2022

Canadian Corporations, Human Rights Violations and Third World Extractive Industries: Justiciability in Canada?

Samsudeen Olalekan Alabi
University of Windsor

CANADIAN CORPORATIONS, HUMAN RIGHTS VIOLATIONS, AND THIRD WORLD EXTRACTIVE INDUSTRIES: JUSTICIABILITY IN CANADA?

by

Samsudeen Olalekan Alabi

A Thesis

Submitted to the Faculty of Graduate Studies
through the Faculty of Law
in Partial Fulfillment of the Requirements
for the Degree of Master of Laws
at the University of Windsor

Windsor, Ontario, Canada

2022

CANADIAN CORPORATIONS, HUMAN RIGHTS VIOLATIONS, AND THIRD WORLD EXTRACTIVE INDUSTRIES: JUSTICIABILITY IN CANADA?

by

Samsudeen Olalekan Alabi

APPROVED BY:

_____

J. Ku
Department of Sociology, Anthropology, and Criminology

_____

I. Ceric
Faculty of Law

_____

S. Xavier, Advisor
Faculty of Law

August 15, 2022

DECLARATION OF ORIGINALITY

I hereby certify that I am the sole author of this thesis and that no part of this thesis has been published or submitted for publication.

I certify that, to the best of my knowledge, my thesis does not infringe upon anyone's copyright nor violate any proprietary rights and that any ideas, techniques, quotations, or any other material from the work of other people included in my thesis, published or otherwise, are fully acknowledged in accordance with the standard referencing practices. Furthermore, to the extent that I have included copyrighted material that surpasses the bounds of fair dealing within the meaning of the Canada Copyright Act, I certify that I have obtained a written permission from the copyright owner(s) to include such material(s) in my thesis and have included copies of such copyright clearances to my appendix.

I declare that this is a true copy of my thesis, including any final revisions, as approved by my thesis committee and the Graduate Studies office and that this thesis has not been submitted for a higher degree to any other University or Institution.

ABSTRACT

Your phone, the car you drive, the bicycle you ride, the aircraft you fly, and the computer with which you are reading this thesis most likely contains minerals extracted from a mine in a Third World State where Canadian corporations are routinely implicated in human rights violations. This thesis explores whether these human rights violations committed by Canadian corporations in the extractive industries of Third World states are justiciable in Canadian courts. Based on an empirical review of caselaw between 2000 to 2020, I argue that the justiciability of *all* human rights violations committed in this context is not yet resolved even after Nevsun. I demonstrate the plausibility of this conclusion by making two arguments in this thesis. The first argument is that Nevsun has only resolved the contention regarding the justiciability of violations based on *jus cogens* and Customary International Law norms. The contention regarding the justiciability of non-*jus cogens* and non-CIL violations is not yet settled. The justiciability of these other violations depends on the judicial philosophy and politics of the presiding Justice. After reviewing Canadian legislative history regarding the justiciability of these violations, I found that there is currently no legislative input toward resolving the existing contention because all the private member bills targeted at the resolution of the controversy regarding the justiciability of these violations have been defeated in the Canadian Parliament. Therefore, my second argument is that only a government bill, created through executive and legislative synergy for Parliamentary approval, can ensure the justiciability of *all* human rights violations committed by Canadian corporations in the extractive industries of Third World states.

DEDICATION

To my aunt and small mummy, who quietly left the world while I was away in Europe.

Hamdy, I am doing everything we discussed and more.

ACKNOWLEDGMENTS

I am grateful to my advisor, Prof Sujith Xavier, for the kind hand of camaraderie with which he guided me throughout this exercise. I asked for an advisor and gained a mentor. Thank you. I am also grateful to my thesis committee members, Profs Jane Ku, Irina Ceric and Vasanthi Venkatesh. Thank you for rigorously engaging with my project. You made it better.

I'm thankful to Windsor Law for the scholarships that enabled me to focus on my studies rather than worrying about financial practicalities. Thanks to Associate Dean of Law, Prof Paul Ocheje, for working with Prof Xavier to ensure that I had research and editorial assistantships that eased my affairs. I would have been lost without them. I am also grateful to Prof Laverne Jacobs for the guidance when this journey began. I'm very thankful to Annette Demers for the kindness, generosity and warmth that she's shown me from my first day in Windsor until now. I'm also thankful to Profs Chris Waters and Patricia Galvao-Ferreira for enriching comments and conversations regarding my project. Thanks to Chinyere Obinna for practical insights and advice. I am grateful to Ifeanyi Nwokolo and Archisha Satyarthi for their spirit of collegiality.

I'm very grateful to my family and friends for their patience throughout this project. I thank my parents, Mr and Hajia M.G. Alabi, for shepherding me through the course of my diaspora dreams. I am thankful to my siblings, Sheriff, Ismail, Farouk, Sodiq, Zainab, Habeeb and my sisters-in-law, Folashade, Jumoke and Khadijah, for their encouragement and support.

To my chosen brother and co-conspirator, Dr Tomiwa Ilori, thank you. You are it.

I am very grateful to Latifah Salaudeen, 'Dekunle Smith, Irebami Taiwo, Babatunde Shobayo and Blessing Tunde-Shobayo for the gift of friendship, encouragement, and support.

TABLE OF CONTENTS

CHAPTER ONE: GENERAL INTRODUCTION

1.0. CHAPTER INTRODUCTION

Your phone, the car you drive, the bicycle you ride, the aircraft you fly, and the computer with which you are reading this thesis most likely contains minerals extracted from a mine in a Third World State.[1] In these mines, the political power of the Third World States[2] and the economic might of First World corporations have combined to create an environment where forced labour, slavery, torture, cruel and inhuman treatment, sexual violence, extra-judicial killings, and other human rights-based violations are the order of the day.[3] The victims of these violations are the Third World people who work in these mines where the minerals that power the tools for our everyday life are extracted.

This project explores whether these human rights-based violations when Canadian corporations have committed them in the extractive industries of Third World states are justiciable in Canadian courts. I hope to create an empirical and historical guide with this project. This guide will curate all the judicial and legislative issues that enable or militate against the justiciability of the claims based on these violations by Third World victims against Canadian corporations under Canadian law.

My reason for choosing to undertake this project is both personal and professional. First, I was born and grew up in Nigeria. Nigeria is a resource-rich Third World country where many extractive corporations – including Canadian ones – operate.[4] These corporations have been implicated in human rights violations such as extra-judicial killings while doing business

[1] See Dionne Searcey & Eric Lipton, "What to Know About Mining in Congo", *New York Times* (20 November 2021), online: <https://www.nytimes.com/interactive/2021/11/29/world/congo-cobalt-artisanal-mining.html?>; See also Shannon Raj, "Blood Electronics: Congo's Conflict Minerals and the Legislation That Could Cleanse the Trade" (2011) 84 S. Cal. L. Rev 981 at 982–983.
[2] See Sundhya Pahuja & Anna Saunders, "Rival Worlds and the Place of the Corporation in International Law," in Jochan von Bernstorff & Phillip Dann, eds, *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford Scholarship Online, 2019) 141.
[3] See Searcey & Lampton *supra* note 1.
[4] See Cyril Obi, "The Geopolitical Consequence of Oil in Africa: The case of Nigeria," (2020) 26:2 Brown J World Aff 7.

in the Nigerian extractive industry.[5] Natural resources, which should ordinarily translate to prosperity, development, and an improved standard of living for Nigerians, have become a curse because of the activities of these extractive corporations.[6] This state of play in Nigeria, nay Africa, is not by happenstance. Rather, it is the result of international law's prioritization of corporate profits over the lives and human rights of Third World peoples.[7] It is no gainsaying that the struggle over the natural resources of Africans and Third World peoples has led to invasion, colonialism, neo-colonialism, and underdevelopment.[8] The work of several Third World scholars attests to this fact.

Many scholars working under the broad aegis of the Third World Approaches to International Law (TWAIL) have argued that these invasions, colonialism, neo-colonialism and underdevelopment have been facilitated through the instrumentality of international law.[9] TWAIL scholars like Anghie have found that international law created a civilizational dichotomy between the European Westphalian states and their Third World non-Westphalian counterparts.[10] The latter states were tagged as "uncivilized" and excluded from the development of the international legal system. The international legal system forged from this

[5] See "BLOOD AND OIL: A Special Report.; After Nigeria Represses, Shell Defends Its Record", *New York Times* (13 February 1996), online: < https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html> (This report details Shell's implication in the extra-judicial execution of Nigerian writer and environmental activist, Ken Saro-Wiwa by Nigeria's brutal dictator, General Sani Abacha). See also Ed Pilkington, "Shell pays out $15.5m over Saro-Wiwa Killing", *The Guardian* (9 June 2009) online: <https://www.theguardian.com/world/2009/jun/08/nigeria-usa> (reporting that "The oil giant Shell has agreed to pay $15.5m (£9.6m) in settlement of a legal action in which it was accused of having collaborated in the execution of the writer Ken Saro-Wiwa and eight other leaders of the Ogoni tribe of southern Nigeria.").
[6] See Ike Okonta & Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (San Francisco: Sierra Club Books Publishing, 2001).
[7] See Muthucumaraswamy Sornarajah, "Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States", in Craig Scott, ed, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Oxford: Hart Publishing, 2001) 491 [Sornarajah "Linking State Responsibility"].
[8] See Walter Rodney, *How Europe Underdeveloped Africa* (Howard University Press, 1972).
[9] See Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," (1999) 40 Harv. Int'l L.J. 1, at 23 [Anghie, "Finding the Peripheries"].
[10] *Ibid*.

dichotomy served the purpose of legitimizing the European colonial incursion into the rest of the world.

Another TWAIL scholar, Mutua, expanded upon Anghie's position when he found that the European colonial incursion enabled "the plunder and subordination of the Third World by the West" under the pretext of creating an international legal order.[11] European states met without any Third World presence and divided the Third World into colonies for the purposes of economic exploitation, political oppression and cultural suppression. The peoples of the world who have suffered these exploitation, oppression and suppression are what TWAIL scholars refer to as Third World peoples.

Gathii has explained that the Third World is not a geographical location on the world map.[12] Any attempt to delimit the Third World within the bounds of a single continent or comity of countries would be an exercise in futility.[13] My usage of the term "Third World" derives from TWAIL-ers' "subaltern epistemic position" that international law is historically a European creation targeted at subjugating and subordinating other peoples.[14] These other peoples are what I mean by Third World peoples.[15] Therefore, my discussion in this project refers to the exploited and oppressed peoples from various countries like Nigeria, Eritrea, Ecuador, and Guatemala collectively as "Third World" peoples.

There were several items on the European colonial agenda. The exploitation of the natural resources of the colonies and the invaded territories for European purposes was at the heart of the European colonial agenda. Additionally, Mutua has found that colonialism targeted

[11] See Makau Mutua, "What is TWAIL?," (2000) 94 Am. Soc'y Int'l L. Proc. 31 at 31.
[12] See James Thuo Gathii, "The Promise of International Law: A Third World View" (2021) 36:3 Am U Int'l L Rev 377 at 401.
[13] *Ibid*.
[14] *Ibid* at 400.
[15] See Obiora Chinedu Okafor, Re-defining Legitimate Statehood: International Law and State Fragmentation in Africa (2000) at 73.

more than the exploitation of the resources of the Third World.[16] Colonialism also involved the annihilation and subjugation of the way of life of Third World peoples.[17]

For instance, the various peoples that make up the country now known as Nigeria had different socio-cultural and political structures before the European colonial invasion. The Yorubas in the west governed themselves through a chief-based system rooted in their traditions, customs and spirituality. The Ibos in the east operated a chiefless society where age groups, clans, and other traditional institutions wielded the socio-cultural and political power to order their fully functional society. The Hausas and the Fulanis in the north governed themselves through an oligarchical spirituality-based, chief system as well.

But shortly after colonization, the British colonialists amalgamated these different peoples into one entity for colonial administrative convenience. They subsumed the peoples' institutions under their European-selected subservient puppets to serve as indirect rulers of this new Nigerian amalgam. The European puppet masters commandeered the affairs of the colonies behind the veil. This subjugation of the Third World peoples' institutions for indirect European rule had far-reaching consequences for the people's political development. According to Daannaa, this forceful amalgamation of different peoples invariably created problems for West African British colonies, including the Nigerian state post-independence.[18]

The subjugation of Third World people's socio-political and economic life was not limited to the British colonialists alone. The French colonialists adopted a colonial governing system of assimilation in their colonies.[19] This assimilationist policy treated colonies as an extension of France. It assumed that the civilization of Africans before the colonial invasion

[16] See Makau Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry," (1995) 16 Mich. J. Int'l L. 1113.
[17] *Ibid* at 1125.
[18] See Henry Seidu Daannaa, "The Acephalous Society and the Indirect Rule System in Africa – British Administrative Policy in Retrospect," (1994) 34 J. Legal Pluralism & Unofficial L. 61.
[19] See Lorelle D. Semley, "Evolution Revolution and the Journey frm African Colonial Subject to French Citizen" (May 2014) 32:2 Law & Hist. Rev. 267.

was inconsequential.[20] Therefore, the French colonialists reasoned that the African and "Francophone Africa" needed be civilized or Frenchified. It is only those Africans who had been adequately Frenchified that could be allowed to participate in the "largesse" of French-ness.[21] Therefore, it was French colonial policy to consciously decimate the existing African political institutions that existed before the French colonial incursion.

The Belgian invasion and subsequent colonization of the Congo deserve special mention because of the brutality that the Congolese people suffered under the reign of Leopold II, King of the Belgians.[22] The Belgian colonialists held the Congolese people in slave-like conditions. They worked the people, maimed them, killed them and exploited their natural resources all under the pretext of a civilizational campaign justified through the instrumentality of international law.

Whether British, Belgian or French, the European colonialists decimated the socio-cultural and political institutions of the colonies. This decimation of Third World people's socio-economic and political institutions birthed unsustainable Third World states post-colonization.[23] For instance, Mutua has found that the non-contextual adoption of European sovereign statehood by African states post-independence has not guaranteed the enthronement of the rule of law in any African state.[24] This is notwithstanding the fact that almost all post-colonial African states profess the rule of law in their constitutions.[25]

In light of their unsustainable institutional architecture, protracted warfare, coups, countercoups, and weak governmental institutions have been the bane of African states post-

[20] *Ibid* at 268.
[21] *Ibid* at 285.
[22] See Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Houghton Miffin, 1999).
[23] See Makau Mutua, "Africa and the Rule of Law" (2016) 23 SUR – Int'l J on Hum Rts 159 [Mutua, "Africa and the Rule of Law"].
[24] *Ibid* at 161.
[25] *Ibid* at 163.

independence.[26] This, in turn, has ensured that most African states did not become truly free after the supposed end of the European colonial campaign on the continent. It is this state of affairs that led Anghie to opine that the alleged independence of colonies or the end of colonialism is farcical because the supposedly independent Third World states are still tied to their colonial masters in a Master-Puppet relationship enabled by the prevailing international legal order.[27] It is this state of affairs in my home country Nigeria that foregrounds my personal reason for undertaking this project.

Regarding my second and professional reason for undertaking this project, I was called to the Nigerian Bar as a barrister and solicitor of the Supreme Court of Nigeria in the year 2015. In 2017, my law firm was approached by two communities from the oil-rich Nigerian Niger Delta. These communities were looking to obtain judicial redress against a foreign corporation whose extractive activities in their communities had caused grave environmental and human rights violations.[28] I was part of a team of lawyers given the mandate by our law firm to advise and assist these two communities.

I knew from my country's political and legal history that the sort of violations allegedly committed by the foreign corporation against these two communities were not a rarity in the Niger Delta. Foreign corporations have always played a pivotal role in the European colonial and imperial ambitions in Africa. Foreign corporations were the first instruments of colonization. They were also the European colonialists' conduits for the exploitation of the natural resources of African states under the charter of their respective European states.

[26] See Martin Meredith, *The Fate of Africa: A History of the Continent Since Independence* (PublicAffairs, 2005).
[27] Anghie, Finding the Peripheries *supra* note 9.
[28] See Fidelis Allen, *Implementation of Oil Related Environmental Policies in Nigeria: Government Inertia and Conflict in the Niger Delta* (Newcastle: Cambridge Scholars Publishing, 2012).

Stern has curated the unison for colonial purposes between corporations and European states.[29] Chartered trading and extractive companies, such as the English East India Company, were the most potent tools used by the European colonialists for the advancement of their colonial objectives. Even after the supposed end of colonialism, the European corporations modernized and continued to conduct in a way that is still greatly influenced by their colonial origins.[30]

Therefore, TWAIL scholars have triangulated the relationship between the European state, colonialism and the corporation. Scholars like Bedjaoui have stated that "the multinational companies are the 'chartered companies' of modern times."[31] In similar manner, Pahuja & Saunders have found that "the long backstory to the question of the multinational corporation is colonialism."[32] The sum of these scholars' findings is that the violations of today form part of a continuing string of violations that historically began during slavery, were maintained during colonialism, and continue in today's supposedly post-colonial Africa.

However, the weak post-colonial institutions of 'sovereign' African states like Nigeria are incapable of delivering justice to victims of these violations in Third World states. Therefore, aside from suffering egregious harm as a result of these violations, the victims also incur an additional burden of having to locate a forum that would accommodate their request for judicial redress of these violations.

Therefore, as lawyers to these two communities, we faced several socio-legal and legal challenges in our attempt at achieving remediation for these violations in Nigeria. I will give two examples to illustrate some of these challenges. The first instance is the challenges associated with the corporate structuring of the foreign corporation that was responsible for the violations alleged by the two communities. The foreign corporation is registered and domiciled

[29] See Phillip J. Stern "The English East India Company and the Modern Corporation: Legacies, Lessons and Limitations," (2016) 39:2 Seattle U. L. Rev. 423.
[30] Ibid.
[31] See Mohammed Bedjaoui, "Towards a New International Economic Order (UNESCO, 1979) at 36-37.
[32] Pahuja & Saunders *supra* note 7 at 141.

in its foreign state of origin. It did not have a physical address or office in Nigeria. It only operated in Nigeria through a registered subsidiary.

No rule of Nigerian law grants a Nigerian court jurisdiction over a foreign corporation. Hence, we could only go after its Nigerian subsidiary. However, during the process of conducting preliminary due diligence for the impending legal action, we found that the Nigerian subsidiary was wholly owned and controlled by a foreign corporation. We also found that the local subsidiary was structured in a way that made it easily severable from the parent, foreign corporation to evade liability if our case succeeds against the subsidiary corporation. Therefore, any judgment we might obtain against the subsidiary corporation would inevitably amount to a pyrrhic victory.

The second instance is the challenges associated with the Nigerian judicial process itself. Recall that I discussed earlier that the European colonial enterprise led to the decimation of the socio-economic and political architecture of the colonies. Nowhere else is this decimation more pronounced in Nigeria than in the Nigerian judiciary. The Nigerian judiciary is a great example of Mutua's thesis that the transposition of Western Westphalian institutions of statehood without contextualization made the African post-colonial institutions a caricature of their European originals.[33] The Nigerian judiciary is institutionally ineffectual against these foreign corporations because it was never designed to be able to bring them to justice.

This situation did not always use to be the state of affairs. There were high hopes for the Nigerian judiciary when Nigeria supposedly gained independence in 1960 and became a republic in 1963. These high hopes can be succinctly captured in the words of Nigeria's first President and only Governor-General, Nnamdi Azikiwe, who described the Nigerian judiciary "as the bulwark of the liberty of the citizen" in 1965.[34] But it did not take long for this hope to

[33] Mutua, "Africa and the Rule of Law" *supra* note 23.
[34] See Nnamdi Azikiwe, "Essentials for Nigerian Survival" (1965) 43:3 For Aff 447 at 451.

unravel because the foundation upon which the hope was premised is faulty. In 1967, two years after Azikiwe's ambitious statement about the Nigerian judiciary, Nigeria descended into a civil war. One of the major and immediate causes of the civil war was ethnic tension arising from the forceful colonial amalgamation that birthed Nigeria in 1914. By the time of the civil war, the Nigerian Army had assumed political power over the country. Human lives, human rights, democracy, and the independence of the Nigerian judiciary were some of the notable casualties of the civil war.

Six years after the civil war ended, Sornarajah found that the Nigerian judiciary had been decimated and brow-beaten into submission by the Nigerian military government.[35] Instead of construing legislation in an independent manner, the Nigerian judiciary had started construing "legislation affecting civil rights as strictly as possible so that they may be given an effect not inconsistent"[36] with the effect desired by the military government. By the last decade of the last century, the Nigerian judiciary had become completely subsumed under the Nigerian military dictatorship. This set the stage for the extra-judicial execution of the famous Nigerian writer, environmental activist, and Nobel Peace Prize nominee, Ken Saro-Wiwa by the Nigerian government at the instigation of the extractive corporation, Royal Dutch Shell.

Saro-Wiwa was a very vocal campaigner against the adverse effects of the extractive activities of Royal Dutch Shell in the Niger Delta. He was particularly opposed to the oil spillages, water pollution and gas flaring in his ancestral homeland known as Ogoni land. Saro-Wiwa and eight activist comrades were prosecuted by the Nigerian state on trumped-up charges before a special court. They were sentenced to death. On November 10, 1995, Saro-Wiwa and the eight activists was extra-judicially executed by the Sani Abacha-led military regime.[37]

---

[35] See Muthucumaraswamy Sornarajah, "Bill of Rights: the Commonwealth debate" (1976) Comp & Int'l L. J. S'thern Afr 161.
[36] *Ibid* at 165
[37] See Frederick Cowell "Preventing coups in Africa: attempts at the protection of human rights and constitutions" (2011) 15:5 Int'l J Hum Rts 749 [Cowell, "Preventing Coups in Africa"].

The following day, Nelson Mandela called for tougher actions against Nigeria's despotic junta.[38] British Prime Minister John Major said that "if the Harare principles mean anything, I do not myself see how Nigeria can stay in the Commonwealth until they return to democratic government."[39] The following day, Nigeria was suspended from the Commonwealth.[40] President Bill Clinton reacted by condemning the executions and recalling the US Ambassador to Nigeria.[41] Abacha held on to power until his death in 1998.[42]By the time Abacha died in office, decades of irreparable damage had already been done to the Nigerian judiciary.

