.

situations especially where the parent corporation takes a majority interest or creates a subsidiary in another country as part of unified economic enterprise that operate in high risk host country, and where there are convincing evidence that the victims are deprived from obtaining adequate judicial remedy either due to corruption with the system or lack of cause of action; where the victims cannot identify the entity liable as a result of the complex corporate structure or where the subsidiaries are underfunded where they cannot adequately pay damages if litigated.[1252]

On the other hand, there is also judicial and academic support for the courts to step in and formulate new avenue for liability to address the transnational atrocities. This drive mainly came from the US jurisprudence especially the proponents of ATS litigation provided strong reasons for why the court has the power to create an exception to impose liability.[1253] For example, in *Kiobel*, the executive department specifically argued that the court may recognize corporate liability in actions under the ATS as a matter of federal common law.[1254]

Gowlings, in its commentary, recommended certain due diligence practices that the corporations operating outside Canada should observe in respect of their foreign operations.[1255] First, the corporations should carry out a thorough human rights, violence and corruption risk assessment procedure that prioritize high risk geographical and functional areas.[1256] Secondly, it was also recommended that corporations should adopt a global code of business conduct and anti-corruption policy that adequately addresses the forum of redress in case of violation of human rights, violence, corruption and bribery.[1257] Further, the corporation should be proactive

[1252] Skinner, *supra* note 718 at 1849.
[1253] Anderson, *supra* note 759 at 1026.
[1254] *Ibid*.
[1255] Gowlings, "Knowledge Centre: Enhanced Liability Abroad for Canadian Corporations?" (August, 2013), online: <http://m.gowlings.com/knowledgecentre/article.asp?pubID=2975>; Duffy, *supra* note 2 at 41.
[1256] *Ibid.*
[1257] *Ibid.*

in training both its employees and third-party intermediaries to reinforce their position.[1258] Additionally, the corporations should install specific procedures and internal systems to effectively control and monitor the operations of their transnational subsidiaries.[1259] Finally, the corporations should adopt a robust risk-based due diligence for retention and monitoring its intermediaries and foreign partners in foreign jurisdictions.[1260]

From the discussion above, it is apparent that there is no clear legal apparatus to hold parent corporations liable for the transnational atrocities committed by their subsidiaries. In the absence of this, victims of the transnational atrocities are engaging in an *ad hoc* mix of private and public legal mechanisms to pursue corporate accountability.[1261] None of the approaches provides a comprehensive method of finding liability. It is apparent that the law continues to evolve relating to how to pursue actions involving multinationals and multinationals operating in different jurisdictions.[1262] Countries such as US and Canada are grappling to set the parameters for what types of actions may be brought against corporations for their cross-border atrocities.[1263] Here, often the metaphor of the door is used, in that we ask to what extent the door remains open to determine whether such actions are viable and if so in what manner.[1264] Statutory intervention is this situation may help to eliminate the doctrinal barriers that the victims of atrocities have traditionally suffered in establishing parental liability for the actions of their subsidiaries.

[1258] *Ibid.*
[1259] *Ibid.*
[1260] *Ibid.*
[1261] Kamphuis, *supra* note 14 at 1460.
[1262] Duffy, *supra* note 2 at 23.
[1263] *Ibid* at 24.
[1264] *Ibid*.

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