Cowell has argued that "the execution of Ken Saro Wiwa in 1995 was indicative of the extent of the Abacha regime's control over the Nigerian judiciary."[43] This control and its effects continue to manifest in different forms of institutional maladies to date. Brems and Adekoya have documented two of these maladies: the widespread corruption of judicial officers and the excruciatingly slow pace of justice itself.[44]

It should ordinarily have been easy to secure justice for the victims of the Saro-Wiwa executions against Royal Dutch Shell and the Nigerian government in Nigerian courts because of the glaring injustice and the notoriety of the executions. But this has not been the case. All the cases that have been brought by the victims of these violations have been in the United States, United Kingdom and the Netherlands. In 2009, Shell settled the case brought by one of the widows of the activists in a US federal court.[45] In March this year, a Dutch court in the

[38] See Charles Hoff, "Nigeria suspended from Commonwealth: Local populace stunned by dissident executions" *CNN* (November 11, 1995), online: <http://edition.cnn.com/WORLD/9511/nigeria/11-11/>.
[39] See Charles Hoff "Nigeria executes 9 activists; world outraged", *CNN* (November 10, 1995) online: <http://edition.cnn.com/WORLD/9511/nigeria/index.html>.
[40] *Ibid*.
[41] *Ibid*.
[42] See Eric Bennett, "Sani Abacha," in Anthony Appiah & Henry Louis Gates, eds, *Encyclopedia of Africa* (Oxford: Oxford University Press, 2010) 1.
[43] Cowell, "Preventing Coups in Africa" at 752.
[44] See Eva Brems & Charles Olufemi Adekoya, "Human Rights Enforcement bt People Living in Poverty: Access to Justice in Nigeria" (2010) 54:2 J Afr. L. 258.
[45] Pilkington *supra* note 6.

Hague threw out the case brought by four of the widows against Royal Dutch Shell in the Netherlands after more than two decades of work.[46]

No victim has pursued remediation in any Nigerian court. Rather, they have been reduced to traversing the globe for access to justice because the Nigerian judiciary "is facing a crisis of legitimacy as a result of the increasing perception of corrupt practices afflicting all levels."[47] According to Gberevbie, "the Nigerian judiciary as a democratic institution has failed to be a facilitator of proper democratic process…"[48] In the advent of this national problems, TWAIL scholars have examined the prospects of seeking justice through the instrumentality of regional[49] and subregional institutions on the continent.[50] Unfortunately, the relevant regional and subregional legal architecture offer limited possibilities.

It is these challenges that formed the background against which we pursued justice for these two victim communities. After two years with no progress, we elected to explore the possibility of litigating these violations against the foreign corporation in their home state. The team started thinking about the legal framework for the protection and remediation of these violations in the home state of this corporation. We wanted to know how the First World states were taking charge and exercising responsibility for the conduct of their corporations in the extractive industries of Third World states like Nigeria.[51]

At around the same time when we started exploring this option, I was selected by the Jean Monet Institute for European Studies (now Brussels School of Governance) for their LLM

[46] See Toby Sterling "Dutch court rejects suit of Nigerian widows against Shell", *Reuters* (March 23, 2022), online: <https://www.reuters.com/business/energy/dutch-court-rejects-suit-nigerian-widows-against-shell-2022-03-23/>.
[47] See Gbenga Oduntan, "Prescriptive strategies to combat corruption within the administration of justice sector in Nigeria" (2017) 20:1 J Money Laundering Control 35 at 36.
[48] See Daniel Eseme Gberevbie, "Democracy, Democratic Institutions and Good Governance in Nigeria" (2014) 30:1 Eastern Afr Soc Sc Res Rev 133 at 151.
[49] See Matiangai Sirleaf, "The African Justice Cascade and the Malabo Protocol", (2017) 11 Int'l L. J. Transnational Just 71.
[50] See Kangikoe Bado, "Good Governance as a Precondition for Subsidiarity: Human Rights Litigation in Nigeria and ECOWAS"(2019) 57 Commonwealth & Comp Pol 242.
[51] Sornarajah, "Linking State Responsibility" *supra* note 7.

program in International and European Law. In Brussels, I saw first-hand how the European Union (EU) works tirelessly to safeguard the rights of its people. In addition to respecting and protecting the rights of their citizens, people within the EU also had multiple channels for remediation when their rights were violated. Shouldn't similar remediation measures be availed to the peoples of the Third World as well? My answer is yes; they should. The yearning for remediation of a person's human rights violation is neither European nor American. It is universal, and it lies at the core of human dignity.

Therefore, when it was time to choose my LLM project in Brussels, I conducted a comparative analysis of the United States and EU legal frameworks for protecting the rights of Third World peoples from US and EU corporations conducting extractive business in the Third World.[52] I chose these two because of their socio-political and economic might. Also, many First World corporations working in the Third World owe them legal obligations.[53] I teased out governance gaps in the frameworks and suggested how to fill them.

The most critical governance gap I found was the absence of sanctions for corporations whenever they committed these violations. This situation fell short of the expectations encapsulated in the "respect, protect, and remedy" framework of the United Nations Guiding Principles on Business and Human Rights (UNGP).[54] I found this situation unacceptable as a citizen of a resource-rich Third World country where these violations occur.

Therefore, I started an inquiry into the issues militating against the remediation of these violations in First World states. During my investigation, I found the judgment of the Supreme

[52] Samsudeen Alabi, "Silencing the Guns: Making a Case for an African Union-driven intervention on Conflict Minerals (LLM International & European Law, Vrije Universiteit Brussels, 2021) [Unpublished].
[53] Ibid at 7.
[54] See John Ruggie, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011).

Court of Canada (SCC) in *Nevsun Resources Ltd. v. Araya*[55] (*Nevsun*) delivered in 2020. In *Nevsun*, Justice Abella held that *jus cogens* and Customary International law (CIL) norms – forced labour, torture, slavery, and cruel and inhuman treatment – committed by Canadian corporations in Third World states were justiciable in Canada. This means that the Third World victims of *jus cogens* and CIL-based human rights violations can bring a justiciable claim against the erring corporations in Canada.

As a citizen of a Third World state and a legal practitioner who had been part of an attempt to institute this type of litigation, I had several questions. First, had there been other cases from Canadian courts with similar far-reaching pronouncements like the judgment in *Nevsun*? What is the position of Canadian law regarding the justiciability of non-*jus cogens* and non-CIL human rights violations committed by Canadian corporations in the Third World? Are they justiciable in Canada as well or is justiciability limited to claims based on *jus cogens* and CIL? It became imperative for me to undertake a project that investigates the leaps and bounds of the justiciability of all human rights violations committed by Canadian corporations in the extractive industries of Third World states. Hence this project.

In the earlier parts of this introduction, I have used TWAIL's theoretical framing to foreground my work and state the problem with which this work engages. This TWAIL framing provided the tools to situate the challenges associated with the justiciability of the human rights violations within the proper historical parameters. I achieved this by adopting what Tzouvala has aptly described as "TWAIL's impulse to historicize."[56] I am mindful of the epistemological limits of such historicization because "there are limits to the explanatory potential of historical and genealogical accounts."[57]

[55] See *Nevsun Resources Ltd. v. Araya* 2020 SCC 5 [Nevsun].
[56] See Ntina Tzouvala, "TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures" (2015) 109 AJIL Unbound 266 at 266.
[57] Ibid at 270.

Therefore, I also used TWAIL to contextualize my findings from the empirical analysis of Canadian jurisprudence. In the last chapter of this project, I used Tzouvala's more recent work to hypothesize that the historically capitalist foundations of international law might be responsible for the intractable contention within the legal framework for the justiciability of IHRL violations committed by Canadian corporations in the Third World. I concluded that the prioritization of competitive advantage over the remediation of the violation of the human rights of Third World peoples is invariably based on the agelong North-South divide.

My project involves the analysis of statutes, doctrines and principles of the law. I believe that this should ordinarily be done through legal positivist lenses first. However, I am also alive to the fact that the application and interpretation of positive norms are greatly influenced by the values and politics of judges. Therefore, I necessarily have to use legal realism to ground my analysis of the law which forms the bulwark of literature for the purposes of my project.

My understanding of legal realism as a theoretical framework is guided by Mertz's exposition on legal realism's developmental stages.[58] There are three periods of the development of legal realism: the "real" Legal Realism as can be found in the works of Oliver Wendell Holmes,[59] Karl Llewellyn,[60] Jerome Frank[61] and others; the legal realism of the Law and Society scholars like Marc Galanter[62] and Stewart McCauley[63] et al., who had either

[58] See Elizabeth Mertz (with Marc Galanter), "Realism then and now: Using the Real World to Inform Formal Law" in Shauhin Talesh et al., eds, *Research handbook on Modern Realism* (North Hampton: Edward Elgar, 2021) 21 at 22 [Mertz, "Realism then and now"].
[59] See Oliver Weldel Holmes, "Path of the Law" (1896-1897) 10:8 Harv L Rev 457.
[60] See Karl Llewellyn, "Some Realism About Realism –Responding to Dean Pound" (1931) 44:8 Harv L Rev 1222.
[61] See Jerome Frank, "Why Not a Clinical Lawyer-School?" (1933) 81:8 U Penn L Rev 907.
[62] See Marc Galanter, "In the Winter of our Discontent: Law, Anti-Law and Society" (2006) Annual Rev L & Soc Science 1.
[63] See Stewart Macauley, "A New Legal Realism: Elegant Models and the Messy law in Action" in Elizabeth Mertz et al, eds, *New Legal Realism, Volume 1: Translating Law-and-Society for Today's Legal Practice* (New York: Cambridge University Press, 2016a) 29.

studied with or been influenced by the "real" Legal Realists; and the legal realism of the Law-in-Social-Context scholars like Elizabeth Mertz.[64]

Legal Realism has meant different things over different times, although the specific recurrent theme remains its "challenge to Legal Formalism."[65] The earliest theorists, Llewellyn, Frank, Holmes et al., conceived Legal Realism as targeting the exposure of "the illogic of ostensibly logically compelling principles and precedents… to describe the law-in-action."[66] They were interested in jettisoning the "naturalized assumptions"[67] that "have been socially constructed over time … by those we have been taught to view as our academic ancestors."[68] These realists believe that this it is only this paradigmatic shift that can propel legal engagement toward the development of "a more accurate analysis of the law."[69] A Llewellynian example might best illustrate this point.

According to Galanter, Llewellyn once arrived in his class "with a bunch of spoons and talked about the different styles of spoons. He argued that this was parallel to different styles of judging… I think that was the big lesson of the course – if I moved over here, law would look different from that angle."[70] Llewellyn conceived the law in terms of its impact on society because "beyond rules, again, lie effects: beyond decisions stand people whom rules and decisions directly or indirectly touch."[71] Llewellyn viewed the law as an instrument for achieving social ends that must be rooted in the conscious policy choices of judges. These

[64] Mertz, "Realism then and now" *supra* note 58.
[65] *Ibid*.
[66] See Susan Sibley, "Law and Society Movement" in H. Kritzer, ed, *Legal Systems of the World: A Political, Social and Cultural Encyclopedia* (Santa Barbara: ABC-CLIO, 2002) 860.
[67] Mertz "Realism then and now" *supra* note 58 at 23.
[68] *Ibid*.
[69] *Ibid*.
[70] *Ibid* at 26.
[71] *Ibid*.

policy choices should be based on empirical social science evidence that cautiously distrusts formalistic doctrines and rules.[72]

It is not the Legal Realist's proposition that formal law should be discarded entirely. Instead, the Law and Society Legal realists suggest that "while also taking seriously the input of formal law, we examine law as it actually works in society."[73] This is very important because "the law and the state interact to impact people throughout their lives."[74]

The New Legal Realists are interested in underscoring the social impact of the law by "using systematic empirical research on law-in-action to directly inform law reform projects that involve law-in-books."[75] The New Legal Realist's understanding of the law is that conclusions regarding an inquiry into the law should be guided by findings "rather than distort what we find to fit pre-formed ideas."[76] Therefore, they rejected the fixation on formalism at the expense of the people.

Legal Realism believes that the virtue of maintaining legal tradition should neither trump nor truncate the achievement of true justice. In sum, Legal Realism contends that while statute books, precedents and formal rules are essential, socio-political, cultural and economic considerations also play an important role in judicial decisions. Hence they should be adequately considered in determining what the law is and what it should be.

Therefore, my reasoning and analysis of the courts' decisions would be guided by the Legal Realist's understanding that every Judge's decision is a conscious policy choice. Like Xavier, I will situate my analysis of the cases within their context and effects.[77] While the

---

[72] *Ibid*.
[73] *Ibid* at 32.
[74] See Martha Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition" (2008) Yale J of L & Feminism 1– 23. See also Martha Fineman, "The Vulnerable Subject and the Responsive State" (2010) 60 Emory L J 251– 275.
[75] Mertz "Reality then and now" *supra* note 58 at 28.
[76] *Ibid* at 31.
[77] See Sujith Xavier, "Biased Impartiality: A Survey of Post-RDS caselaw on Bias, Race and Indigeneity" (2021) 99:2 Canadian Bar Review 354 [Xavier, "Biased Impartiality"].

victims have been denied access to the benefits of the natural resources that should be their right, I would be mindful not to pitch my tent of reasoning regarding the law with a proposition that might deny them access to justice as well. I will conceive the law as a shield that must remain mindful of its impact on people. I will not conceive the law as a formalistic set of rules and doctrines that hides behind a Rawlsian veil of ignorance and permits no social contextualisation.[78] Rather, I will investigate and challenge these rules within rational and legally logical parameters.

The significance of undertaking my research exercise is twofold. First, this project can provide the Third World victims of these violations and their lawyers – like me – with the necessary legal tools to prophesy the justiciability of their claims in Canada. Third World victims suffer very heavily when these violations occur. But their suffering doubles when their cases are dismissed for non-justiciability in court. Therefore, a toolkit that helps them to prophesy the justiciability or otherwise of their claims can potentially prevent this double jeopardy.

Second, this project also has significant value for policymakers. It will reveal the chokepoints where the claims of the Third World victims are frustrated. It will do this by surveying the available jurisprudence and the legislative history of the justiciability of claims based on these violations in Canada. It will also suggest what stakeholders can do to loosen the identified chokepoints, open the door, and keep the door open for these victims under Canadian law. Therefore, policymakers can use the findings of this project to frame and set their policy priorities on these justiciability issues.

In the final analysis, I make two arguments in this thesis to advance the significance of my project. My first argument is that *Nevsun* has settled the law regarding the justiciability of

[78] See John Rawls, *A Theory of Justice* (Belknap Press, 1971).

jus cogens and CIL violations committed by Canadian corporations against Third World victims in the context of natural resources extraction in Third World states. However, my empirical analysis of Canadian jurisprudence reveal that the law regarding the justiciability of non- *jus cogens* and non-CIL violations is not settled. Instead, my investigation revealed that the justiciability of these other violations depends on the judicial philosophy of the presiding Justices as informed by their politics.

This understanding is undergirded by both the TWAILian and legal realist frameworks that I have selected for the framing of my arguments in this project. These two frameworks gave me the theoretical basis to situate my argument within a law-in-context parameter rather than a law-in-books parameter. It is both TWAIL and legal realism that provided the analytical tools which I deployed to appreciate the impact of non-formalistic factors such as the judicial philosophy and politics of the individual Justices on the eventual outcomes in the judgments.

There is currently no legislative input toward resolving this issue. All the private member bills targeting the resolution of these justiciability problems have been defeated. These bills were defeated because of the differing political cum economic views of Parliament's party blocs. Therefore, I make the second argument that only a government bill created through executive and legislative synergy for Parliamentary approval can ensure the justiciability of all, rather than some human rights violations committed by Canadian corporations in the extractive industries of Third World states.

1.1. RESEARCH QUESTIONS

The main research question of this thesis is whether all human rights violations committed by Canadian corporations in the extractive industries of Third World states are justiciable in Canadian courts. In pursuing this question, I consider the following sub-research questions:

a. What are Canada's international human rights law obligations regarding Canadian corporations doing business in the extractive industries of Third World states?

b. How have Canadian courts decided the cases of international human rights law violations committed by Canadian corporations against non-Canadian, Third World victims in the extractive industries of Third World states?

c. Can the Canadian Federal Executive and the Canadian Parliament fill the governance gap in the legal framework for the justiciability of human rights violations committed by Canadian corporations against Third World victims in Third World states?

1.2. SCOPE OF THE STUDY

The scope of my study is limited to the justiciability of human rights violations committed by Canadian corporations against Third World victims in Third World states. I am concerned with the cases that have been decided on this subject in Canadian courts. My research is limited to Canadian corporations, Canadian law, and all Canadian cases decided on this subject from 2000 to 2020.

The reason for limiting the scope of my study to Canadian law and corporations is Canada's prominence in the global mining sector and the undeniably global reach of Canadian extractive corporations. More than 75% of global mining corporations are headquartered in Canada.[79] Whatever happens to Canadian corporations under Canadian law reverberates across the global extractive industry. This prominence makes Canadian law and corporations a prime choice for my project. My selection of Canadian cases was also informed by the epochal judgment of the SCC in *Nevsun*.

It is essential to state that this project is not about *jus cogens* or CIL. I will briefly discuss these two concepts. I will also describe the innovations Canada has made in listing *jus cogens*. But I will not dwell extensively on them. This project is also not about the merits of cases that form the data set for my empirical analysis. It is strictly about justiciability. I have

[79] See Global Affairs Canada, "Corporate Social Responsibility, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (March 2009) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>.

limited my investigation to justiciability because at the time of writing and finalising this project, no case on these violations has ever gone to trial in a Canadian court. Therefore, no Canadian court has had the opportunity to decide any of these cases on the merits. In all instances, the defendants raised preliminary motions asking the courts to determine the justiciability or otherwise of the Third World victims' claims because a right of action was not presumed in favour of the Third World plaintiffs against the Canadian corporations. Therefore, only the court's judgment on the justiciability motions in each case forms the data set for my empirical analysis.

1.3. STRUCTURE OF THE STUDY

This thesis is divided into five different chapters. In the first chapter, I briefly introduced my research by laying out the considerations foregrounding my thesis. I provide the research question and sub-questions that guide my study. I also stated the study structure and the methods. In the second chapter, I answered my first research sub-question concerning Canada's international human rights law obligations for Canadian corporations doing business in the extractive industries of Third World states. In the third chapter, I answered the second sub-research question by conducting an empirical analysis of Canadian judgments that have been delivered on the justiciability of human rights violations committed by Canadian corporations against non-Canadian, Third World victims in the extractive industries of Third World states. In the fourth chapter, I answered my third research sub-question by examining whether the Canadian Federal Executive and the Canadian Parliament can fill the governance gap in the legal framework for the justiciability of these human rights violations. In the fifth and last chapter, I state my answer to the overarching question of this thesis on whether human rights violations committed by Canadian corporations in the extractive industries of Third World states are justiciable in Canada. I draw some conclusions and make some recommendations for further research.

1.4. METHODOLOGY OF THE STUDY

I have deployed two different methods in this research project. In chapter 2, I deployed the doctrinal legal research method. I considered both Canadian and international law, described their provisions, and analysed the rules that arose from them to determine whether Canada has obligations under international human rights law that apply to Canadian corporations doing business in the extractive industries of Third World states. I also analysed some judgments of the Canadian courts touching on Canada's international law and international human rights law obligations.[80]

In Chapter 3, I deployed the empirical research method. I collated judgments from Westlaw using search terms selected based on their relevance to *Nevsun*. These terms are: "corporation", "*jus cogens*", Customary International Law", "extractive industry", and "Justiciable". My search returned 87 cases in total. I grouped the cases according to their order of relevance which I determined using four factors. The first factor was whether the plaintiffs of the case were Third World people. The second factor was whether the defendants were Canadian corporations, and the third factor was whether the violations leading to the cause of action arose because of the business practices of the Canadian defendants in the extractive industry of the Third World people's state. The last factor was whether the case was litigated in Canada.

The first group included cases that were tangentially relevant to my study.[81] The second group had cases that were very relevant to my study.[82] The third group included the most

[80] My analysis of Canadian judicial precedents like *R v. Hape* 2007 SCC 26 [*Hape*]; *Kazemi (Estate) v. Islamic Republic of Iran* 2014 SCC 62 [*Kazemi*]; and *Bouzari v. Iran (Islamic Republic)* 2004 CarswellOnt 2681 (*Bouzari*) foregrounded the analysis that follows in Chapter 3.

[81] They include but are not limited to *Montana Band of Indians v. R* 2002 CAF 331, *Delgamuukw v. British Columbia* 1997 CarswellBC 2358, *United States v. Mcvey* 1992 CarswellBC 318, *Amnesty International Canada v. Canada (Minister of National Defence)* 2008 CAF 401, *Fraser v. Canada (Attorney General)* 2020 SCC 28, *D.R. Fraser & Co. v Minister of National Revenue* 1948 CarswellNat 16 etc.

[82] They include but are not limited to *Copello v Canada (Minister of Foreign Affairs)* 2003 CAF 295; *Kindyslides v John Does* 2020 BCCA 330; *Khadr v Canada* 2010 SCC 3 [*Khadr*]; *Bennett Estate v Islamic Republic of Iran* 2013 ONCA 623; speak to the extra-territorial application of Canadian law to Canadians outside Canada and the

relevant cases to my research and their appeals. They were the most relevant because they met all the four factors listed above. These cases are *Piedra v. Copper Mesa Mining Corp* (*Piedra*),[83] *Choc v. Hudbay Minerals Inc,* (*Choc*),[84] *Garcia v. Tahoe Resources Inc*. (*Garcia*)[85] and *Nevsun*[86] (Most Relevant Cases Group). I discussed these cases very extensively in chapter 3.

In Chapter 4, I consulted the Canadian Parliamentary Hansard to understand the justiciability bills and the debates that have ensued because of these bills in the Canadian Parliament. I considered the individual provisions of the bills and the policy motivations and considerations that underpinned them. I analysed the arguments proffered either in support or against the provisions of the bills by members of the parliament representing different voting blocs and their respective ideologies. I used these analyses to reach some conclusions.

In the next chapter, I answer my first sub-question by examining the applicability of Canada's international human rights law obligations to Canadian corporations.

justiciability and competence of Canadian Courts to adjudicate upon claims arising therefrom. *Hape, supra* note 80, *Bouzari, supra* note 80, *Kazemi, supra* note 80, etc offer the rich jurisprudential basis for the understanding of the subject matter and research questions of my thesis. Many of these latter decisions relied upon these former ones. For instance, the thoughts grounding the Abella dissent in *Kazemi* foreshadowed the destination that Abella reached in *Nevsun supra* note 55.

[83] 2010 ONSC 2421 [*Piedra*].

[84] 2013 ONSC 1414 [*Choc*].

[85] 2015 BCSC 2045 [*Garcia*].

[86] *Nevsun*, *supra* note 55.

CHAPTER TWO: CANADA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS, THE CONDUCT OF CANADIAN CORPORATIONS, AND THE EXTRACTIVE INDUSTRY IN THE THIRD WORLD

2.0. CHAPTER INTRODUCTION

This chapter will be guided by the question of what Canada's obligations are under international human rights law regarding Canadian corporations doing business in the extractive industries of Third World states. Any discussion of international law obligations for Canadian corporations must necessarily start with the debate on Canada's engagement with international law. This is because Canada, as a state, negotiates and makes laws that bind Canadian subjects with other states. Canadian corporations are Canadian subjects. So, my inquiry must begin with Canada's engagement with international law.

In this chapter, I examined how Canada creates international law (IL) obligations for itself. I discussed how Canada brings home the IL obligations that it makes for itself. I examined the subsisting IL obligations – with a more particular focus on international human rights law (IHRL) duties – that Canada has created and brought home for itself. I also examined how Canada implements its IHRL obligations. Lastly, I appraised how Canada implements its IHRL obligations, specifically over the Canadian corporations doing business in the extractive industries of Third World states. I concluded this chapter by drawing some conclusions based on my findings.

2.1. BRINGING INTERNATIONAL LAW HOME TO CANADA

Canada's Constitutional history is divisible into two distinct eras: the 1867-1982 era under the *British North America Act* and the era from 1982 to date under the *Constitution Act.* These two eras have essential differences. But the common denominator is their overt embrace

of the British legal system as the inspirational basis for the Canadian legal system.[87] The British North America Act 1867 is an Act of the British Parliament – under the royal assent of the Queen granted on 29 March 1867 – that merged the three separate territories of Nova Scotia, Canada, and New Brunswick into one Dominion to be known as Canada.[88]

The British North America Act created "a Constitution similar in Principle to that of the United Kingdom"[89] that amalgamated the British settler colonies of Canada. The Act became the constitution of Canada, and it came into effect on the 1st day of July 1867. It remained the constitution of Canada until the British Parliament enacted the Canada Act and the Constitution Act in 1982. Through the Canada Act, Britain relinquished the right and power to promulgate, amend, or repeal Canada's Constitution to the state of Canada. Through the Constitution Act, the British North America Act of 1867 was renamed "the Constitution Act of 1867". The Constitution Act also enacted the Canadian Charter of Rights and Freedoms and created Canada's Constitutional amendment procedure from 1982 onward.

The sum of the preceding explicatory background is that the Canadian common law is a direct descendant of the common law of England. Therefore, the delineation of Canada's legislative, executive, and judicial powers follows the same pattern as England's. Understanding the influence of the English common law on the Canadian legal system helps to situate Canada's engagement with international law. For instance, Canada takes the dualist approach to international law similarly with its English influences.

---

[87] See Peter Oliver, Patrick Macklem, & Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (Oxford University Press Online, 2017) at 1 ("The Canadian Constitution is in important ways a constitution in the tradition of the British Commonwealth.").
[88] See *Constitution Act, 1867* (UK), 30 & 31, c 3, s 91, reprinted in RSC 1985, Appendix II, No. 5. [*Constitution Act*] (Promulgated for the Provinces of Canada based on the expression of "their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland…").
[89] *Ibid* at Preamble.

There are two theoretical approaches to the relationship between international law and domestic or national law – monism and dualism.[90] The monist theoretical approach posits that "national and international law form one legal order, or at least a number of interlocking orders which should be presumed to be coherent and consistent. On that basis, international law can be applied directly within the national legal order."[91] A state with a monist approach upholds the direct application of international law within its national legal system because it believes that its legal order consists of both international and domestic law. On the other hand, a state that adopts the dualist theoretical approach believes that international law is distinct and different from its national law. It does not form a directly applicable law within such state's legal system. Under the dualist approach,

> When an international law rule applies, this is because a rule of the national legal system so provides. In the case of a conflict between international law and national law, the dualist would assume that a national court would apply national law, or at least that it is for the national system to decide which rule is to prevail.[92]

Britain adopted the dualist approach and Canada has retained the British dualist tradition even after attaining sovereignty.[93] According to Canada's dualism structure, international law is ordinarily not directly applicable or enforceable in Canada.[94] For instance, international agreements or treaties[95] are typically inapplicable in Canada until they have undergone the Canadian treaty-making process. This approach is rooted in the British dualist

---

[90] See James Crawford, *Brownlie's Principles of Public International Law* 9th ed (Oxford: Oxford University Press, 2019) [James Crawford, "Brownlie's Principles of Public International Law] at 45.
[91] *Ibid*.
[92] *Ibid*.
[93] Gib van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) 501 [van Ert, "The Domestic Application of International Law in Canada"] at 509-518.
[94] *Ibid* at 510.
[95] See *Vienna Convention on the Law of Treaties* 23 May 1969, UNTS vol. 1155 p. 331 [*VCLT*] at Art. 2(1)(a) (which defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.")

approach to international law which requires international agreements to undergo the British treaty-making process before it becomes applicable to Britain.[96]

Historically, the power to ratify treaties for both Britain and Canada was an exclusive prerogative of the British Crown until 1926.[97] In 1926, Canada was granted the power to conduct its foreign affairs, negotiate, and conclude its treaties without British involvement.[98] Canada's treaty-making powers devolved on the Canadian Federal Executive being "the representative of the British Crown in Canada."[99] Today, the treaty-making powers of Canada lie solely with its Federal Executive. The Canadian Federal Executive enters into international agreements for Canada through Canada's tripartite treaty-making process of negotiation, signature, and ratification. Only the treaties that have gone through this tripartite treaty-making process have "been brought home to Canada". Only these treaties are applicable and enforceable regarding Canadian natural or corporate persons – as the case may be.

On the other hand, although Canada is a dualist state, CIL norms are directly applicable and enforceable because they automatically form part of the common law.[100] This automatic and direct application of CIL is the law in England,[101] and it became the law in Canada based on the historical and constitutional nexus between the two countries.[102] This principle of automatic applicability of CIL is known as the doctrine of incorporation in England and the

[96] Van Ert, "The Domestic Application of International Law in Canada" *supra* note 93 at 510.
[97] *Constitution Act*, *supra* note 88 at s.132 (which provides that "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.")
[98] See Oliver et al., *The Oxford Handbook of the Canadian Constitution*, *supra* note 21 at 39.
[99] Laura Barnett, *Canada's Approach to the Treaty-Making Process* 2008-45-E (Ottawa: Library of Parliament, Legal and Social Affairs Division Publication, 2021) [Barnett, *Canada's Approach to the Treaty-Making Process*] at 2.
[100] See *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.)
[101] *Ibid*.
[102] See *Hape*, *supra* note 80 at paras 36- 39; *Nevsun*, *supra* note 80 at para 95 (where Abella J held that "There is no doubt then, that customary international law is also the law of Canada… The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.").

doctrine of adoption in Canada.[103] It is worthy of note that the doctrine of automatic incorporation or adoption of CIL norms into domestic legal orders is not a case of British or Canadian exceptionalism.[104] Instead, it is the norm in the legal orders of states worldwide. The Supreme Court of Canada (SCC) has traced the origin of the doctrine back to the eighteenth-century writings of jurists like Blackstone[105] and the decisions of English courts from the same era.[106] Therefore, when I conducted my Westlaw search for the purpose of empirical case law analysis for Chapter 3, the search returned several Canadian cases wherein the Canadian courts have directly adopted CIL and restated Canada's fidelity to the doctrine of direct and automatic adoption of CIL.[107]

CIL norms are international customs that are generally practised and accepted as law.[108] General practice and opinion juris are the two requirements that a norm must meet to be termed an international custom.[109] *Jus cogens* is a non-derogable subset of CIL norms that are fundamental to the international legal order.[110] *Jus cogens* or peremptory norms take precedence over all other norms of international law.[111] They are automatically applied to all states including Canada and it is not permitted for states to make treaties that negate *jus cogens*.[112]

---

[103] *Ibid* at para 86 (where Justice Abella explained that "In England this is known as the doctrine of incorporation and in Canada as the doctrine of adoption.")
[104] See Professor John Humphrey, "The Implementation of International Human Rights Law", (1978) 24 NY L Sch Rev 31 at 32 ("Customary law has the great advantage over treaty law in that it is binding on all states.")
[105] See *Nevsun, supra* note 80 at para 87 where the SCC relied on Blackstone's 1769 Commentaries on the Laws of England: Book the Fourth at 67 ("the law of nations … is here adopted in it[s] full extent by the common law, and is held to be a part of the law of the land.")
[106] *Ibid* at para 87.
[107] See *Mack v Canada (Attorney General)* 2002 CarswellOnt 2927; *Kazemi, supra* note 80; *Suresh v Canada (Minister of Citizenship & Immigration)* 2002 SCC 1[Suresh]; *Bouzari, supra* note 80.
[108] See *Statute of the International Court of Justice*, Can. R.S. 1945, No.7, [Statute of the ICJ] at art. 38.
[109] See *North Sea Continental Shelf*, Judgment, I.C.J. Report 1969, p.3, at para. 71; *Kazemi* supra note 14 at para. 38; United Nations, International Law Commission, 73rd Sess., Supp. No. 10, U.N. Doc. A/73/10, 2018, at 124.
[110] See *Kazemi, supra* note 80 at para. 47; *Nevsun, supra* note 80 at paras 82-84.
[111] See Majorie M. Whiteman, 'Jus Cogens in International Law, With a Projected List' (1977) 7 GA. J. INT'L & COMP. L. 609-28, at 609.
[112] *VCLT, supra* note 95 at art. 53.

Due to the distinctive position that *jus cogens* occupy under IL, there has been an agelong controversy regarding the CIL norms that have attained the status of *jus cogens*.[113] *Jus cogens* norms are "among the most ambiguous and theoretically problematic doctrines of international law."[114] In line with the spirits of the Vienna Convention on the Law of Treaties (VCLT), there is no exhaustive list of *jus cogens*. It would be counterintuitive to make a conclusive list of *jus cogens* because the VCLT provides that *jus cogens* or peremptory norm of international law can be modified "…by a subsequent norm of general international law having the same character."[115] However, an illustrative list of these norms is under consideration by the International Law Commission.[116] But before this work is concluded, courts must decide claims based on these norms. Therefore, international, and national judges have been devising means of determining the peremptoriness of a norm whenever it is alleged before their courts.

Canadian judges have been on the cutting edge of the *jus cogens* norm-setting exercise.[117] In *Suresh*, the SCC used "three compelling indicia" to arrive at its conclusion that the prohibition of torture is *jus cogens* as far as Canadian law is concerned.[118] The first indicium is the explicit prohibition in "a great number of multilateral instruments."[119] The second indicium is non-legalization or admission to the deliberate domestic practice of such prohibition by any state.[120] The third indicium is the attestation from several academic and judicial authorities that the norm is non-derogable.[121] Transposing this judicial reasoning from the specific to the general, it might be permissive to believe that whenever a prohibition is

[113] See Mark W. Janis, "Nature of *jus cogens* " (1988) 3:2 Conn J Int'l L 359.
[114] See Christopher A. Ford, "Adjudicating *jus cogens* " (1994) 13:1 Wis Int'l LJ 145 at 145.
[115] *VCLT*, *supra* note 95 at art. 53.
[116] At its Seventy-First Session in 2019, the International Law Commission considered"...whether the Commission should adopt an "illustrative list" *of jus cogens* norms."
[117] *Suresh*, *supra* note 107.
[118] *Ibid* at para 62.
[119] *Ibid* at para 63.
[120] *Ibid* at para 64
[121] *Ibid* at para 65.

prohibited in many multilateral treaties, not legalized in any country and enjoys notoriety amongst scholars as permitting no derogation, then such prohibition could be regarded as *jus cogens*.

The SCC has said in *Nevsun* that claims based on the violations of *jus cogens* and CIL are generally justiciable in Canada. Victims looking to bring a case based on *Nevsun* need to be sure that the human rights prohibition they allege is either *jus cogens* or CIL. A great way of determining whether such prohibition is *jus cogens* is to apply the *Suresh* indicia. Therefore, the SCC decision on the three compelling indicia in *Suresh* is very important for Third World victims looking to bring a claim based on *jus cogens* against a Canadian corporation in Canada. Since CIL and *jus cogens* are automatically applied in Canada, any claims based on these obligations are generally likely to be justiciable in Canadian courts. However, the automatic adoption of *jus cogens* and CIL into Canadian common law is a general rule. Like most general rules, it has qualifications or exceptions. I will discuss the exceptions to this general rule in the next section.

2.2. PARLIAMENTARY SOVEREIGNTY, JUDICIAL FINALITY & THE STATE IMMUNITY ACT

An exception to the general rule that CIL norms are directly adopted as part of the Canadian common law is if such rules are "inconsistent with Acts of Parliament or prior judicial decisions of final authority."[122] Justice LeBel aptly described the exception in *Hape*[123] as follows:

> The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly.

[122] Ian Brownlie, *Principles of Public International Law* 7th ed (Oxford University Press, 2008) [Brownlie, *Principles of Public International Law*] at 41.
[123] *Hape*, *supra* note 80 at para 90.

This is the principle of parliamentary sovereignty and judicial finality.[124] A rule of CIL is only directly and automatically adopted for application in Canada if it does not contradict any act of the Canadian Parliament or any decision from a Canadian court with final authority such as the Supreme Court of Canada (SCC). Where a rule of CIL contradicts Canadian legislation or a decision of the SCC, such an inconsistent rule will not be directly adopted, and it won't be applicable to Canada.

A very famous example of an act of the Canadian Parliament that bars the automatic adoption of CIL obligations in Canada is the State Immunity Act (SIA).[125] The SIA provides that "a foreign state is immune from the jurisdiction of any court in Canada."[126] SIA's general rule is that foreign states are immune from any litigation in Canada because they are not subject to the jurisdiction of Canadian courts.[127] The only exception to this general rule is if the proceeding "relates to the commercial activity of the foreign state."[128] Canadian courts are not barred from adjudicating a litigant's case against a foreign state if the subject of such litigation concerns the commercial activity of the foreign state only.

Some examples will suffice here. The prohibition against torture is a CIL norm that has been codified into a treaty through the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (the Convention against Torture).[129] The Convention Against Torture requires that States Parties must criminalize torture within their legal system.[130] Canada implemented this criminalization requirement by amending its

[124] *Ibid*.
[125] See *State Immunity Act*, R.S.C.1985, c. S-18 [SIA].
[126] *Ibid* at s. 3.
[127] *Ibid*.
[128] *Ibid* at s. 5.
[129] See *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984*, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51 [Covention Against Torture] at art. 2(1) (providing that "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.")
[130] *SIA*, *supra* note 125 at art. 4.

criminal code to the effect that anyone found guilty of torture would be "liable to imprisonment for a term not exceeding fourteen years."[131] The Convention Against Torture also requires party-states like Canada to ensure that a victim of torture can "obtain redress and has an enforceable right to fair and adequate compensation."[132] Considering the provisions of SIA which guarantees immunities for foreign states against litigation in Canada, does Canada have the same obligation to provide a forum for redress for the victims of torture committed by foreign states in foreign territories? This was the subject of the litigation in *Bouzari*.[133]

Mr Bouzari, his wife, and children – all Iranian citizens – alleged that Mr Bouzari was falsely imprisoned and tortured by agents of the Iranian government while living in Iran between 1993 and 1994.[134] They escaped Iran and fled to Canada as landed immigrants in July 1998.[135] The Bouzari family instituted a civil suit against the Islamic State of Iran in the Ontario Superior Court of Justice.[136] They claimed damages against the Islamic Republic of Iran for the torture.[137] Iran did not defend the suit.[138] The Attorney General of Canada and Amnesty International intervened. The Ontario Superior Court of Justice (ONSC) had to determine whether it had jurisdiction over the family's claim.[139] Does the family have the right to a civil remedy in Canada for torture committed against them by agents of the foreign Islamic Republic of Iran considering the foreign state immunity provisions of SIA?[140] The Bouzari family believed that they did.

The Bouzari family argued that if the ONSC interprets SIA within the context of Canada's international law obligations regarding torture, then the court would conclude that

[131] See *An Act to Amend the Criminal Code (torture)*, S.C. 1987, c. 10 (3rd Supp.), s. 2.
[132] *Ibid* at art. 14(1).
[133] *Bouzari*, *supra* note 80.
[134] *Ibid* at para 9.
[135] *Ibid* at para 1.
[136] *Ibid*.
[137] *Ibid* at para 1.
[138] *Ibid* at para 4.
[139] *Ibid* at para 2.
[140] *Ibid* at para 87.

their civil claim had been validly commenced and should proceed.[141] They provided two arguments in support of this submission. The first argument was that since Canada is a signatory to the Convention Against Torture, Canada was obliged to provide a civil remedy to victims of torture.[142] The family argued further that torture is *jus cogens*, a peremptory norm, and therefore constitutes an exception to the state immunity doctrine. Accordingly, they submitted that the ONSC ought to discountenance the argument that SIA bars their suit and allow their civil action to proceed.[143]

Justice Swinton of the ONSC disagreed. The ONSC judge formed the opinion that s. 3 of the SIA bars the ONSC from having jurisdiction in any suit over a foreign state except commercial activity only.[144] Therefore, the learned judge dismissed the Bouzari Family's claim for lack of jurisdiction against the Islamic Republic of Iran because the claim did not concern commercial activity.[145] The Bouzari family appealed to the Ontario Court of Appeal (ONCA). Justice Goudge of the ONCA affirmed Justice Swinton's judgment and dismissed the family's appeal.[146] The Bouzari family's attempt to approach the SCC for an appeal failed because Justices Abella, Fish and Major dismissed their application for leave to appeal to the SCC.[147]

It is imperative to clarify that although Canada will not adjudicate torture committed by a foreign state in that foreign state within its territory, it would nevertheless not send back a person to be tortured as well. In *Suresh*,[148] the SCC upheld the CIL principle of non-refoulment. It held that Mr Suresh, a refugee in Canada, cannot be deported to Sri Lanka because he has shown that he would be tortured if deported.[149] The juxtaposition of state

[141] *Ibid* at para 40.
[142] *Ibid*.
[143] *Ibid*.
[144] *Ibid* at paras 18 – 29.
[145] *Ibid* at para 90.
[146] *Ibid* at para 104.
[147] See *Bouzari v. Iran (Islamic Republic)* 2005 CarswellOnt 292 [*Bouzari* SCC].
[148] See *Suresh*, *supra* note 107.
[149] *Ibid* at para 102.

immunity under SIA and Canada's IHRL treaty obligations is a recurring theme throughout my discussion in this thesis.

2.3. CANADA'S INTERNATIONAL HUMAN RIGHTS LAW TREATY OBLIGATIONS

The Canadian constitution robes the Federal Executive with the power to conduct Canada's foreign relations and make treaties on behalf of Canada. Aside from the ones under the Convention Against Torture, Canada has more treaty obligations on human rights. The Canadian executive arm of government has negotiated, concluded, and ratified several IHRL treaties on behalf of Canada. These treaties have created obligations that Canada has undertaken to fulfil. Slavery, servitude, forced labour, torture, cruel and inhuman treatment, sexual violence, rape, and extra-judicial killings are some of the several human rights violations occurring within the extractive business context in the Third World states. Hence, I will identify IHRL treaties to which Canada is a State Party that have outlawed these violations.

Canada is a party to the Universal Declaration of Human Rights (UDHR). The UDHR guarantees human rights for all of humankind and prohibits slavery, servitude, and other violations that infringe on these rights.[150] Canada was one of the forty-eight UN member states that voted for the adoption of Resolution 217A (III) that birthed the UDHR on 10 December 1948 at the UN General Assembly.[151] Canada also holds a particularly prestigious and seminal position regarding the UDHR because it was "a Canadian named John Peters Humphrey that hand wrote the first draft of the UDHR."[152]

---

[150] See Universal Declaration of Human Rights, 10 December 1948, 217 A (III) [UDHR] at art. 4 (which provides that "No one shall be held in slavery or servitude: slavery and slave trade shall be prohibited in all forms.") and Art. 23(1) which provides for the right "to free choice of employment".

[151] Rhona K. M. Smith, *International Human Rights Law* 8th ed (Oxford: Oxford University Press 2018) [Smith, *International Human Rights Law*] at 39 (explaining that "A Declaration of the General Assembly is not, by definition, legally binding…").

[152] See The Canadian Museum of Human Rights, "A Universal Commitment: The People of the Universal Declaration of Human Rights", online: <https://humanrights.ca/story/a-universal-commitment>.

Although the UDHR is not "technically binding", [153] it has a "strong moral force",[154] and it occupies a particularly important position regarding human rights.[155] According to Alfredsson and Eide, "the forces of moderation, tolerance and understanding that the text represents will probably in future history-writing be seen as one of the greatest steps forwards in the process of global civilization."[156]

Canada is also a party to the International Covenant on Civil and Political Rights (ICCPR).[157] The ICCPR prohibits "slavery and the slave trade in all their forms."[158] It prohibits "servitude"[159] and proscribes "forced or compulsory labour."[160] It also prohibits torture, "cruel, inhuman or degrading treatment or punishment."[161]

Further, Canada was a foundational party to the League of Nations' Abolition of Slavery Convention of 1926,[162] the United Nations' Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. Canada has ratified the Rome Statute of the International Criminal Court, which characterizes "enslavement" as a crime against humanity.[163]

Canada was also a foundational contracting party to the International Labour organisation (ILO's) Constitution of 1919.[164] Canada has ratified all the Fundamental

---

[153] Smith, *International Human Rights Law supra* note 151 at 39.
[154] *Ibid*.
[155] *Ibid*.
[156] Asbjørn Eide Gudmundur Alfredsson, "The Origins of the Universal Declaration of Human Rights" in Asbjørn Eide Gudmundur Alfredsson eds *The Universal Declaration of Human Rights: a common standard of achievement* (Kluwer Law International, c1999).
[157] See *International Covenant on Civil and Political Rights, 1966*, C.T.S. 1976/47; 999 U.N.T.S. 171. [ICCPR]
[158] *Ibid* art. 8(1).
[159] *Ibid* art 8 (2).
[160] *Ibid* art 8 (3)(a).
[161] *Ibid* art 7.
[162] See League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253 [the Slavery Convention]. Canada signed the Slavery Convention on 28 September 1926 (wherein Canada undertook the obligation to work towards the prevention, suppression and total elimination of slavery and its forms in the world by virtue of the provision of art. 1-4 of this convention).
[163] See the *Rome Statute of the International Criminal Court*, at Art. 5(1), 7(1)(b) and 7(2)(c).
[164] See the International Labour Organization Constitution (Part XIII, Treaty of Versailles 1919) [ILO Constitution] at Preamble (wherein contracting parties– including Canada– "moved by sentiments of justice and

Conventions of the ILO.[165] Canada agreed to the Forced Labour Convention, 1930 on 13th June 2011,[166] the Abolition of Forced Labour Convention, 1957 on 14 July 1959[167] and Protocol of 2014 to the Forced Labour Convention, 1930 on 17 June 2019.[168]

I highlighted all these treaty obligations for two reasons. The first reason is to show that Canada is a party to these international agreements that outlaw all these human rights violations. The second reason is that whenever corporations – subjects of Canadian law – are implicated in these violations, Canada has an obligation to ensure the remediation of such violations.

The most crucial international agreement on the remediation of human rights violations that occur in the context of extractive business practices is the United Nations Guiding Principles on Business and Human Rights (UNGP).[169] The UNGP's "respect, protect, and remedy" framework enjoins State Parties to the UN Charter – including Canada – to ensure that adequate remedies are available within their legal systems for the victims of human rights violations arising from doing extractive business in the Third World.[170] It is essential to see how Canada has brought home these business and human rights obligations. This is what I will consider in the next section of this chapter.

humanity as well as the desire to secure the permanent peace of the world" agreed to work towards the elimination of conditions of labour that engender "injustice, hardship and privation…")

[165] See the Fundamental Conventions include: C029- Forced Labour Convention, 1930 (No. 29); C087- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); C098- Right to Organize and Collective Bargaining Convention, 1949 (No. 98); C100- Equal Remuneration Convention, 1951 (No. 100); C105- Abolition of Forced Labour Convention, 1957 (No. 105); C111- Discrimination (Employment and Occupation) Convention, 1958 (No. 111); C138- Minimum Age Convention, 1973 (No. 138); C182- Worst Forms of Child Labour Convention, 1999 (No. 182).

[166] See CO29- Forced Labour Convention, 1930 (No.29) at Art. 1 (which provides that each ILO member– including Canada– that ratifies this Convention "undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.")

[167] See C105- Abolition of Forced Labour Convention, 1957 (No. 105) at Art. 2 (which provides that each ILO member– including Canada– that ratifies this Convention "undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour…")

[168] See Protocol of 2014 to the Forced Labour Convention, 1930).

[169] Ruggie, *supra* note 54.

[170] *Ibid.*

2.4. BRINGING HOME CANADA'S BUSINESS AND HUMAN RIGHTS OBLIGATIONS

IHRL obligations are not self-fulfilling. They require implementation measures by State Parties to have the desired effect. Generally, Canada's Federal Executive has two approaches to bringing home Canada's IHRL obligations. The first approach is to issue IHRL implementation measures under existing Canadian laws. The second approach is to create new implementation laws. The executive sends a legislative proposal – a Bill for an Act – to the Canadian legislature to implement these obligations under this second approach. Canada has always chosen the first approach toward implementing its business and human rights obligations under IHRL. The Canadian Federal Executive has never proposed a Bill for an Act to tackle the IHRL challenges arising from the Canadian extractive sector in Third World states.

The Canadian Federal Executive has created three policy measures out of existing laws to address these issues. These measures are the Canadian Ombudsperson for Responsible Enterprise (the CORE)[171]; the Canadian Multi-stakeholder Advisory Body on Responsible Business Conduct (the Advisory Body); and A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad (the CSR Strategy).[172]

These three measures are premised on Canadian corporations' significant economic power over the global exploration and mining industry.[173] As of 2008, "over 75% of the world's exploration and mining companies were headquartered in Canada"[174]. Canadian responsibility should accompany this economic power. Therefore, the Canadian Government created "a comprehensive strategy on corporate social responsibility for the Canadian extractive sector

[171] See Government of Canada, "Order Setting out the MANDATE of the SPECIAL ADVISER to the Minister for International Trade, to be known as the Canadian Ombudsperson for Responsible Enterprise" Orders In Council PC Number 2019-0299 dated 8 April 2019 [The CORE Order in Council].
[172] *Ibid.*
[173] See Global Affairs Canada, "Corporate Social Responsibility, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (March 2009) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>.
[174] *Ibid.*

operating abroad".[175] The CSR Strategy's action points include out-of-court responsibility and accountability measures. These measures are non-judicial, and victims cannot use them as legal bases for instituting a legal action for redress.

The first action point is capacity-building for the host, resource-rich countries through organizations like Global Affairs Canada, Natural Resources Canada (NRCan) and Canadian participation in the Extractive Industries Transparency Initiative (EITI).[176] The second action point is "voluntary CSR reporting by Canadian companies" in line with "the Global Reporting Initiative (GRI) for CSR Reporting by the extractive sector and also "the International Finance Corporation Performance Standards on Social & Environmental Sustainability for extractive projects".[177]

Canada also created a CSR Centre for Excellence and the Office of the Extractive Sector CSR Counsellor. The Counsellor's mandate "relate exclusively to the activities of Canadian extractive sector companies operating abroad." The Counsellor is to act as a mediator in resolving "CSR disputes related to the Canadian extractive sector abroad … [because] unresolved disputes directly affect businesses through expensive project delays … and the loss of investment capital."[178] The CSR strategy requires voluntary self-reporting and out-of-court mediation of issues when rights-related issues arise.

The CORE and the Advisory Board form part of the Responsible Business Conduct Abroad framework, created in 2020.[179] The high point of the framework that concerns the thematic preoccupation of this thesis is the Dispute Resolution Mechanism led by the CORE.[180]

---

[175] *Ibid.*
[176] *Ibid.*
[177] *Ibid.*
[178] *Ibid.*
[179] See Global Affairs Canada, "Responsible Business Conduct Abroad" (28 April 2022) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.
[180] *Ibid.*

The CORE's mandate[181] was intended to extend to the independent investigation of "allegations of human rights abuses linked to Canadian corporate activity abroad."[182] The CORE Order-In-Council defines human rights as "any of the human rights that are referred to"[183] in the International Bill of Human Rights.[184]

The Advisory Board was created to counsel the government on the CORE.[185] Labour groups and civil society organisations joined industry players and government stakeholders in the Canadian extractive and garment sectors abroad on the Advisory Board. However, a strong disagreement arose between industry players and the labour groups and civil society organisations on the Advisory Board concerning whether to grant powers to the CORE through the Inquiries Act, the Public Service Employment Act or through a new Act of the Canadian Parliament.

The appointment of the Ombudsperson through the Inquiries Act would automatically robe the Ombudsperson with the power of a commissioner. This would let them summon oral and documentary evidence. It would also allow them to enforce the attendance of witnesses necessary for procuring such evidence.[186] This was meant to give the CORE the policing powers over corporate compliance with Canada's IHRL obligations.[187]

---

[181] See Global Affairs Canada, News Release "The Government of Canada brings leadership to responsible business conduct abroad" (17 January 2018) online: <https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html>.
[182] *Ibid.*
[183] The CORE Order in Council *supra* note 171 at art. 1(1).
[184] *Ibid.*
[185] See Global Affairs Canada, "Multi-Stakeholder Advisory Body on Responsible Business Conduct abroad" (17 January 2018) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/advisory_body-groupe_consultatif.aspx?lang=eng>.
[186] See *Inquiries Act* (R.S.C., 1985, c. I-11) at s.4 (which provides that "the commissioners have the power of summoning before them any witnesses, and of requiring them to (a) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and (b) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.")
[187] See Jennifer Wells, "Canada has a new watchdog for corporate ethics. But where are its teeth?" The Star (9 April 2019) online: <https://www.thestar.com/business/opinion/2019/04/09/canada-has-a-new-watchdog-for-corporate-ethics-but-where-are-its-teeth.html>.

The Canadian government commissioned an independent legal expert to provide some advice. [188] After consulting legal opinions from industry players, labour, organizations and civil society and academia regarding the subject of the commission,[189] the expert concluded that

> it is clear that the only ways to vest the CORE with the powers to compel witnesses and documents is to either create it by a statute or to appoint the CORE as a Commissioner under the Inquiries Act. *From a legal standpoint, it is my view that a body created by statute would be the preferable of the two approaches*. The statute would create permanence, and many of the issues regarding confidentiality, immunity, use of evidence in other proceedings and details regarding powers and procedures would be more easily delineated than in an Order-in-Council appointing a Commissioner. *As I have already stated, any commission of inquiry should only be a temporary measure pending legislation*.[190] [emphasis mine]

The report noted that the "industry will be unhappy if the CORE is given the power to compel witnesses and evidence."[191] In line with industry preference, the Canadian government neither sent a Bill for an Act to the Parliament nor did it create the CORE's powers through the Inquiries Act. Rather, it chose the Public Services Employment Act. This meant that the CORE would not have the power to compel documents and testimony from Canadian corporations.

All the members of the Advisory Board from labour groups and civil society[192] unanimously resigned in protest from the Advisory Board in July 2019.[193] They cited a lack of

---

[188] See Canadian Network on Corporate Accountability, "Government conceals and ignores expert advice on CORE, report leaked by civil society" (25 February 2021) online: <https://cnca-rcrce.ca/2021/02/25/government-conceals-and-ignores-expert-advice-on-core-report-leaked-by-civil-society/>. The report was prepared by independent counsel, Barbara A. McIsaac Q.C.

[189] *Ibid* at 3 (where the report stated that "In preparing this advice, I have received outside legal opinions provided to the Minister by counsel to the Prospectors and Developers Association of Canada (PDAC) and the Mining Association of Canada (MAC), as well as the Mining Association itself, regarding the creation of the CORE. I have also been provided with a letter dated December 22, 2017, from a group of Administrative Law Professors.")

[190] *Ibid* at 29.

[191] *Ibid* at 28.

[192] These labour groups and civil society organisations include Amnesty International; L'Association Québécoise des organismes de cooperation internationale; Canadian Council for International Cooperation; Canadian Network on Corporate Accountability; Canadian Labour Congress; Inter Pares; Mining Watch Canada; Development and Peace- Caritas Canada; World Vision Canada and United Steelworkers Union.

[193] See Jolson Lim, "Civil Society, labour groups resign in protest from federal panel on corporate responsibility abroad" iPolitics (July 11 2019) online: <https://ipolitics.ca/2019/07/11/civil-society-labour-groups-resign-in-protest-from-federal-panel-on-corporate-responsibility-abroad/>.

"trust and confidence in the government's commitment to international corporate accountability".[194] Contrary to the government's promise[195], the CORE Order In Council described the CORE as an "independent fact-finding"[196] body. Still, it failed to robe the CORE with the envisaged necessary powers it would need to fulfil its mandate effectively. They had also envisaged that the appointment of the Ombudsperson would be made under the Inquiries Act[197] rather than the Public Service Employment Act.[198] Civil society formed the opinion that the Canadian Federal Executive prioritised the insulation of the corporations from any form of actual accountability over the Third World victims' right to justice for the human rights violations committed by Canadian corporations in the Third World.

Although the Federal Executive has created several measures to implement Canada's business and human rights obligations under IHRL, these measures fall short of the internationally acceptable standards. The efforts focus on responsibility measures towards securing respect for human rights. But it is challenging to ensure respect for rights when the corporations know that there are no judicial consequences for violating them. Therefore, the measures created by the Federal Executive cannot guarantee the protection of human rights in the business context. These measures can also not ensure the remediation of violations of these rights without the necessary judicial mechanisms. Therefore, although Canada has created IHRL obligations that apply to Canadian corporations, it has not made sufficient implementation measures that can guarantee the respect and protection of human rights and

---

[194] See Canadian Network on Corporate Accountability, "News release: Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society" (11 July 2019) online: <https://cnca-rcrce.ca/2019/07/11/news-release-government-of-canada-turns-back-on-communities-harmed-by-canadian-mining-overseas-loses-trust-of-canadian-civil-society/>.

[195] See Emily Dwyer, "Canada's 'toothless' new corporate watchdog is a broken promise and a major setback for human rights" in Business & Human Rights Resource Centre (15 May 2019) online: <https://www.business-humanrights.org/en/blog/canadas-toothless-new-corporate-watchdog-is-a-broken-promise-and-a-major-setback-for-human-rights/>.

[196] See Order in Council, *supra* note 171 at art 1(1).

[197] *Inquiries Act*, *supra* note 186 at s. 3 (which provides that "Where an inquiry described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted.")

[198] See *Public Service Employment Act* (S.C. 2003, c. 22, ss. 12, 13).

remediation when the violation of these human rights occurs in the extractive industries of Third World states.

2.5. CHAPTER-SPECIFIC CONCLUSION AND KEY INSIGHTS

The research sub-question I formulated for this chapter is whether Canada has IHRL obligations that apply to Canadian corporations doing business in the extractive industries of Third World States. My answer to this question is yes, Canada has IHRL obligations that apply to Canadian corporations. These obligations are rooted in treaties and CIL. Canada has a responsibility to ensure that these obligations are met because of the age-long IL principle that agreements must be honoured. Therefore, I examined how Canada is meeting these obligations.

On the domestic front, I found that the Canadian Charter of Rights and Freedoms (the Charter) expressly guarantees the protection of the rights and freedoms of peoples subject to Canadian jurisdiction.[199] Canada has demonstrated a commendable willingness and capacity to guarantee the rights of its subjects both within and outside Canada.[200]

But how has Canada faired in ensuring that the rights and freedoms of Third World peoples are not eroded, denied, or become an opportunity cost for Canadian corporations doing business in the extractive industries of Third World states? My investigation revealed that these measures fall short in many regards and a judicial remediation mechanism currently does not exist.

The existing measures are grounded on a voluntary CSR mechanism that focuses on assisting Canadian businesses to maintain "the competitive advantage of Canadian companies" in the global extractive industries rather than ensuring the prevention and remediation of human rights violations committed against the Third World victims. Consequently, accountability and

[199] See *Charter of Human Rights and Freedoms*, CQLR c C-12. [*the Charter*]
[200] See *Khadr*, *supra* note 82.

access to justice are left at the mercy of these voluntary, self-administered CSR strategies of the Canadian extractive corporations.

I believe that this situation strikes an ethically wrong balance between two competing interests. On one side is the Canadian corporate interest of economic profits. On the other side is the human rights interests of Third World victims. As it stands, the Canadian corporate interest currently trumps the victims' accountability interest on the Canadian Federal Executive's scale of preference. The inevitable conclusion that I draw from this is that the Canadian Federal Executive values the corporate competitive advantage of these corporations over the lives and rights of these Third World victims. I suggest to victims of these violations and their lawyers not to look towards measures such as the CORE if their interests are in the justiciability of their claims in Canada because there is nothing for them there.

I am mindful of the fact that Canada is a sovereign state. I am also cognizant that with Canadian sovereignty comes the Canadian right to conduct Canadian affairs according to Canadian priorities. But even sovereign states have universal ethical imperatives, and Canada has the onus to act on one of such ethical imperatives here. Canada has made invaluable contributions to IHRL. Its footprints are visible in most of the IHRL instruments. Canada is the country whose jurist hand-wrote the draft of UDHR and is one of the earliest parties to the ICCPR. Canada is also one of the earliest parties to most IHRL treaties. Therefore, Canada's pride of place as a torch bearer for IHRL imposes an ethical imperative upon it to re-examine its stance regarding the balance of interests between corporate profits and Third World human rights.

Other First World powers have taken the lead in this regard. The United States of America has enacted Section 1502 of the Dodd-Frank *Wall Street Reform & Consumer*

Protection Act and the *Alien Torts Statute*.[201] The EU has also passed the EU Regulation on Conflict Minerals.[202] Considering Canada's IHRL exploits, it is surprising that Canada has no similar Parliamentary Act. Even after the independent expert counsel commissioned by the Canadian government suggested such legislation, the Federal Executive refused the expert advice to work on such a piece of legislation. Canada's implementation measures fall short of IHRL standards without a judicial mechanism for remediation.

Considering this shortfall, victims of these infractions have approached Canadian courts to invoke their common law jurisdictions to fill this lacuna. In the next chapter, I will examine, through judgments, how the Canadian courts have adjudicated claims brought by Third World victims of human rights violations committed by Canadian corporations in the extractive industries of Third World states.

[201] See *Dodd-Frank Wall Street Reform and Consumer Protection Act 2010* 12 USC 5301. (this imposes due diligence obligations on US corporations regarding the human rights implications of their business activities in Third World states).
[202] See Regulation [EU] 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas [2017] OJ L130/1.

CHAPTER THREE: EMPIRICAL ANALYSIS OF THE DECIDED CASES

3.0. CHAPTER INTRODUCTION

This chapter investigated how Canadian courts have decided the justiciability of cases brought by Third World victims of human rights violations committed by Canadian corporations in the extractive industries of Third World states.[203] I conducted this investigation in the context of the SCC's landmark judgment in *Nevsun*.[204] This is because the jurisprudential polemic over the justiciability of human rights violations committed by Canadian corporations abroad reached its height with the *Nevsun* judgment. On one side of the polemical divide is Justice Abella's incisive legal analysis of the knotty issues surrounding the justiciability of the claims in Canada.

Justice Abella concluded that the *jus cogens* and CIL violations alleged in *Nevsun* were justiciable by the Third World victims in Canadian courts. Four of her fellow SCC Justices agreed with her and concurred entirely with her judgment.[205] On the other side of the divide were four other fellow SCC Justices. Justices Brown and Rowe disagreed partially with Justice Abella and issued a partial dissent to the *Nevsun* judgment. Justices Côté and Moldaver disagreed completely with Justice Abella's reasoning. They issued a complete dissent.

The *Nevsun* judgment and the two dissents incisively captured the arguments for and against the justiciability of these human rights violations in Canadian courts. *Nevsun* also generated extensive academic commentaries, and commentators have taken different sides on this judicial controversy.[206] My survey of Canadian jurisprudence revealed that aside from

[203] Pahuja & Saunders, *supra* note 2 at 141.
[204] *Nevsun*, *supra* note 55.
[205] These Justices are Chief Justice Wagner, Justices Karakatsanis, Gascon and Martin.
[206] See Gerard J. Kennedy, "Nevsun, Atlantic Lottery, and the Implications of the 2020 Supreme Court of Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 UNBLJ 82; Tamar Meshel, "From Nevsun v Araya to the Core: Taking Stock of State-Based Business and Human Rights Grievance Mechanisms in Canada" (2021) 54:1 UBC L Rev 203; Jeremy Zullow, "Canadian Litigation for Violations of Customary International Law: Questions Remaining after Nevsun v Araya" (2022) 80 U. Toronto Fac. L. Rev. 122; H. Scott Fairley, "International Law Matures within the Canadian Legal System: Araya et al v Nevsun Resources Ltd" (2021) 99 Can. B. Rev. 193; Samuel E. Farkas, "Araya v Nevsun and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law" (2018) 76 U. Toronto Fac. L. Rev. 130; Peter

Nevsun, there were ten other judgments by Canadian courts between 2000 and 2020 when the SCC delivered the *Nevsun* judgment. However, *Nevsun* was the only judgment of its kind from Canada's highest and final court, the SCC.

I conducted a line-by-line reading of all the judgments and found several commonalities. The plaintiffs in the judgments were Third World plaintiffs, and Canadian corporations were the defendants. The claims were predicated on the acts or omission of the defendant Canadian corporations leading to human rights violations against the Third World plaintiffs. The violations occurred in the extractive industries of Third World states, and the plaintiffs brought their claims to Canadian courts. I have provided further methodological clarifications under the method section in the introductory chapter of this project.

The most critical commonality between all these cases is that the defendants mounted several justiciability challenges through preliminary motions against the plaintiffs' claim at the preliminary stage. The first justiciability challenge is the defendants' allegation that the plaintiffs' claim disclosed no reasonable cause of action (the reasonable cause of action challenge to justiciability). The second justiciability challenge is the defendants' allegation that the Canadian court does not have jurisdiction to adjudicate the plaintiffs' claim (the jurisdictional challenge to justiciability). The third justiciability challenge is that although the Canadian court had jurisdiction over the plaintiffs' claim, the court ought to decline its jurisdiction because there was another forum that was more appropriate for the litigation of the plaintiffs' claim (the forum non-conveniens challenge to justiciability). The fourth justiciability challenge is that the plaintiffs' claim was statute-barred because the claims had been brought after the limitation period prescribed by the Limitations Act for bringing such claim had passed (the Limitation challenge to justiciability). It is imperative for me to empirically analyse all the

Muchlinski, "Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: Nevsun Resources Limited v Araya (2019-2020) 2:1 Amicus Curiae 505.

cases. This will help to explain what transpired in each case and how the Justices resolved the challenges the defendants mounted. This empirical analysis is important to the actualization of my ambition to make this project a one-stop guide for Third World victims of human rights violations and their lawyers who are looking to litigate their cases in Canada.

Therefore, I have set out the facts that culminated in the plaintiffs' cause of action in each case. I identified the specific justiciability challenge(s) mounted by the defendant(s) in each case. I also highlighted the main arguments for and against the justiciability challenge by the corporations and the victims respectively. Then I examined the presiding Justice's analysis of the law and decision on the justiciability of each case in Canada. I provided case-specific conclusions to spotlight the most integral points of interest regarding justiciability at the end of my analysis of each case.

I also thought through the significance of each judgment and the significance of all the judgments collectively to deduce an overarching narrative. I used this overarching narrative to answer this chapter's question of how Canadian courts have resolved the justiciability of these violations in Canada. Lastly, I drew some chapter-specific conclusions.

3.1. PIEDRA V COPPER MESA MINING CORP (ONSC, 2010)

3.1.1. THE FACTS, JUSTICIABILITY CHALLENGE AND PARTIES' ARGUMENTS

On March 3, 2009, three Ecuadorian activists, Marcia Luzmila Ramírez Piedra, Jaime Polivio Pérez Lucero and Israel Pérez Lucero (the plaintiffs)[207], filed a claim in the Ontario Superior Court of Justice. These activists alleged that they had been physically assaulted and threatened with violence by agents and employees of Copper Mesa Mining Corporation in the course of exercising their freedom to oppose and protest the mining activities of Copper Mesa on their ancestral lands in the Junin area of Ecuador.[208] The plaintiffs named Copper Mesa

[207] *Piedra*, *supra* note 83 at para 4.
[208] *Ibid*.

Mining Corporation, Mr William Stearns Vaughan and Mr John Gammon (the Copper Mesa defendants) and the Toronto Stock Exchange (TSX) as defendants in their suit.[209] The first defendant, Copper Mesa Mining Corporation was a Canadian corporation incorporated in British Columbia. It carried on the business of mining and exploration of natural resources across the globe in its own name and through its various subsidiaries.[210] The second and third defendants, William Stearns Vaughan and Mr John Gammon were residents of Ontario and directors of Copper Mesa Mining Corporation.[211] The fourth defendant, TSX is a Canadian corporate entity that operates the stock exchange in Toronto. Corporations, including Copper Mesa Mining Corporation, raise capital by selling equity shares to public investors through the TSX's exchange.[212]

The plaintiffs alleged that TSX owed them a duty of care to ensure that the capital raised through its exchange for Copper Mesa's mining enterprise in Ecuador was not used to enable the perpetration of violence against them in Ecuador.[213] The following were the particulars of the breach that TSX allegedly owed to the plaintiffs:

> (a) "not to list a corporation when there is a reasonably foreseeable and serious risk that funds raised on the Exchange will be used in such a way as to harm individuals such as the Plaintiffs;" or in the alternative, (b) "not to list a corporation on the Exchange without instituting precautionary measures to prevent a serious risk that funds raised through the Exchange will be used to harm individuals such as the plaintiffs."[214]

The plaintiffs argued that if TSX had sufficiently exercised the duty to take reasonable care in favour of the plaintiffs, TSX would have reasonably foreseen that the capital raised from its exchange by Copper Mesa Mining Corporation was likely to enable the assault and

[209] *Ibid* at paras 5 – 8.
[210] *Ibid* at para 5.
[211] *Ibid* at para 6.
[212] *Ibid* at para 6.
[213] *Ibid* at para 12.
[214] *Ibid* at para 15.

threat of violence against them in Ecuador.[215] Therefore, the plaintiffs claimed that TSX was liable to them in the tort of negligence.[216]

The plaintiffs stated that Vaughan and Gammon, being two alter egos of the Copper Mesa Mining Corporation, had ample information regarding previous incidences of confrontations and possibility of the further and eventual harm that happened to the plaintiffs. Rather than act, these two directors did nothing to curtail or prevent the harm from happening to the plaintiffs.[217] Therefore, the plaintiffs claimed that Vaughan and Gammon were personally liable to them for neglecting to prevent the assault and threat of violence.[218] The plaintiffs' claim against Copper Mesa Mining Corporation was that the corporation automatically became vicariously liable for the conduct of its principal officers once the Ontario Superior Court of Justice (ONSC) finds that the two Vaughan and Gammon were personally liable for the assault and threat of violence.[219] Hence, the plaintiffs' claim of vicarious liability against Copper Mesa.

The defendants reacted to the plaintiffs' suit by filing preliminary motions in which they alleged that the plaintiffs' statement of claim discloses no reasonable cause of action.[220] Therefore, they urged the ONSC to strike out their claims. In effect, the defendants mounted a no reasonable cause of action challenge to the justiciability of the plaintiff's claims. Justice Campbell heard the defendants' motions on March 25, 2010 and delivered judgment on the motions on May 7, 2010.

[215] *Ibid* at paras 19-20.
[216] *Ibid* at para 15.
[217] *Ibid* at paras 21-23.
[218] *Ibid* at para 16.
[219] *Ibid* at para 17.
[220] *Ibid* at paras 1 & 14 showing that the defendants brought their applications pursuant to Rule 21.01 [b.] of the Rules of Civil Procedure; *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.).

3.1.2. LEGAL ANALYSIS IN PIEDRA

Justice Campbell approached the defendants' justiciability challenge to the plaintiffs' suit by first considering whether a duty of care exists between the parties to sustain the plaintiffs' claims under Canadian law.[221] He found that Canadian courts have developed a test for ascertaining the existence or otherwise of a prima facie duty of care between the parties in a suit like *Piedra* without having to delve into the merits of the plaintiffs' claim.[222] This two-stage conjunctive[223] test has been explained by the SCC as follows:

> To determine whether there is a prima facie duty of care, we examine the factors of reasonable foreseeability and proximity. If this examination leads to the prima facie conclusion that there should be a duty of care imposed on this particular relationship, it remains to determine whether there are nonetheless additional policy reasons for not imposing the duty.[224]

At the first stage of the test, the court examines whether the events culminating in the plaintiffs' claims were reasonably foreseeable by the defendants, and whether there is a sufficient relationship of proximity between the parties.[225] Where the plaintiffs' claims fail at the this first stage, the judge can strike out the plaintiffs' statement of claim for disclosing no reasonable cause of action.[226] He would have no obligation to proceed to the second stage – the policy consideration stage – of the test.

Justice Campbell stated that it was impossible for TSX to foresee that the capital raised by Copper Mesa through the exchange would cause harm to the Plaintiffs in rural Ecuador.[227] In his words, TSX could not "reasonably foresee that some agent apparently hired by Copper

---

[221] *Ibid* at para 26-28 where Justice Campbell relied on *Williams v. Canada (Attorney General)* (2009), 95 O.R. (3d) 401 (Ont. C.A.), *Williams v. Canada (Attorney General*), 2009 ONCA 378 (Ont. C.A.), leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 298 (S.C.C.); *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2; *Cooper v. Hobart*, [2001] 3 S.C.R. 537.
[222] *Ibid* at para 34.
[223] See *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 15 ("Desormeaux").
[224] See *Piedra, supra* note 83 at para 34 where Justice Campbell quoted *D. (B.) v. Children's Aid Society of Halton (Region)*, [2007] 3 S.C.R. 83 (S.C.C.).
[225] *Ibid*.
[226] *Ibid*.
[227] *Ibid*.

Mesa in remote Ecuador might assault the Plaintiffs."[228] Justice Campbell also stated that he could not find a proximate relationship between TSX and the plaintiffs to satisfy the proximity requirement of the test.[229] Justice Campbell reasoned that the plaintiffs were neither participants in the capital market nor were they investors or shareholders in Copper Mesa Mining Corporation.[230]

Having found neither a proximate relationship between the plaintiffs and TSX nor a situation where harm to the plaintiffs could have been foreseeable by TSX, Justice Campbell resolved that the Plaintiffs' claims failed the foreseeability and proximity stage of the two-stage test.[231] Therefore, he held that the plaintiffs' claim had no reasonable cause of action against TSX. He dismissed the plaintiffs' suit as far as TSX was concerned.[232]

Justice Campbell then proceeded to consider the plaintiffs' personal liability claim against Vaughan and Gammon and the vicarious liability claim against Copper Mesa Mining Corporation.[233] Justice Campbell stated that directors are protected from personal liability for the alleged act of their corporate principal except it could be established that the directors were personally complicit for the tortious act.[234] The judge said that he could not find sufficient facts from the plaintiffs' pleadings to show that Vaughan and Gammon were personally involved in the alleged physical assault and threat.[235] Consequently, the claim against the two directors were dismissed.[236] The plaintiffs' vicarious liability claim against Copper Mesa could not stand without the personal liability claim against the two directors.[237] So, the vicarious liability claim against Copper Mesa failed as well. Justice Campbell also granted the defendants' motion to

[228] *Ibid* at para 35.
[229] *Ibid* at para 37.
[230] *Ibid* at para 38.
[231] *Ibid.*
[232] *Ibid* at para 40.
[233] *Ibid* at paras 41-53.
[234] *Ibid* at para 48.
[235] *Ibid* at para 49.
[236] *Ibid* at para 49.
[237] *Ibid.*

strike the plaintiffs' pleadings against Copper Mesa Mining Corporation.[238] This ordinarily should have been the end of the case, but something else rather interesting happened. Justice Campbell was no longer obliged to examine the policy considerations for the justiciability of the plaintiffs' claim since the plaintiffs' claims had already failed. Yet, he decided to examine them.

He started by stating that the court must turn a blind eye to the dynamics of the relationship between the parties whenever it is called upon to make policy considerations of this nature. In his opinion, the most paramount consideration when examining these policy considerations must be protecting the legal system.[239] He explained further that the policy decisions of the government must be immunized from tort liability.[240] He then proceeded to consider the legal framework established to ensure responsible and accountable business practices by Canadian corporations in the Third World in similar manner as I have done in Chapter 2.

He found that the Canadian Federal Executive had only created voluntary, CSR measures for these violations. He also found that Canada had no legislation creating a right of action for victims of these human rights violations. Therefore, he reasoned that all these factors were policy considerations militating against the creation of a novel duty of care between the plaintiffs and the defendants. To him, the absence of legislation supporting such innovation meant that such innovation had no place in Canadian law.

Justice Campbell then proceeded to state quite categorically and emphatically that assuming there had been sufficient proximity and foreseeability between the plaintiffs and the defendants, he would still have formed the view that the plaintiffs' claims disclosed no reasonable cause of action.[241] To him, if "there were to be policy considerations that would

[238] *Ibid* at paras 49 & 54.
[239] *Ibid* at para 50.
[240] *Ibid.*
[241] *Ibid* at 52.

favor extending liability as sought by the Plaintiffs, **such policy would appropriately be a matter for the legislatures and not the courts, at least on these facts**." (Emphasis mine)[242] In the final analysis, he dismissed the plaintiffs' claims for disclosing no reasonable cause of action against the defendants.

Justice Campbell considered the issue of litigation costs after dismissing the plaintiffs' claim as discussed above.[243] The Plaintiffs argued that a "no costs" disposition would be the most appropriate measure considering the novelty of the suit's subject matter and the plaintiffs' "impecuniousness".[244] The Plaintiffs also urged the court to consider the fact that they were peasants from Junín in "rural Ecuador" as noted by the records of the Court.[245] The World Bank's data bank reveals that the per capita income in Ecuador at the time of the plaintiffs' case in 2010 was $4,231.619.[246] The defendants on the other hand were multibillion-dollar corporate entities and the directors of one of the entities respectively.

Also, *Piedra* was the first litigation of its kind in any Canadian court against both natural and corporate Canadian parties. Parties and their lawyers had to navigate an entirely new aspect of Canadian law without the benefit of judicial, legislation or policy guidance on such novel litigation.[247] Therefore, the plaintiffs urged Justice Campbell to order parties to bear their individual costs.

After hearing these arguments, Justice Campbell awarded the TSX a "fair and reasonable" cost of $12500. It also awarded $15,000 to the Copper Mesa defendants.[248] Even after considering the Plaintiffs' impecuniousness, the court saw "no reason to depart from the normal rule that costs be payable within 30 days."[249]

---

[242] *Ibid* at para 51.
[243] See *Piedra v. Copper Mesa Mining Corp.* 2010 ONSC 3253 [*Piedra 2*].
[244] *Ibid*.
[245] *Piedra, supra* note 83 at para 35.
[246] See The World Bank, "GDP per capita (current US$) – Ecuador" online: <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=EC>.
[247] *Piedra 2, supra* note 243 at para 2.
[248] *Ibid* at para 6.
[249] *Ibid*.

The plaintiffs appealed to the Ontario Court of Appeal (ONCA).[250] Justices Cronk, Rosenberg and Simmons heard the plaintiffs' appeal. Justice Cronk delivered the court's judgment, and Justices Rosenberg and Simmons agreed. Justice Cronk dismissed the Plaintiffs' appeal with additional costs of $10,000 to both TSX and the Copper Mesa defendants.[251] She stated that:

> The threats and assaults alleged by the plaintiffs are serious wrongs. Nothing in these reasons should be taken as undermining the plaintiffs' rights to seek appropriate redress for those wrongs, assuming they are proven. But that redress must be sought against proper parties, based on properly pleaded and sustainable causes of action. The claims at issue in these proceedings do not fall in that category. [Emphasis mine]

The dismissal of the plaintiffs' appeal spelt the final disposition in this case because the plaintiffs did not appeal any further. The plaintiffs did not appeal Justice Campbell's decision that a legislative act would be necessary for their claims to be justiciable in Canada. Therefore, Justice Cronk did not get the opportunity to rule on that decision by Justice Campbell. In the following section, I examine the significance of these first three judgments regarding *Piedra*. I will also highlight some key insights and draw some case-specific conclusions.

3.1.3. CASE-SPECIFIC CONCLUSION AND KEY INSIGHTS

Piedra is significant because it is the first judgment of its kind regarding the justiciability of claims based on human rights violations committed by Canadian corporations in the context of doing extractive business in the Third World. My first insight from *Piedra* concerns the decisions regarding the awards of costs. As if the additional injury of not getting their grievances redressed was not enough, the learned Justices Campbell and Cronk awarded litigation costs against the indigent plaintiffs in favour of the rich defendants. These cost awards ran into sums the plaintiffs had probably never collectively owned in their entire lives. The cost awards represent the exercise of judicial prerogative without ethical considerations. While it

[250] See *Piedra v. Copper Mesa Mining Corp.* 2011 ONCA 191 [*Piedra CA*].
[251] *Piedra 2*, *supra* note 243 at para 100.

might be lawful for Justices Campbell and Cronk to award these costs, contextual judging[252] that takes the circumstances of the *Piedra* plaintiffs and the novelty of their claims into account would have led the two Justices to a different conclusion regarding the award of costs. But it appears that the two learned Justices are not judicial contextualists. Hence, the imposition of such costs against the plaintiffs.

A legally realistic and contextualized examination of these awards would reveal that they seem more like fines to these impecunious plaintiffs who had suffered violations of their human rights, been turned back by the courts, and then made to pay their alleged violators. The palpable double jeopardy from these awards in *Piedra* is disturbing to say the least. More disturbing is the fact that the Justices appeared oblivious to the multi-layered nuances of this case.

My second key insight from this case is Justice Campbell's insistence that he would still have struck out the plaintiffs' claim even if the violations had been foreseeable and there was proximity between the parties to establish a prima facie duty. I think Justice Campbell realized the potential judicial significance of *Piedra*. Therefore, he did not want to leave any potential issue unaddressed. Justice Campbell held that only the Canadian legislature can validly create a right of action for the justiciability of these violations committed by Canadian corporations in Third World states. Justice Campbell believed that where such legislation-based right of action did not exist, he cannot as a judge, legitimately adjudicate on any such proceeding that might be instituted in Canada by any affected foreigner.

It is important to recall my argument that *Nevsun* has not completely resolved all the justiciability issues associated with litigating these human rights violations in Canada. I stated that *Nevsun* has only extended justiciability to *jus cogens* and CIL violations because those were the basis of the claims presented in *Nevsun*. Nevsun did not cover other human rights

[252] *Xavier*, *supra* note 77.

violations that are non- *jus cogens* or non-CIL. Where the claims border on freedom from cruel and inhuman treatment (physical assault and threat of violence) during a protest (right to freedom of assembly), *Nevsun* would not suffice to resolve the justiciability contention because these claims are clearly not based on *jus cogens* and CIL. *Nevsun* reaches far, but it does not reach far enough.

Another key insight is the fact that some might argue that an act is not necessary because the common law has already created room for legal innovation through the two-stage test for creating novel torts. But the second stage of the two-stage test requires that no innovation can pass if policy measures negate such innovation. The action or inaction of the Canadian Federal Executive is not a negligible policy measure. Therefore, it is equally arguable, if not more compelling, that judges like Justices Campbell and Cronk are well within their adjudicatory rights to ascribe the highest amount weight to the action or inaction of the Federal Executive when considering the justiciability of these violations.

Since *Nevsun* did not address the justiciability of these non- *jus cogens* and non-CIL violations, the absence of a justiciability Act could continue to be an impediment to the justiciability of these other violations in Canada. In effect, any Third World victim who goes before a Canadian court to argue the justiciability of their non- *jus cogens* and CIL violations while placing reliance on *Nevsun* might have to prove that their cases are based on *jus cogens* and CIL norms. Otherwise, if the presiding Judges for their claims have similar judicial philosophies like Justice Campbell, they could easily distinguish their case from *Nevsun* and strike down their claim out as non-justiciable based on policy consideration.

Lastly, Justice Campbell's pronouncement in *Piedra* that only an act of the Canadian Parliament can confer justiciability on the type of the plaintiffs' claim was an obvious indication of the learned Justice's judicial philosophy towards the justiciability of these violations in Canada. However, Justice Campbell's insistence that only the legislature can

lawfully create a right of action to ground the justiciability of these violations represents only one side of the justiciability polemic. This approach appears dated, considering Canada's obligations under IHRL and the pivotal role that Canada continues to play in developing IHRL. But it is not an approach that can be wished away because it enjoys an equally wide acceptance amongst the Canadian Justices that have decided this type of case.

Three years after Justice Campbell's judgment in *Piedra*, Madam Justice Carole J. Brown, also of the Ontario Superior Court of Justice (ONSC), provided a different approach when she was presented with similar facts and claims like *Piedra* in the next case. Like *Piedra*, the plaintiffs were all citizens of Guatemala. They had suffered human rights-related violations like death, gang rapes and crippling injuries because of the alleged actions and omissions of a Canadian extractive corporation, Hudbay Minerals Inc.

Whether the plaintiffs' claims were justiciable in the ONSC also became a contentious issue. The defendants also filed preliminary motions to mount justiciability challenges against the plaintiffs' claims. Similarly to my discussion of Piedra above, I will chronicle the facts of this second case, and discuss Justice Brown's legal analysis of the facts and her eventual judgment on the justiciability of the plaintiffs' claims. I will also reach some case-specific conclusions.

3.2. CHOC V. HUDBAY MINERALS INC. (ONSC, 2013)

3.2.1. THE FACTS, JUSTICIABILITY CHALLENGE AND PARTIES' ARGUMENTS

On January 11, 2007, Margarita Caal and ten other Guatemalan women were each allegedly gang-raped by security personnel during their forceful removal from their village in Guatemala.[253] Their forceful removal was part of an operation targeted at making way for the Fenix Mining Project, an "open-pit nickel mining operation located in eastern Guatemala".[254]

[253] *Choc*, *supra* note 84 at para 5.
[254] *Ibid* at para 4.

The project was owned by a Canadian extractive corporation, Skye Resources.[255] Skye Resources was subsequently acquired by another Canadian extractive corporation, Hudbay Minerals Inc.[256] Hudbay inherited Skye's Resources' liability by virtue of the acquisition. The 11 women filed a civil action against Hudbay Minerals Inc and its subsidiary HMI in the case of *Margarita Caal Caal v. Hudbay Minerals Inc*.[257]

In a similar fashion to the defendants in *Piedra*, Hudbay and HMI brought a preliminary motion asking the ONSC to strike the suit on two grounds. The first ground was that the plaintiffs' Statement of Claim discloses no reasonable cause of action. The second ground was that assuming the statement of claim disclosed a reasonable cause of action, it was already statute-barred.[258] I will refer to the civil suit filed by the 11 gang-raped women, as Justice Brown did, as "the Caal action" for the purpose of this discussion.

On a related note, the Chief Security Officer of the same Fenix Mining Project, Mynor Padilla, allegedly beat, then shot and killed Adolfo Ich, a Guatemalan community leader and critic of the extractive practices of Hudbay Minerals.[259] Adolfo Ich's wife, Angelica Choc, instituted a civil suit in Canada against Hudbay Minerals Inc and its subsidiaries, HMI Nickel Inc., and Compañía Guatemalteca de Niquel S.A. (CGN).[260] CGN filed a preliminary motion asking the court to either dismiss or stay Angelica Choc's civil action because the ONSC does not have jurisdiction over CGN.[261] I will refer to the civil suit filed by Angelica Choc against these three defendants, as Justice Brown did, as "the Choc action" for the purpose of this discussion.

[255] *Ibid* at para 5.
[256] *Ibid* at para 5.
[257] *Ibid* at para 5.
[258] *Ibid* at para 1.
[259] *Ibid* at para 6.
[260] *Ibid* at para 6.
[261] *Ibid* at para 1.

Furthermore, German Chub Choc, another Guatemalan, was paralysed from the wound he sustained through a gunshot fired by security personnel attached to the Fenix Mining Project on September 27, 2009.[262] He brought a civil action against Hudbay Minerals Inc. and CGN for civil reparations for the injuries he suffered.[263] Hudbay and CGN filed a preliminary motion asking the court to strike out German Chub Choc's civil claim on the ground that his Statement of Claim disclosed no reasonable cause of action.[264] I will refer to the civil suit filed by German Chub Choc against these two defendants as "the Chub action" for the purpose of this discussion.

The first defendant, Hudbay Minerals Inc., (Hudbay), is a Canadian corporation registered under the Canadian *Business Corporations Act*[265] with mining properties – including its Guatemalan Fenix mining project – in North and South America.[266] Hudbay owned the Fenix mining project at all material times to the Choc and Chub actions.[267] The second defendant, HMI Nickel Inc., (HMI), is a former Canadian corporation that merged with Hudbay.[268] HMI owned the Fenix mining project at the time material to the Caal action. The third defendant, CGN, is the Guatemalan "wholly-controlled and 98.2% owned subsidiary of Hudbay Minerals".[269] It was through CGN that Hudbay operated the Fenix mining project in Guatemala.[270]

Due to the commonalities between the three cases, the ONSC consolidated them into one civil suit on May 14, 2012.[271] Amnesty International was granted intervenor status in the

[262] *Ibid* at para 7.
[263] *Ibid* at para 7.
[264] *Ibid* at para 1.
[265] See *Canadian Business Corporations Act*, R.S.C. 1985, C. c-44.
[266] *Choc*, *supra* note 84 at para 8.
[267] *Ibid*.
[268] *Ibid*.
[269] *Ibid* at para 10.
[270] *Ibid* at para 10.
[271] *Ibid* at para 2.

consolidated suit on February 14, 2013.[272] The ONSC heard the defendants' motions between March 4 – 5, 2013.

3.2.2. LEGAL ANALYSIS AND DECISION IN CHOC

Justice Brown delivered judgment on all the motions on July 22, 2013. She found that the plaintiffs pleaded facts alleging the tort of negligence.[273] Therefore, she needed to analyse the facts of the case through the prism of the two-stage test for the creation of a novel duty of care between the parties.[274] This would determine whether the plaintiffs' statements of claims disclosed a reasonable cause of action and whether the ONSC had jurisdiction over their claims.

As discussed under *Piedra*, the two-stage test has three elements that are considered in two stages.[275] The twin elements of foreseeability and proximity are applied to the fact pattern of the plaintiffs' Statement of Claim at the first stage.[276] If the Court finds that there is a relationship of proximity between the plaintiffs and the defendants and the injury alleged by the plaintiffs could have reasonably been foreseeable by the defendants, the plaintiffs' claim would have passed the first stage of the test.[277] The second stage of the test requires the court to see whether there are policy considerations militating against establishing a novel duty of care between the parties.[278] If the plaintiffs' claim passes this policy consideration stage, the claim is deemed justiciable.[279]

According to Justice Brown, the displacement of the plaintiffs as a direct effect of the defendants' mining activities constituted enough grounds for the existence of foreseeable harm

[272] *Ibid*.
[273] *Ibid* at para 54.
[274] The common law judicial basis for this test had been discussed in this thesis under the section on Piedra. The cases establishing this test in the UK and Canada include *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.). at para 52 to the effect that "1. That the harm complained of is a reasonably foreseeable consequence of the alleged breach; 2. That there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants; and there exist no policy reasons to negative or otherwise restrict that duty."
[275] *Choc*, *supra* note 84 at paras 56-57.
[276] *Ibid* at para 58.
[277] *Ibid* at para 59
[278] *Ibid* at para 59
[279] *Ibid* at para 59

based on a proximate relationship between the parties. This was enough to ground the Plaintiffs' argument that the harm they suffered was a prima facie consequence of their displacement for the defendants' mining project.[280]

Therefore, Justice Brown found that "the plaintiffs have pleaded facts which, if proven at trial, could establish that the harm complained of was the reasonably foreseeable consequence of the defendants' conduct. I find that the first requirement is met."[281] Regarding proximity, Justice Brown found that the forcible displacement of the plaintiffs because of the Fenix Mining Project is itself a prima facie causal connection between the defendants and the plaintiffs because the project led to the plaintiffs' displacement from their lands.[282] Therefore, the plaintiffs' claims scaled the first stage of the test.

Justice Brown then looked to see whether there were sufficient prima facie policy considerations to support the plaintiffs' case for the establishment of a novel duty of care between the parties.[283] The parties had urged two different sets of policy considerations upon the Court. The defendants argued that assuming without conceding that a duty of care existed between the parties, it is negated by the following policy considerations:

> a private member's bill was introduced in federal parliament to ensure that Canadian extractive corporations met environmental and human rights standards – it was defeated; **a private member's bill was introduced in federal parliament to permit foreign plaintiffs to sue in Canada for claims based on violations of international law or treaties to which Canada is a party – it was also defeated (and has since been reintroduced but has not gone past first reading)**; recognizing a duty risks exposing any Canadian company with a foreign subsidiary to a myriad of claims, many of which will likely be meritless; this in turn would burden an already overtaxed judicial system; recognizing a duty of care would pre-empt the efforts of the federal government over the past seven years to work with Canada's mining sector to implement corporate social responsibility principles; and recognizing a duty would likely impinge upon the fundamental principles of separate corporate personality entrenched in the common law and its corporate statutes.[284] [Emphasis Mine]

[280] *Ibid* at para 70.
[281] *Ibid* at para 65.
[282] *Ibid* at para 67.
[283] *Ibid* at paras 71-75.
[284] *Ibid* at para 72.

The plaintiffs disagreed and sought to dispel the defendants' by urging the following counter-policy considerations upon the court as well:

> Recognizing a duty would support efforts taken by the federal government by encouraging Canadian mining companies to meet the "high standards of corporate social responsibility" that are currently expected by the Canadian government; recognizing a duty would support the government's stated goal of reducing risks of excessive force or human rights abuse related to the deployment of private security at Canadian enterprises abroad; and tort law should be evolving to accord with globalization, and local communities should not have to suffer without redress when adversely impacted by business activity of a Canadian corporation operating in their country. In other words of Justice Ian Binnie, "Ordinary tort doctrine would call for the losses to be allocated to the ultimate cost of the products and borne by the consumers who benefit from them, not disproportionately by the farmers and peasants of the Third World."[285]

Justice Brown reasoned that the existence of these two competing sets of policy considerations by the defendants and the plaintiffs is enough to show that "it is not plain and obvious" that the plaintiffs' case would fail.[286] She reasoned further that she was not in haste to strike out the plaintiffs' claim based on the defendants' preliminary motions. She reasoned that courts have been admonished to be reluctant to dismiss a case for disclosing no reasonable cause of action at the motion stage without having had the opportunity to weigh the pros and the cons of each set of policy considerations canvassed by the parties through a trial.[287] Hence, she held that the plaintiffs' claims had successfully scaled the two stages of the test. Therefore, she dismissed the defendants' motion alleging that the plaintiffs' claim discloses no reasonable cause of action.[288]

Justice Brown also considered the defendants' statute-bar challenge to the gang-raped women's claims. The defendants had argued that the claims of the 11 women plaintiffs who were gang-raped was statute-barred by virtue of section 4 of the *Limitations Act*.[289] The

[285] *Ibid* at para 73
[286] *Ibid* at para 74
[287] *Ibid* at para 74.
[288] *Ibid* at para 75.
[289] See *Limitations Act*, 2002, S.O. 2002, c.24, Sched. B, at s. 4. [*Limitations Act*]; Ibid at paras 76 – 84.

Limitations Act prescribed a two-year limitation period for the commencement of a civil suit after sexual assault discovered.[290] The gang rapes occurred on January 17, 2007, and the gang-raped women made their claims on March 28, 2011.[291] This was after the limitation period. However, Justice Brown pointed out that Section 10 (1) of the *Limitations Act* provided that the limitation period established by section 4 "does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition…"[292] Section 10(3) supplemented section 10(1) by providing that "unless the contrary is proved, a person with a claim based on a sexual assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced."[293] Therefore, Justice Brown rejected the defendants' argument that the claims based on the gang-rape of the 11 women plaintiffs were statute-barred. She dismissed the statute-bar motion and held that the 11 women's claims were justiciable.

CGN had already conceded in its Jurisdiction Motion that if Hudbay and HMI's No Cause of Action Motion failed, then CGN's No Jurisdiction Motion became redundant.[294] Therefore, since the No Cause of Action Motion had failed, it was not necessary to consider CGN's Jurisdiction Motion. Hence, the Jurisdiction Motion also failed. In the final analysis, Justice Brown held that the plaintiffs' claims were justiciable in Canada having surmounted the defendants' justiciability challenges and they could proceed to trial.

As at the time of writing this thesis, *Choc* is currently still a live case before the ONSC. However, it is poised to go to trial after Master M.P. McGraw granted the plaintiffs' motion to

[290] *Ibid* at para 76; *Limitations Act*, *supra* note 289 s. 4 which provides as follows: "Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."
[291] *Ibid* at para 76.
[292] *Choc*, *supra* note 84 at para 77; *Limitations Act*, *supra* note 289 at s 10(1).
[293] *Ibid* at para 77; *Limitations Act*, *supra* note 289 at s 10(3).
[294] *Ibid* at para 85.

amend their pleadings on January 21, 2020.[295] *Choc* is also a first of its kind in Canadian jurisprudence. In the next section, I will examine the significance of this case on the justiciability debate, provide some key insights and reach some conclusions.

3.2.3. CASE-SPECIFIC CONCLUSION AND KEY INSIGHTS

Choc is very significant because it represents the first time in Canadian legal history when a legal action based on human rights violations allegedly committed by Canadian corporations in the context of doing extractive business in a Third World country was found to be justiciable in a Canadian court. My first key insight from this case is that the main factor that precipitated the difference in outcomes for the plaintiffs in *Piedra* and *Choc* is the difference in the judicial philosophy and approach of the two Justices that handed down the judgments.

Recall that Justice Campbell had taken a very formalistic approach to the plaintiffs' claim in *Piedra*. He had insisted that the plaintiffs' claim could never be justiciable without Canadian legislation. On the other hand, Justice Brown took a more contextualized judicial approach in *Choc*. Once the plaintiffs' claims had scaled the onerous tests of foreseeability, proximity, and policy considerations, she found that the claims were justiciable in Canada. She assessed the common law framework for deciding the justiciability of the plaintiffs' claims and found it to be suitable and sufficient for the purpose of this type of claim.

Justice Brown did not reason that the absence of an act of the Canadian parliament legislating the justiciability of such claims by the Canadian Parliament was necessary. Rather, she hearkened to the exhortation of the victims, their lawyers and Amnesty International. She looked to the U.K. common law decisions where the two-stage test had been utilized. Justice Brown also looked to IHRL, the evolving IL landscape for corporations and human rights, and Canada's demonstrable interest in preventing human rights abuses in the business practices of

[295] See *Caal Caal v. Hudbay Minerals Inc.*, 2020 ONSC 415.

Canadian corporations in the Third World. All of these provided solid grounds upon which she based her conclusion that a summary disposition of the plaintiffs' claims as non-justiciable would neither be appropriate, nor would it serve the cause of justice.

The observable aftermath of Justice Brown's judgment in *Choc* is that there are two judicial views by two Justices of the same court regarding the justiciability of these violations in Canada. On the first side is Justice Campbell's view in *Piedra*. This view insists that only a legislative act of the Canadian Parliament can confer justiciability on these violations in Canadian courts. On the other side of the divide is Justice Brown's views in *Choc*. This view holds that the common law framework is already sufficient to determine the justiciability of claims like the ones in *Piedra* and *Choc*. They view the additional requirement of an act for justiciability as a needless surplusage.

Choc signalled a positive development for Third World victims and their lawyers regarding the justiciability of these violations in Canada. However, it is imperative to consider other judgments handed down after *Piedra* and *Choc*. It would be interesting to see whether subsequent judgments have resolved the impasse created by the judgments in *Piedra* and *Choc*. This leads to the discussion of *Garcia*, where Justice Gerow of the British Columbia Supreme Court (BCSC) made incisive contributions to the justiciability discourse.

3.3. GARCIA V TAHOE RESOURCES INC. (BCSC, 2015)

3.3.1. THE FACTS, JUSTICIABILITY CHALLENGE, AND THE PARTIES' ARGUMENTS

On April 27, 2013, seven Guatemalan farmers were staging a protest outside the Escobal Mine in San Rafael Las Flores, Guatemala (the Escobal Mine). They were shot and injured by security personnel attached to the Escobal mine.[296] The Escobal Mine is a silver,

[296] *Garcia, supra* note 85 at para 1.

gold, lead, and zinc mining project. It was owned by Minera San Rafael S.A. (MSR).[297] MSR was wholly owned by Tahoe Swiss A.G. and Escobal Resources Holdings Limited (Barbados).[298] Tahoe Swiss and Escobal Barbados were wholly owned by Tahoe Resources Inc., a Canadian extractive corporation.[299] In effect, the Guatemalan, Barbadian, and Swiss companies are all owned by the Canadian corporation, Tahoe Resources Inc. (Tahoe Resources). The capital with which Tahoe Resources acquired the Escobal Mine was raised from the Toronto Stock Exchange through a public offering in 2010.[300]

The seven Guatemalan farmers alleged that the shooting was "planned, ordered, and directed by Tahoe's Guatemala Security Manager, Alberto Rotondo Dall'Orso (Rotondo)."[301] The farmers' allegation was based on the chain of security command at the mine. Rotondo personally oversaw security at the Escobal Mine. He reported security matters directly to Don Gray, the general manager of MSR. Don Gray reported security matters directly to Ron Clayton, the President, and Chief Operating Officer of Tahoe Resources.[302] The Guatemalan farmers also based their allegations on video and audio intercepts which indicated that "security personnel planned to shoot at the plaintiffs with rubber bullets."[303]

Following the shooting, criminal proceedings were commenced against Rotondo in Guatemala in May 2013.[304] Six of the seven farmers triggered the civil reparation provisions of Guatemalan criminal law in the Rotondo criminal case in June 2013.[305] This civil reparation provision allowed victims of a crime to claim civil reparation within the criminal prosecution of such crime.

---

[297] *Ibid* at paras 1 & 4.
[298] *Ibid* at para 13
[299] *Ibid.*
[300] *Ibid.*
[301] *Ibid* at para 7.
[302] *Ibid* at para 20.
[303] *Ibid* at para 24
[304] *Ibid* at para 25
[305] *Ibid.*

The criminal prosecution against Rotondo was still ongoing in Guatemala when the seven Plaintiffs brought a civil claim against Tahoe Resources Inc. at the BCSC in June 2014 (*Garcia*).[306] The seven farmers (the plaintiffs) claimed that Tahoe Resources was expressly impliedly or negligently responsible for the shootings.[307] They claimed general tortious damages as well as "damages for loss of income, earning capacity, loss of opportunity, future care, and punitive damages."[308]

Tahoe Resources responded by filing a preliminary motion against the plaintiffs' suit. This motion was premised the *Supreme Court Civil Rules*[309] and the *Court Jurisdiction and Proceedings of Transfer Act* (CJPTA).[310] Tahoe Resources did not dispute that the BCSC had jurisdiction over the plaintiffs' claim in its motion. It conceded that Tahoe Resources is subject to the jurisdiction of the BCSC because Tahoe Resources had a registered office in British Columbia.[311] Rather, Tahoe's position is that "Guatemala is clearly the more appropriate forum for determining the claims of the plaintiffs in these proceedings."[312] This application is known as a Forum non-conveniens application.

Tahoe Resources reasoned that the plaintiffs were already pursuing remediation in Guatemala against Rotondo.[313] They reasoned further that the plaintiffs can recover both civil and criminal remedies in Guatemala. They also reasoned that Guatemala had a framework that would allow Tahoe Resources to be validly joined to the case in Guatemala. Therefore, they concluded that since Guatemala has such a functional legal framework, the BCSC ought to "exercise its discretion to decline jurisdiction and stay the action."[314]

---

[306] *Ibid* at para 2.
[307] *Ibid*.
[308] *Ibid* at para 9.
[309] See Rule 21–8 (1-2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 at r. 21–8 (1-2) quoted by the BCSC in para 29 of the Judgment.
[310] See *Court Jurisdiction and Proceedings of Transfer Act*, S.B.C. 2003, c. 28 [CJPTA] at s. 11 (1-2).
[311] *Ibid* at s. 7; *Garcia, supra* note 85 at para. 30.
[312] *Ibid* at para 3.
[313] *Ibid* at para 27.
[314] *Ibid* at para 2.

The plaintiffs opposed the defendant's application. They contended that the central issue for deciding the defendant's forum non-conveniens application was not whether Guatemala had a functional legal framework that can purportedly serve the cause of justice.[315] Rather, they argued that the issue should be:

> whether a Canadian company has any responsibility under Canadian law for the brutal conduct of security personnel hired to protect its prize asset. The plaintiffs submit that question can only be answered in a Canadian court. **They seek justice in Canada against the Canadian company that owns the mine as they have no faith in the Guatemalan legal system to hold the company accountable**.[316] [emphasis added]

The plaintiffs contended further that the Guatemalan legal system lacks independence and transparency. They stated that powerful elements like the government and wealthy corporations like Tahoe Resources had a very strong hold and could easily influence the Guatemalan judicial system.[317] The plaintiffs stated that Canada is the only jurisdiction where they stand a chance of getting justice against the Canadian corporation in the circumstances. Therefore, they asked the BCSC to dismiss the defendant's forum non-conveniens application and hold that their claim was justiciable in Canada.

3.3.2. LEGAL ANALYSIS IN GARCIA

Justice Gerow stated that many factors must be considered when making the decision regarding the appropriate forum for a case. She started by considering the comparative convenience and litigation expenses for the plaintiffs' suit. She reasoned that since the events leading to *Garcia* occurred in Guatemala,[318] it would be comparatively more convenient and less expensive to secure the evidence and witnesses needed to litigate the case in Guatemala.[319] She also reasoned that the substantial translational resources that would be needed can be

[315] *Ibid* at para 37.
[316] *Ibid* at para 4.
[317] *Ibid* at para 38.
[318] *Ibid* at paras 43-44.
[319] *Ibid* at paras 45-46.

averted if the case is litigated in Guatemala instead of British Columbia.[320] Justice Gerow also found that all the wrongs occurred in Guatemala, therefore "the factor of which law to be applied suggests Guatemala is the more appropriate forum."[321] Therefore, she resolved factor regarding the comparative convenience and litigation expenses in favour of the defendant's application.

Justice Gerow also considered the options available to the plaintiffs in Guatemala. She considered the fact that the plaintiffs can recover civil reparation as part of the criminal prosecution against Rotondo in Guatemala.[322] She also considered the fact that the plaintiffs were already seeking civil reparations in the criminal case against Rotondo.[323] She considered the fact that they could add any other party – including Tahoe Resources – to that Guatemalan criminal case. Therefore, she formed the opinion that these factors point to Guatemala as the more convenient forum for the plaintiffs' case.[324] Lastly, Justice Gerow said she was convinced that the Guatemalan legal system "has a functioning judicial system".[325] She said the plaintiffs had demonstrated a repose of faith in the same Guatemalan system by bringing their civil reparation claim as part of the criminal action against Rotondo in Guatemala.[326] Therefore, they ought to continue following that path.

The plaintiffs urged Justice Gerow to consider both *Piedra* and *Choc* regarding the establishment of novel torts for these violations.[327] Justice Gerow opined that her analysis of *Choc* showed that "it is far from clear based on *Choc* that such a duty will be established. As noted in *Choc* it is a novel claim."[328] Therefore, she was not persuaded to establish such novel duty by Justice Brown's reasoning in *Choc*. Justice Gerow also considered Justice Campbell's

[320] *Ibid* at para 47.
[321] *Ibid* at para 80.
[322] *Ibid* at paras 37-73.
[323] *Ibid* at para 83.
[324] *Ibid* at para 82.
[325] *Ibid* at para 105.
[326] *Ibid* at para 86.
[327] *Ibid* at paras 88-90.
[328] *Ibid* at para 90.

judgment in *Piedra*. She quoted three paragraphs from Piedra.[329] The third and last paragraph that Justice Gerow quoted and considered from *Piedra* is paragraph 53 where Justice Campbell held that:

> If there were to be policy considerations that would favor extending liability as sought by the Plaintiffs, such policy would appropriately be a matter for legislatures and not the courts, at least on these facts.[330]

Justice Gerow invariably aligned herself with Justice Campbell's reasoning.[331] She thought that it was not altogether clear from Justice Brown's judgment in *Choc* whether the novel tort will eventually be created. Therefore, she did not agree that the common law framework was as sufficient or as settled in *Choc* as the plaintiffs in *Garcia* were making it out to be. Therefore, she did not venture to consider the common law framework as done in the other two cases. She concluded that Guatemala is a more appropriate forum in the following words:

> In my view, the public interest requires that Canadian courts proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its citizens. To hold otherwise is to ignore the principle of comity and risk that other jurisdictions will treat the Canadian judicial system with similar disregard. In this case, as noted earlier, Guatemala has a functioning legal system for both civil and criminal cases, and the plaintiffs are already seeking compensation for their injuries in Guatemala.[332]

Hence, Justice Gerow declined jurisdiction and consequently granted the defendant's forum non-conveniens application by staying further proceedings in the plaintiffs' suit.[333] The plaintiffs appealed to the British Columbia Court of Appeal (BCCA).

3.3.3. GARCIA V. TAHOE RESOURCES INC. (BCCA, 2017)

The BCCA allowed the plaintiffs' appeal. Justice Garson delivered the court's unanimous judgment on January 26, 2017. Justices Groberman and Dickson concurred.[334]

---

[329] *Ibid* at para 92.
[330] *Ibid*.
[331] *Ibid* at para 92.
[332] *Ibid* at para 105.
[333] *Ibid*.
[334] See *Garcia v. Tahoe Resources Inc.* 2017 BCCA 39 [*Garcia Appeal*].

Justice Garson raised seven issues for the determination of the appeal (*Garcia Appeal*).[335] The first issue was whether the plaintiff/appellants could introduce new evidence on appeal.[336] Rotondo, who had been under house arrest pending the conclusion of his criminal trial, had absconded to Peru.[337] In the circumstance the Guatemalan judge suspended the criminal trial indefinitely.[338] Rotondo was still in Peru at the time of hearing the *Garcia appeal*.[339] Tahoe Resources did not contest the veracity of this new evidence. However, they vehemently opposed its introduction into the BCCA's records for deciding the *Garcia appeal*.[340]

Justice Garson reasoned that Justice Gerow's judgment in *Garcia* rested on two pillars. The first pillar was Rotondo's criminal trial. The second pillar was the possibility of pursuing remedial and reparational claims based on the criminal trial.[341] Any evidence that could assist the BCCA to decide whether the pillars were still standing or had collapsed ought to be allowed on appeal. Therefore, he held that the new evidence was admissible. It was already obvious that the plaintiffs' appeal should succeed upon the admission of this new evidence. Nonetheless, Justice Garson proceeded to examine all the other issues. He resolved them in the plaintiffs' favour and allowed the appeal.[342]

In 2019, Pan American Silver, the new owner of Tahoe Resources reached a reparations settlement with the plaintiffs.[343] The defendant also issued a public apology to the plaintiffs as part of the settlement.[344] This made *Garcia* the first case in Canadian jurisprudence where a

[335] *Ibid* at para 47.
[336] *Ibid* 4 & 57.
[337] *Ibid* at para 58.
[338] *Ibid*.
[339] *Ibid*.
[340] *Ibid* at para 59.
[341] *Ibid* at para 60 – 61.
[342] *Ibid* at paras 72 – 130.
[343] See Rights Action, "Pan American Silver forced to offer settlement to Guatemala victims of mining repression and violence" (31 July 2019) online: <https://us9.campaign-archive.com/?u=ea011209a243050dfb66dff59&id=2ab9bc4f1a>.
[344] See Mining Weekly, "Court case sets precedent for claims arising from overseas activities of Canadian miners" (30 July 2019) online: <https://www.miningweekly.com/article/court-case-sets-precedent-for-claims-arising-from-overseas-activities-of-canadian-miners-2019-07-30/rep_id:3650>.

Canadian corporation would admit wrongdoing and apologise to the Third World victims of these violations. It was also the first case of its kind to be settled out of Court by the parties.

3.3.4. CASE-SPECIFIC CONCLUSION AND KEY INSIGHTS

So far, I have examined three different cases: *Piedra*, *Choc*, and *Garcia*. Justice Brown formed the view in *Choc* that a Parliamentary act was not necessary for the justiciability of human rights violations committed by Canadian corporations in the Third World. However, Justices Campbell and Gerow formed the contrary view in *Piedra* and *Garcia* respectively. Justices Cronk and Garson did not have the opportunity to decide on this point of law in *Piedra appeal* and *Garcia appeal* respectively. They had decided the plaintiffs/appellants' appeal on grounds of appeal related to the legal correctness or otherwise of positions taken by their respective application Judges without anymore. Therefore, their views regarding the necessity of a justiciability Act for the violations remain unknown.

It might be argued that Justices Cronk and Garson had implicitly ruled on the necessity or otherwise of a parliamentary act for the justiciability of the plaintiffs' claims by being silent on this point. That argument, albeit reasonable, would be legally wrong. The situation would have been different if Justices Cronk and Garson had issued rulings regarding this legal issue. Such rulings would have settled this contentious issue until a court with a higher judicial hierarchy than the ONCA and the BCCA – the SCC – decided otherwise. Therefore, it is my conclusion that the scale tilts toward the necessity of a Parliamentary act because two out of the three Justices had insisted on the necessity of such a Parliamentary act. Therefore, it would be interesting to see the position of the BCSC, the BCCA and the SCC in the last judgments in *Araya*.[345]

[345] See *Araya v. Nevsun Resources Ltd.* 2015 BCSC 1209 [*Araya*].

3.4. ARAYA V. NEVSUN RESOURCES LTD. (BCSC, 2016)

3.4.1. THE FACTS, JUSTICIABILITY CHALLENGE, AND THE PARTIES' ARGUMENTS

In 1997, the Eritrean Government began the Eritrean National Service Program as capacity development and military service initiative for young Eritreans.[346] All participants had initially been billed to participate in the program for a total period of 18 months before they were demobilized.[347] However, the program started to extend beyond the specified 18-month period. The Eritrean Government stopped demobilizing youths from the program in 2002.[348] Those who attempted to flee the program were arrested, treated as deserters, detained without trial, and frequently tortured.[349] Youths in the program were forcefully conscripted to work in businesses owned by public officials and their cronies.[350] Two such businesses, Segen Construction Company ("Segen") and Mereb Construction Company ("Mereb"), were owned by senior military officers.[351] The Contract Administration Head of Segen, Berhane Afewerki Weldemariam, gave affidavit evidence that

> the Eritrean government has encouraged Segen to use active NSP service staff for road and dam construction and other infrastructure projects commissioned by the government or public authorities. This is done "in order to assist in the construction of public projects that are in the national interest".[352]

It was in furtherance of these "national interests" that Gize Yebeyo Araya, Kesete Tekle Fshazion and Mihretab Yemane Tekle and several others whom they represented were forcefully conscripted as forced labour under the threat of torture by the Eritrean Government through its Eritrean National Service Program.[353] They were deployed to work for Segen who

[346] *Ibid* at para 26.
[347] *Ibid* at para 27.
[348] *Ibid* at para 27.
[349] *Ibid* at para 31.
[350] *Ibid* at para 30.
[351] *Ibid* at para 28.
[352] *Ibid* at para 29.
[353] *Ibid* at paras 26-32.

had been contracted to "build the infrastructure and mine facilities" at the Bisha gold mine.[354] The Bisha gold mine was jointly owned, by Nevsun Resources Ltd., and the Eritrean national government. However, the mine was controlled by Nevsun and Eritrea through a corporation known as Bisha Mine Share Company (BMSC).[355] Nevsun Resources Ltd. owned 60% of the BMSC and the Eritrean National Government owned 40%. Nevsun had majority control of the BMSC board. Cliff Davis, Nevsun's Chief Executive Officer, was the chairman of the BMSC board.[356] In 2013, Eritrea made $143 million with virtually all of it coming from the proceeds of the gold mined at the Bisha mine. This made Bisha mine the single largest source of income for the state of Eritrea.[357] However, the people of Eritrea, including the plaintiffs, remained mired in extreme poverty.[358]

The plaintiffs individually fled Eritrea at different times and sought asylum as refugees in Canada.[359] They brought a civil action as refugees against Nevsun Resources Ltd. at the BCSC. The plaintiffs alleged they were held and worked against their will, tortured[360], and subjected to cruel, inhuman, and degrading treatment while at the Bisha mine.[361] They claimed civil reparation from Nevsun for breach of their *jus cogens* and CIL-based human rights.[362]
In a similar manner as the defendants in *Piedra*, *Choc* and *Garcia*, Nevsun Resources Ltd. responded with justiciability challenges to the plaintiffs' claims.[363] The first challenge, asked the BCSC to decline jurisdiction because British Columbia is not the best forum for this case.[364] Second, the defendant asked the BCSC to strike the plaintiffs' claims because the claims were

[354] *Ibid* at para 43.
[355] *Ibid* at para 5.
[356] *Ibid* at paras 51 – 52.
[357] *Ibid* at para 40.
[358] *Ibid* at para 41.
[359] *Ibid* at para 4.
[360] *Ibid* at para 45.
[361] *Ibid* at paras 42 – 46.
[362] *Ibid* at para 4.
[363] *Ibid* at para 6.
[364] *Ibid* at para 6a.

"barred by the act of state doctrine" (the Act of State Application).[365] Third, the defendants alleged that the plaintiff's claims "based on alleged breaches of customary international law" were non-justiciable in Canada. Fourth, the defendant asked the court to disallow the plaintiffs from carrying on the suit in a representative capacity.[366]

Both parties led evidence regarding the administration of justice in Eritrea.[367] They agreed that Eritrea has never had a constitution since independence. A constitution was drafted but it was never implemented.[368] The country was being ruled by proclamation and there was no conflict of laws legislation.[369] The court dismissed cases if foreign law is the applicable law governing such cases.[370] Most judges had no legal training, and the courts were manned by the state-party loyalists, military officers, and freedom fighters.[371] The only law school had been closed by the government and the students at a new law program opened at a different college in 2011 were conscripts of the National Service Program who were required to work as judicial and quasi-judicial officers.[372] The civil code developed for the country by the Dutch had never been utilized.[373] After considering all the evidence, Justice Abrioux proceeded to rule on each of the four applications.[374]

3.4.2. LEGAL ANALYSIS IN ARAYA

Justice Abrioux considered Nevsun's Forum non-conveniens application first. The application had been brought pursuant to the Supreme Court Rules and the CJPTA in a similar fashion as in *Garcia*.[375] Nevsun urged the Court to decline jurisdiction and stay proceedings in

[365] *Ibid* at para 6bii
[366] *Ibid* at para 6c.
[367] *Ibid* at paras 71-85.
[368] *Ibid* at para 72
[369] *Ibid.*
[370] *Ibid* at para 81.
[371] *Ibid* at para 83
[372] *Ibid* at para 84.
[373] *Ibid.*
[374] *Ibid* at para 127.
[375] *Ibid* at para 227

the suit in British Columbia because the state of Eritrea is a more convenient forum for the litigation of the issues in the case.[376]

Justice Abrioux adopted Justice Gerow's summary of the legal framework for forum non-conveniens applications as provided in *Garcia*.[377] He found that there was a real risk that the plaintiffs would not obtain justice in Eritrea based on the socio-political context I explained above.[378] Therefore, he concluded that "Nevsun has not established that … Eritrea is the more appropriate forum."[379] Consequentially, Justice Abrioux dismissed the forum application.[380] Then he considered the defendant's Act of State application. The mainstay of Nevsun's Act of State application is that there was no way the BCSC could adjudicate the plaintiffs' claim that Eritrea's National Service Program enabled torture, forced labour, cruel and inhuman treatment, crimes against humanity, and slavery, without deciding on the propriety of the actions of the state of Eritrea. This made the plaintiffs' claims contrary to the doctrine of state immunity from litigation in other states.[381]

After reviewing available jurisprudence, Justice Abrioux found that the Act of State doctrine had never been applied in Canada.[382] However, he curiously held that even though there is no jurisprudence applying the doctrine in Canada, he is of "the view that the act of state doctrine, notwithstanding its uncertain application and lack of clarity does form part of the common law of this country."[383] But did it apply to *Araya*? Justice Abrioux held that he could

[376] *Ibid* at para 227.
[377] *Ibid* at paras 229 – 233.
[378] *Ibid* at para 236
[379] *Ibid* at para 338
[380] *Ibid* at para 339.
[381] *Ibid* at para 329.
[382] *Ibid* at paras 350-352 where Justice Abrioux considered *R. v. Bow Street Metropolitan Stipendiary Magistrate (No. 3)*, [2000] 1 A.C. 147 (U.K. H.L.) at 269 [Pinochet No. 3]; *Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6)*, [2002] 2 A.C. 883 (U.K. H.L.) at 1108 as per Lord Hope Craighead; *Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co.*, [2012] EWCA Civ 855 (Eng. & Wales C.A. (Civil)) ["Yukos"] at para. 110.
[383] *Ibid* at para 375.

not dispose the plaintiffs' claim based on such uncertainty.[384] Therefore, he dismissed Nevsun's Act of State application.[385]

Justice Abrioux then turned to the CIL application.[386] Nevsun argued that corporations do not have any obligations under CIL. Therefore, the allegation that a corporation breached CIL contradicted international law. Such allegation is novel. It stands against settled Canadian tort and criminal law because the norms allegedly breached were crimes and not torts.[387] Nevsun argued that **the Canadian Parliament had demonstrated its stance against establishing private law torts for CIL claims through its refusal of legislative proposals to this effect**.[388] Therefore, they urged the court to strike those claims because they had no reasonable prospect of success should they go to trial.[389]

Justice Abrioux considered *Hape*[390] and *Bouzari*[391] to establish four legal principles which ultimately guided his resolution of this case. The first one is that CIL forms part of Canadian law through the doctrine of adoption.[392] I discussed this extensively in Chapter 2. The second one is that "the prohibitions on slavery, forced labour, torture and crimes against humanity are part of CIL, and all have the status of *jus cogens*."[393] The third one is that there is no Parliamentary act outlawing the establishment of CIL torts.[394] Fourth, the decision on whether the plaintiffs had presented enough evidence for new nominate torts to be created could not be resolved at the preliminary stage. Hence, the plaintiffs' CIL claim cannot be

[384] *Ibid* at paras 389 – 418.
[385] *Ibid* at para 422.
[386] *Ibid* at para 423.
[387] *Ibid* at para 425.
[388] *Ibid* at para 459.
[389] *Ibid* at para 426.
[390] See *Hape, supra* note 80.
[391] *Bouzari*, *supra* note 80 at paras 63-66.
[392] *Ibid* at para 440.
[393] *Ibid* at para 439.
[394] *Ibid* at para 462.

dismissed for not having a prospect of success.[395] Therefore Justice Abrioux also dismissed Nevsun's CIL application.[396]

Lastly, Justice Abrioux considered Nevsun's application against the propriety of the plaintiffs' case as a representative suit.[397] He found that the law weighed against such claim continuing in a representative capacity. So, he ordered that the plaintiffs cannot continue their suit on behalf of a class of victims. They must continue it as it concerns the named plaintiffs only.[398]

In the final analysis, the evidence application was granted in part, the forum non-conveniens application was dismissed, the no cause of action application was dismissed, the Act of State application was dismissed, the CIL application was dismissed, and the representative action application was granted.[399] Nevsun was dissatisfied with Justice Abrioux's judgment. So, they appealed to the BCCA.[400]

3.4.3. ARAYA V. NEVSUN RESOURCES LTD. (BCCA, 2017)

Justices Newbury, Willcock, and Dickson heard Nevsun's appeal between September 25 – 28, 2017. Justice Newbury delivered the BCCA's judgment in the appeal on November 21, 2017. Justice Newbury began the judgment with Lord Justice Lloyd Jones's observation in *Belhaj v Straw* (*Belhaj*)[401] that:

> ... a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects. A corresponding shift in international public policy has also taken place....These changes have been reflected in a growing willingness on the part of courts in this jurisdiction to

[395] *Ibid* at para 463 – 466.
[396] *Ibid* at paras 483 – 485.
[397] *Ibid* at paras 486.
[398] *Ibid* at para 570.
[399] *Ibid* at paras 575-579.
[400] See *Araya v. Nevsun Resources Ltd.* 2017 BCCA 401 [*Nevsun Appeal BCCA*].
[401] [2014] EWCA Civ 1394 (Eng. & Wales C.A. (Civil)) at para. 54 [Belhaj]

> address and investigate the conduct of foreign states and issues of public international law when appropriate.[402]

Justice Newbury framed the appeal's overarching question to be whether Canadian courts should participate in this paradigmatic shift. Then she turned to the individual issues that she framed for the determination of *Nevsun Appeal BCCA*. To determine Nevsun's allegation that Justice Abrioux was wrong for refusing to strike down the plaintiffs' CIL claims, Justice Newbury considered *Kazemi*[403] and *Bouzari*.[404]

She also reached the same conclusion as Justice Abrioux that it was not "plain and obvious that the plaintiffs' CIL claims were bound to fail" although the claims had a great hurdle to surmount should they go to trial.[405] Justice Newbury made no pronouncement on whether a justiciability Act might be helpful for surmounting the great hurdles that she foresaw should the plaintiffs' case go to trial. She dismissed Nevsun's appeal.[406] Nevsun was dissatisfied with Justice Newbury's judgment, so they appealed to the Supreme Court of Canada.[407]

3.4.4. NEVSUN RESOURCES LTD. V. ARAYA (SCC, 2020)

Nevsun's appeal to the SCC was predicated on two issues. The first issue was whether the act of state doctrine formed part of Canadian common law. The second issue was whether CIL prohibitions can ground a claim for damages under Canadian law.[408] The appeal was heard on January 23, 2019, and the judgment was delivered on February 28, 2020. Justice Abella delivered the judgment. Chief Justice Wagner, Justices Karakatsanis, Gascon and Martin concurred. Justice Abella dismissed Nevsun's appeal in its entirety.

---

[402] *Nevsun Appeal BCCA* supra note 400 at para 115.
[403] See *Kazemi supra* note 80.
[404] *Nevsun Appeal BCCA supra* note 334 at paras 177 – 197.
[405] *Ibid* at para 197.
[406] *Ibid* at para 198.
[407] *Nevsun supra* note 12.
[408] *Ibid* at para 26.

Regarding the issue of the Act of State doctrine, Justice Abella traced the doctrine to its English common law roots. She clarified that although Canadian judges have utilized elements of the doctrine, no Canadian case has ever applied or attempted to apply the doctrine itself.[409] She insisted that this deliberate refusal to apply the doctrine cannot be overlooked. Overlooking it would be tantamount to adopting an English approach while jettisoning Canadian jurisprudence.[410] Therefore, she held that the doctrine is not part of Canadian common law. So, it cannot constitute a bar to the plaintiffs' case.[411]

Justice Abella then turned to the issue of the justiciability of CIL violations committed abroad. She stated that CIL is one of the sources of IL.[412] She opined that as far as Canada is concerned, CIL is part of Canadian common law by automatic and direct incorporation.[413] Therefore, CIL norms are automatically enforceable in Canadian courts except if there is any statute to the contrary.[414] Justice Abella quoted extensively from Justice LeBel's judgment in *Hape* to support her position on the principle of automatic and direct incorporation of CIL in Canada.[415] I have considered this principle in Chapter 2 of this thesis as well.

She concluded that Canada's position can be aptly summed up by the words of Rosalyn Higgins, former President of the ICJ that "there is not 'international law' and the common law. International law is part of that which comprises the common law on any given subject."[416] Therefore, Justice Abella found that Canadian courts are obligated to treat CIL as part of

[409] *Ibid* at para 57.
[410] *Ibid* at para 58.
[411] *Ibid* at para 58.
[412] *Statute of the ICJ*, supra note 108 at art. 38.
[413] *Nevsun*, *supra* note 80 at paras 85-90
[414] *Ibid*.
[415] *Ibid* at paras 90-93.
[416] See Rosalyn Higgins, "The Relationship Between International and Regional Human Rights Norms and Domestic Law" (1992), 18 Commonwealth L. Bull. 1268, at p. 1273.

Canadian law and not as a matter of fact that required proof before it becomes applicable.[417] Hence, violations of CIL norms are justiciable in Canada.

Justice Abella then turned to Nevsun's argument that assuming without conceding that CIL forms part of Canadian law through the doctrine of direct incorporation, the defendant enjoys immunity from the plaintiffs' CIL claim because the defendant is a corporation.[418] Justice Abella disagreed with the defendant. She stated that defendant's argument was based on a misapprehension of the law.[419] Nevsun's position represented the classic, Grotian understanding of international law, and not the current, modern international law.[420]

According to Justice Abella, international law moves, and it has now moved to a point where the human being has become the focal point of the law.[421] Therefore, modern IHRL accommodates claims against private actors – both human and corporate – who violate the human rights of individuals.[422] Corporations like Nevsun no longer enjoy a blanket immunity from cases alleging liability for violating CIL.[423] Justice Abella admitted that the plaintiffs' CIL claims raised challenging, novel, and unsettled issues of law.[424] However, she held that these novel issues could not be decided at the preliminary stages of the case.[425]

Justice Abella reasoned quite ambitiously that Canadian courts, like their counterparts all over the world, have a prominent role to play in the evolution and expansion of international

---

[417] *Nevsun*, *supra* note 12 at paras 95 – 98 relying on James Crawford, *Brownlie's Principles of Public International Law* (9th ed. 2019), at p. 52; Robert Jennings and Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1, at 57.
[418] *Ibid* at para 104.
[419] *Ibid* at para 105 per Abella relying on William S. Dodge, "Corporate Liability Under Customary International Law" (2012), 43 Geo. J. Int'l L. 1045, at p. 1046; Harold Hongju Koh, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 J.I.E.L. 263, at pp. 265-267.
[420] *Ibid* at para 106.
[421] *Ibid* at para 106 per Abella relying on the dictum of Lord Denning in *Trendtex Trading Corp. v. Central Bank of Nigeria* (1977), [1977] 1 Q.B. 529 at 554.
[422] *Ibid* at paras 110 – 112 where Justice Abella relied on Beth Stephens, "The Amorality of Profit: Transnational Corporations and Human Rights" (2002), 20 B.J.I.L. 45, at 73.
[423] *Ibid* at para 113.
[424] *Ibid* at para 69.
[425] *Ibid* at para 69.

law. Canadian courts must embrace this responsibility and contribute to the growing choir[426] of the international comity of national courts rather than shy away from this significant role.[427] Therefore, she concluded that the breaches alleged by the plaintiffs can apply to Nevsun and there is no contrary provision against it in Canadian law.[428]

Justice Abella then turned to the question of whether there are remedies available in Canadian law for the plaintiffs' CIL claims.[429] She resolved this issue in the affirmative, although she noted that such remedies would have to be novel tort remedies to be developed by the trial judge for the CIL claims.[430] She left the development of such novel tort remedies to the trial judge for the suit.[431] In the final analysis, Justice Abella dismissed Nevsun's appeal.[432]

3.4.5. THE TWO DISSENTS TO THE SCC JUDGMENT IN NEVSUN

Four Justices of the SCC issued two dissents to Justice Abella's judgment. Justices Brown and Rowe issued a partial dissent to Justice Abella's judgment because they agreed with all of Justice Abella's holdings in her judgment. On the other hand, Justice Côté issued a complete dissent because she disagreed completely with all the holdings in Justice Abella's judgment. Justice Moldaver concurred with Justice Côté's complete dissent. I will discuss the two dissents in this subsection.

---

[426] *Ibid* at para 72 per Justice Abella relying on Osnat Grady Schwartz, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 Cardozo J. Intl & Comp. L. 587, at 616; see also René Provost, "Judging in Splendid Isolation" (2008), 56 Am. J. Comp. L. 125, at 171.
[427] *Ibid* at paras 70 – 71 per Justice Abella relying on Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 Can. Y.B. Intl Law 89, at 100-1; Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 I.C.L.Q. 57, at 69; Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 Can. Y.B. Intl Law 3, at 4-6, 8 and 56; see also Hugh M. Kindred, "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., The Globalized Rule of Law: Relationships between International and Domestic Law (2006), 5 at 7.
[428] *Ibid* at para 116.
[429] *Ibid* at para 127.
[430] *Ibid.*
[431] *Ibid.*
[432] *Ibid* at para 133.

Justices Brown and Rowe agreed with Justice Abella's dismissal of Nevsun's appeal on the Act of State doctrine.[433] But they dissented, in part, when they held that Nevsun's appeal should be allowed regarding the plaintiffs' CIL claims. According to Brown and Rowe, CIL cannot be used to create tort liability.[434] Justices Brown and Rowe stated that allowing such CIL claim to continue would be tantamount to "changing the role of international law within Canadian law which exceeds the limits of the judicial role."[435] They believe that Justice Abella's judgment constituted a judicial usurpation of what should ordinarily be a sacrosanct territory for legislative prerogative.[436]

Justices Brown and Rowe stated that Justice Abella's decision was perverse because she relied on Professor Stephen J. Toope's position that "international law speaks directly to Canadian law and requires it to be shaped in certain directions."[437] Justices Brown and Rowe framed the issue as one of supremacy tussle between Canadian law and international law. They resolved the tussle in favour of Canadian law.[438] They held that it is a Canadian law that should always shape the direction of the application of international law in Canada and not the other way round.[439]

The two Justices also dissented with the majority judgment by holding that corporations cannot be liable under international law.[440] This is because corporate liability for IHRL violations does not enjoy universal acceptance yet. Therefore, it is plain and obvious that the plaintiffs' claim founded on such equivocal custom is bound to fail.[441] Brown and Rowe also argued that prohibitions such as slavery, forced labour, crimes against humanity and torture

[433] *Ibid* at para 134.
[434] *Ibid* at para 135.
[435] *Ibid* at para 149.
[436] *Ibid.*
[437] *Ibid* at para 150 citing to Professor Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23.
[438] *Ibid* at para 178
[439] *Ibid.*
[440] Ibid at para 190 relying on James Crawford, Brownlie's Principles of Public International Law (9th ed. 2019), at 630.
[441] *Ibid* at para 191.

cannot give rise to civil liability because they are crimes.[442] Brown and Rowe admonished that Justice Abella's judgment would lead to grave uncertainty because it constituted a fundamental "**remaking of the laws of this country which is not for the courts**. This, ultimately, is where we part ways from the majority" and allow the appeal in part.[443]

Justice Côté disagreed with Justice Abella's judgment in its entirety. She stated that she would have allowed the appeal and dismissed the plaintiffs' claims in its entirety. Justice Moldaver concurred with Justice Côté's dissent. Justice Côté issue with Justice Abella's lead judgment is the "**existence and applicability of the act of state doctrine or some other rule of non-justiciability barring the respondents' claims**."[444]

She stated that the question for the determination of Nevsun's appeal should not be whether corporations are immune from CIL claims. It should be "whether CIL extends the scope of liability for violation of the norms at issue to corporations."[445] She relied on US case laws for the framing of this question.[446]

Justice Côté takes Justice Abella to task for not ascertaining whether there was sufficient, widespread, and consistent state practice to ground Justice Abella's holding that CIL, particularly IHRL, apply to corporations.[447] She referred to Dworkin's *Law's Empire* to emphasize the necessity for legal interpretation and adjudication based on consistent internal principles.[448] She asserted that there is currently no rule of customary international law that supports the application of IHRL to corporations in the same way as private human beings.[449] Therefore, she resolved the issue of jurisdiction in favour of Nevsun.[450]

---

[442] *Ibid* at para 203.
[443] *Ibid* at para 265-266.
[444] *Ibid* at para 267.
[445] *Ibid* at para 269.
[446] *Ibid* where the learned Justice cited to *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (U.S. C.A. 2nd Cir. 2010), at p. 120 aff'd on other grounds, 569 U.S. 108 (U.S. Sup. Ct. 2013).
[447] *Ibid* at para 269
[448] *Ibid.*
[449] *Ibid.*
[450] *Ibid.*

Justice Côté also examined the act of state doctrine and divided it into two branches for the purposes of her analysis.[451] The first branch was the choice of law which presupposed that a court would not appraise or adjudicate the act of a foreign state using the prisms of its own local laws.[452] The second branch is the non-justiciability branch requiring courts to abstain from deciding the legality of actions of foreign states.[453] She concluded that while a court has the legitimate right to inquire into a question of international law, the court does not have the standing to adjudicate a matter between private parties founded on an allegation of wrongdoing on the part of a foreign state.[454] She concluded that the plaintiffs' claim would require a necessary determination regarding whether Eritrea violated IL and therefore was not justiciable in a Canadian court.[455] She concluded that it is plain and obvious that the plaintiffs' claim would fail, so the appeal should be allowed and the claim dismissed.[456]

3.4.6. CASE-SPECIFIC CONCLUSION & KEY INSIGHTS

Before *Nevsun*, five Justices (Campbell, Cronk, Brown, Gerow, and Garson) had issued judgments that were relevant to the controversy surrounding the justiciability of human rights violations committed by Canadian corporations in the extractive industries of Third World states. Justices Campbell and Gerow had found it necessary that an act of the Canadian parliament must establish a right of action for these violations before they can be justiciable in Canada. The opinions of Justices Cronk and Garson were unknown because they did not get the opportunity to decide on the necessity of an act of Parliament for the purposes of justiciability of these violations. Only Justice Brown had found that an act of Parliament was not necessary for the claims to be justiciable in her Court. Justice Brown found the common

[451] *Ibid* at para 274-278.
[452] *Ibid* at para 279-285.
[453] *Ibid* at para 286-293.
[454] *Ibid* at para 305.
[455] *Ibid* at para 312.
[456] *Ibid* at para 313.

law framework sufficient for her purposes. She went ahead to apply it. This was the situation before the three judgments regarding the *Araya* plaintiffs were delivered.

This situation made the judgments regarding the *Araya* plaintiffs' claims even more jurisprudentially significant. These judgments had the potential to resolve the issue regarding the necessity of a Parliamentary act for the justiciability of these violations. However, before considering the significance of these judgments, it is imperative to be mindful of the distinguishing elements between the *Araya* plaintiffs' claims and the claims in all the previous cases. This is very essential for precedential purposes.

The *Araya* plaintiffs' claims were the first CIL-based human rights violations claims that had been brought to Canada in the context of Canadian extractive business in the Third World. The claims in *Piedra*, *Choc* and *Garcia* were not based on *jus cogens* and CIL in the same manner as the *Araya* plaintiffs' claims. This is a significant difference because *jus cogens* and CIL norms are automatically incorporated into Canadian law. They are automatically enforceable in Canadian courts except if there is any legislation to the contrary. I discussed this extensively in Chapter 2. Non-CIL norms do not enjoy the same status and treatment. Therefore, their application is not automatic.

Victims of these violations and their lawyers must take cognizance of this important difference. *Nevsun* may only serve as a binding judicial precedent for cases involving the violation of *jus cogens* and CIL norms. It holds only persuasive precedential value for cases based on other human rights norms. Future cases might fail or succeed based on this important distinction.

The three judgments on the justiciability of the *Araya* plaintiffs' claims completely mirror the general judicial controversy over the justiciability of these violations in Canada. Justice Abrioux decided in *Araya* that he did not need an act of Parliament to hold that the

Araya plaintiffs' claims were justiciable in Canada. These claims were based on *jus cogens* and CIL norms.

But violations of Jus Cogen and CIL norms are not the only human rights violations that occur in the context of these cases. The violations in *Piedra*, *Choc*, and *Garcia* attest to this fact. Therefore, Justice Abrioux's judgment in *Araya* amounts to a partial resolution of the controversy regarding the need for an act of Parliament for the justiciability of these claims in Canada. According to Abrioux's judgment, the claims are justiciable without an act of the Canadian Parliament *if* they are based on CIL norms.

Justice Newbury did not disturb the decision of Justice Abrioux when Abrioux's judgment came up for appeal in the *Nevsun Appeal BCCA*. She had the opportunity to do so. But she did not. This is different from Cronk and Garson who did not have the opportunity at all. It is my position that Newbury's refusal to disturb Abrioux's finding constitutes a tacit approval of Abrioux's finding. Therefore, Newbury's judgment also amounts to a partial resolution of the controversy. According to Newbury's judgment, these human rights violations claims are justiciable without an act of the Canadian Parliament *if* they are based on CIL norms.

Justices Abella, Wagner, Gascon, Karakatsanis and Martin did not disturb Justices Abrioux and Newbury's position regarding the controversy. These SCC Justices had the opportunity to do so in *Nevsun*. But their reasoning revealed that they did not see any reason to do so. Rather, their judgment, delivered by Abella, reinforced Abrioux and Newbury's position. According to Justices Justice Abella's judgment – to which Wagner, Gascon, Karakatsanis and Martin concurred – the human rights violations claims are justiciable in Canada without an act of the Canadian Parliament *if* they are based on CIL norms.

The dissenters in *Nevsun* are firmly on the other side. Justices Brown, Rowe, Côté, and Moldaver strongly believed that only the Canadian Parliament can determine whether IHRL violations committed by Canadian corporations abroad were justiciable in Canada. It did not

matter to them if the violations alleged were based on CIL norms. Only an act of the Canadian Parliament can confer justiciability once the plaintiff's claim is based on violations committed by Canadian corporations abroad. Since such Act of the Canadian Parliament does not currently exist, they believe – in a similar fashion as Justices Campbell and Gerow – that such claims ought to be dismissed as non-justiciable. Therefore, Justices Brown, Rowe, Côté, and Moldaver's concluded that such Act of Parliament was necessary for all human rights violations committed by Canadian corporations in the extractive industries of Third World states to be justiciable in Canada.

3.5. CHAPTER CONCLUSION

I began this chapter with the aim of examining how Canadian courts have resolved the controversy regarding the justiciability of human rights violations committed by Canadian corporations while doing extractive business in Third World states. Therefore, I conducted an empirical analysis of all the judgments that have been handed down by Canadian courts at various levels to see how the courts have resolved this issue.

A common thread that I found is that once all the cases were filed by the Third World victims/plaintiffs, the Canadian corporations/defendants responded with preliminary motions challenging the justiciability of the suits. These preliminary motions were based on several grounds ranging from the contention that the suit disclosed no reasonable cause of action, or that Canada was not the most convenient forum for the litigation of the suit, that the Canadian court did not have jurisdiction, or that the suit was barred by statute. The preliminary motions succeeded in *Piedra, Piedra Appeal*, and *Garcia*. The success in *Garcia* was overturned in the *Garcia Appeal*. The preliminary motions failed in *Choc, Araya, Nevsun Appeal BCCA* and *Nevsun*. There are some narratives that emerged from my analysis in this chapter.

The first narrative is that human rights violations based on *jus cogens* and CIL norms that are committed by Canadian corporations in the extractive industries of Third World states

are generally justiciable in Canada. A very narrow majority of the SCC reached this conclusion in *Nevsun*. The *Nevsun* judgment was supported by five Justices while four Justices dissented. Considering the novelty of the decision in *Nevsun* and the fierceness of the two dissents by the four Justices, a slight change in the composition of the SCC might lead to a departure from the narrative in *Nevsun*.

The second narrative is that the justiciability of the human rights violations that are not based on *jus cogens* and CIL norms depend on the judicial philosophy and politics of the presiding Justice in each individual case. My analysis revealed that different Justices reached different decisions regarding the justiciability of non-*jus cogens* and non-CIL violations based on the exercise of their own judicial discretion. The Justices had no binding guidance such as judicial precedent or statute because none existed. Therefore, the exercise of their discretion was unfettered. This opened the door for their hunches and predilections to creep into their judgments.

Some Justices believed that the plaintiffs' claims are not justiciable in Canada without an Act of the Canadian parliament. Some other Justices believed that the common law framework for deciding the justiciability of these claims was sufficient. Other Justices did not get the opportunity to rule on this issue because the issue was not placed before them for a decision. I have tabulated the differing positions of the Justices for ease of reference below:

S/No.	Case	I **need** an Act of Parliament for Justiciability (**Yes**)	I **do not need** an Act of Parliament for the Justiciability of these violations (**No**)	I only got the opportunity to Decide on Justiciability of *jus cogens* and CIL-based violations (**Partial No**)	I didn't get an opportunity to decide at all (**Unknown**)
1.	*Piedra*, ONSC	Justice C. Campbell			
2.	*Piedra Appeal*, ONCA				Justice E.A. Cronk

3.	*Choc*, ONSC		Justice C.J. Brown		
4.	*Garcia*, BCSC	Justice L. Gerow			
5.	*Garcia Appeal*, BCCA				Justice N.J. Garson
6.	*Araya*, BCSC			Justice P. Abrioux	
7.	*Nevsun Appeal*, BCCA			Justice M. Newbury	
8.	*Nevsun*, SCC	Justice R. Brown; Justice M. Rowe; Justice S. Côté; Justice M. Moldaver.		Justice R.S. Abella; Chief Justice R. Wagner; Justice A. Karakatsanis; Justice C. Gascon; Justice S. Martin.	
9.	**TOTAL**	6	1	7	2

There are several metanarratives that are deductible from the table above. The first deduction is that the highest number of Justices have held that they do not require an act of Parliament to decide the justiciability of *jus cogens* and CIL-based violations in Canada. This deduction confirms the first overarching argument in this thesis. In the introductory chapter, I stated that *Nevsun* is a remarkable judgment with far-reaching consequences for justiciability. But I argued that *Nevsun* has only resolved the controversy surrounding the justiciability of *jus cogens* and CIL-based violations. *Nevsun* has not resolved the controversy surrounding the justiciability of *all* human rights violations committed by Canadian corporations in the extractive industries of Third World states.

The second deduction from this tabulation is that the second highest number of Justices insisted that an Act of the Canadian Parliament is necessary for the justiciability of *all* violations. Justices Campbell and Gerow insisted that such Parliamentary Act would be

required to make the violations of the non-CIL norms allegedly committed by the defendants in *Piedra* and *Garcia* to be justiciable in Canada. The four dissenters in *Nevsun*, Justices Brown, Rowe, Côté and Moldaver confirmed this position taken by Justices Campbell and Gerow. These SCC Justices went a step further to add that all violations are not justiciable in Canada except through the provision of an act of the Canadian Parliament.

This second metanarrative confirms my second argument in this thesis. Nevsun has resolved the issue regarding the justiciability of violations based on *jus cogens* and CIL norms. Based on the common law doctrine of judicial precedent and *stare decisis*, this would remain the law until the SCC sets the *Nevsun* judgment aside or an act of the Canadian Parliament outlaws the judgment. However, the issue regarding whether the claims based on non-CIL violations are justiciable in Canada remains unresolved.

This led me to my second argument that the Federal Executive and the Canadian Parliament must work together to resolve this other half of the justiciability challenge through the enactment of a justiciability Act. This Act would would provide for the justiciability of all human rights violations committed by Canadian corporations in the extractive industries of Third World states. The non-CIL violations may not be justiciable in Canada if they come before Justices like Justices Campbell, Gerow, Brown, Rowe, Côté and Moldaver without the support of an Act of the Canadian Parliament. Only Justices like Justice Brown of the ONSC would find these violations justiciable without an act of Parliament. In the advent of this situation in the courts, it is important to examine the possibility of resolving this issue through a synergy between the Federal Executive and the Canadian Parliament.

CHAPTER FOUR: JUSTICIABILITY ACT FOR EXTRACTIVE BUSINESS, CANADIAN CORPORATIONS AND HUMAN RIGHTS

4.0. CHAPTER INTRODUCTION

In Chapter 2, I examined the Canadian Federal Executive's non-judicial implementation policy measures for the remediation of IHRL violations committed by Canadian corporations in the extractive industries of Third World states. I found that these measures fall short of international standards. In Chapter 3, I conducted an empirical analysis of all the Canadian judgments on the justiciability of these violations. I also found that these judgments had not resolved all the issues associated with the justiciability of these violations in Canada. Having identified a gap in the existing governance framework for these violations, I am going to suggest how Canada can fill this gap through an Act of the Canadian Parliament.

Therefore, the sub-research question that I framed for this chapter is whether a synergy between the Canadian Federal Executive and the Canadian Parliament can fill the governance gap in the legal framework for the justiciability of there human rights violations committed by Canadian corporations in Third World states. My answer to this question is yes. But before discussing the viability of my proposal, I will first examine the legislative history of this kind of proposal in the Canadian Parliament.

There is a very rich history of private-member legislative proposals for corporate accountability and corporate social responsibility regarding the human rights violations occurring in Canada's extractive sector in the Third World. Private members' bills are bills "introduced in the House of Commons by individual members who are not Cabinet ministers, typically dealing with matters of public policy under federal jurisdiction."[457] Seven private member bills have been presented to the Canadian Parliament regarding the remediation of these violations.

[457] See Parliament of Canada, "LEGIS*info*" online: <https://www.parl.ca/legisinfo/en/help>.

Three of these seven bills sought to create judicial mechanisms for the remediation of these violations while the remaining four bills proposed corporate social responsibility and accountability measures with respect to these violations. Five of these seven bills have been defeated. The remaining two bills were only recently introduced in Parliament in March of 2022. They have just gone through their first reading. I will examine the content of each of these private members' bills, and the treatments they have received in Parliament. Then I will draw some conclusions.

4.1. BILL FOR AN ACT TO AMEND THE FEDERAL COURTS ACT (INTERNATIONAL PROMOTION OF HUMAN RIGHTS)

The first attempt at creating a human rights justiciability statute for Canadian corporations doing extractive business in the Third World was made by Peter Julian. Julian, a New Democratic Party (NDP) member of the Canadian House of Commons, presented the private members' Bill for an Act to amend the Federal Courts Act (international promotion of human rights) to the 39th Parliament (Bill C-492-39th) in 2007.[458]

Bill C-492-39th sought to grant jurisdiction to the Federal Court over legal actions of a civil nature brought in Canadian court by a foreigner if "the claim for relief or remedy arises from a violation of international law or treaty to which Canada is a party… if the act alleged violation occurred in a foreign state or territory….".[459] This bill would have resolved the contention regarding the justiciability of these human rights violations in Canadian courts in a way that court judgments were incapable of doing.

The bill provided a long list of violations that would be subject to the jurisdiction of the Federal Court. These included – without limiting the generality of the court's jurisdiction –

[458] See Bill C-492 An Act to amend the Federal Courts Act (international promotion of human rights) 2nd Session, 39th Parliament, 56 Elizabeth II, 2007 House of Commons of Canada.
[459] Ibid at s.1.

"genocide, slavery or slave trade, an extrajudicial killing or the disappearance of an individual, torture or other cruel, inhuman, or degrading treatment or punishment, prolonged arbitrary detention, war crimes or crimes against humanity…"[460] The bill reached farther than *Piedra, Choc, Garcia,* and *Nevsun* combined through this comprehensive list of justiciable human rights violations.

In the judgments that I examined under Chapter 3, the Justices were limited to the fact patterns presented to them by the parties. This is because the legality of their findings and holdings can only extend to the application of the law to such presented fact pattern. In effect, the norm-setting capabilities of these courts were automatically restricted as well. On the other hand, the norm-setting capability of the Parliament is only delimitable by the Constitution, which the parliament even has the power to amend. Therefore, the reach of Julian's proposed bill legitimately extended to include human rights-based violations that have indisputably achieved the status of *jus cogens* like slavery, genocide, and slave trade.[461] It also captured other norms whose *jus cogens* status is still contentious. It reached even further to encapsulate human rights-based violations such as rape, prolonged arbitrary detention, cruel, inhuman, or

[460] Ibid at s.1. a-p which provides that "Without limiting the generality of subsection (1), the Federal Court's jurisdiction shall include any acts or events involving the following claims: (a) genocide; (b) slavery or slave trading; (c) an extrajudicial killing or the disappearance of an individual; (d) torture or other cruel, inhuman or degrading treatment or punishment; (e) prolonged arbitrary detention; (f) war crimes or crimes against humanity; (g) systemic discrimination based upon a person's race, ancestry, place of origin, ethnic origin, colour, religion, gender or gender identity, sexual orientation, marital or family status, mental or physical disability, or any other analogous ground; (h) a consistent pattern of gross violations of internationally recognized human rights; (i) the inducement or coercion of a person less than 18 years of age to engage in prostitution or any other unlawful sexual activity, including the creation, distribution, printing, publishing or displaying of pornographic materials or the sale or trafficking of a person less than 18 years of age; (j) the conscripting or enlisting of a person less than 18 years of age into armed forces or paramilitary groups for use in any form of warfare; (k) rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, forced sterilization, or any other form of sexual violence of comparable gravity; (l) the death or serious endangerment of the health of a person by physical mutilation or by subjecting a person to a medical or scientific experiment that is not in the best interest of the person; (m) wanton destruction of the environment that directly or indirectly initiates widespread, long-term or severe damage to an ecosystem, a natural habitat or a population of species in its natural surroundings; (n) transboundary pollution that directly or indirectly brings about significant harm to persons living in an adjacent state or territory; (o) the failure of a person or government agency with direct knowledge of an impending environmental emergency to immediately and adequately alert persons whose life, health or property is seriously threatened by the environmental emergency; and (p) a violation of any of the fundamental conventions of the International Labour Organization."

[461] *Ibid.*

degrading treatment, systemic discrimination and "a consistent pattern of gross violations of internationally recognized human rights".[462] This all-encompassing and varied provision of the bill made it a norm-setting measure that goes far beyond what is ordinarily possible through court judgments like *Piedra*, *Choc*, *Garcia*, and *Nevsun*.

Secondly, the bill also proposed the removal of all limitation provisions that could constitute an impediment to the justiciability of these violations in Canada. It provided that

> Despite any other provision of this or any Act, any case referred to in section 25.1 shall not be prohibited by reason of any prescription or limitation of action that sets a maximum period of time within which a proceeding must be initiated after the cause of action arises.[463]

This provision would have taken care of justiciability challenges based on the statute of limitation.

Thirdly, the proposed bill provided that Canadian courts could neither decline jurisdiction nor stay proceedings in cases involving the violations enumerated above except the defendant can "cleanly, cogently and convincingly"[464] establish that

> (a) the Federal Court of Appeal or the Federal Court, as the case may be, is not a suitable forum in which to decide the case;
>
> (b) a more appropriate forum is available that will fairly and effectively provide a final and binding decision;
>
> (c) the more appropriate forum will likely provide a final and binding decision in a timely and efficient manner; and
>
> (d) the interests of justice adamantly require that a stay of proceedings be granted.

This provision would have narrowed down the circumstances under which the court may stay proceedings in this kind of human rights-based civil suit to very few and exceptional circumstances. For instance, it would have been outrightly impossible for Justice Gerow to

[462] *Ibid*.
[463] *Ibid* at s. 2.
[464] *Ibid* at s. 3.

order the stay in *Garcia*. Also, it would have been very difficult for Justice Campbell to order the stay in *Piedra* if this section of the bill had been the law when *Piedra* and *Garcia* were decided. The parameters for granting a stay would have been statutorily higher, and the Justices would not have had as wide a berth of discretionary powers as they did in those cases.

Lastly, the bill would have conferred a special and exclusive jurisdiction on the Federal Courts for the litigation of the IHRL claims. Federal courts are more suited for the purposes of these suits and victims would not have to go through the challenges associated with finding the appropriate Canadian court where a corporation has ties that can ground litigation to different provinces.

Unfortunately, the bill was defeated after the first reading.

On January 26, 2009, Bill C-492-39th was reinstated as Bill for Act to amend the Federal Courts Act (international promotion of human rights) and Peter Julian re-presented it to the 40th Canadian Parliament (Bill C-354-40th).[465] This 2009 version of the Bill was a verbatim recreation of the Bill that had been presented by the same Peter Julian in 2007. The new bill received the same treatment in the 40th Parliament that the 2007 version received in the 39th Parliament. The reinstated version of the bill was defeated after the first reading again.

4.2. BILL FOR AN ACT RESPECTING CORPORATE ACCOUNTABILITY FOR THE ACTIVITIES OF MINING, OIL OR GAS IN DEVELOPING COUNTRIES

Liberal Party member of parliament representing Scarborough – Guildwood, John Mckay tried a new approach after the defeats recorded by Peter Julian's 2007 and 2009 Bills. Mckay presented a Bill for An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries to the 40th Parliament (Bill C-300-40th).[466] Rather

[465] See Bill C-354 An Act to amend the Federal Courts Act (international promotion of human rights) 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009 House of Commons of Canada.
[466] See Bill C-300 An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries 2nd Session, Fortieth Parliament, 57-58 Elizabeth II, 2009. See also Parliament of Canada,

than proposing a judicial accountability mechanism as Julian did, Mckay proposed a non-judicial corporate accountability mechanism. Mckay gave a very compelling speech during the introduction of Bill C-300-40th on the floor of the House of Commons. He stated that "there are documented abuses by Canadian companies operating in … as many as 30 other countries, Canadian companies that are acting in manners that are unbecoming of our sense of self as a nation."[467]

Mckay also highlighted the fact that three-fifths of all mining and extraction companies in the world were listed in Canada.[468] He contended that "when a Canadian company behaves badly, our national reputation suffers."[469] Therefore, his bill suggested the creation of the office of an Ombudsperson and other corporate accountability measures that would ensure that "money just got a whole lot more expensive for a corporation that ignores this bill."[470]

In their response, the Conservative Party representing the Canadian government of that day – rejected the bill "as redundant" and proposed the continuation of the CSR approach that allowed each corporation to decide its own path.[471] The Conservative Party insisted that the responsibility for protecting human rights in this context should lie at the feet of the host country. Paul Crête of Bloc Quebecois rejected the Conservative Party's suggestion. He said that the CSR approach meant to "simply rely on companies' good faith".[472] Crête disagreed also with the Conservative Party's

---

C-300 40th Parliament, 2nd Session (January 26, 2009, to December 30 2009) "An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries" available at https://www.parl.ca/LegisInfo/en/bill/40-2/c-300 (accessed 25 February 2022).

[467] See Our Commons, "Private members' Business, Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act" by Hon. John Mckay (3 March 2009) online: <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#SOB-2634035>.

[468] *Ibid.*

[469] *Ibid.*

[470] *Ibid.*

[471] See Our Commons, "Response Speech by Mr. Ron Cannan" (3 March 2009) available online at <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

[472] See Our Commons, "Response Speech by Mr. Paul Crête" (3 March 2009) online: <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

> belief that the responsibility needs to be laid at the feet of the host countries…[because] the problem does not arise from economic development in the developing countries, but it comes from the way certain businesses behave, businesses that should be subject to more supervision and possibly more discipline.

Crête concluded by affirming his bloc's support for Bill C-300 as "a step in the right direction" and warned that if Canada must continue to ask countries like India and China to enact laws to protect the environment and the rights of local workers, Canada also "has to abide by the same standards" for Canadian corporations.

John Rafferty responded on behalf of the New Democratic Party (NDP). He offered NDP's support for Bill C-300-40th but suggested some amendments.[473] On 3 April 2009, a motion regarding whether Bill C-300 could proceed to second reading was taken, and it narrowly passed by a vote of 137 to 133. Consequently, the Bill was read for the second time and subsequently referred to the Standing Committee on Foreign Affairs and International Development. The Bill died in committee on 3 December 2009.

4.3. BILL FOR AN ACT RESPECTING CORPORATE PRACTICES RELATING TO THE PURCHASE OF MINERALS FROM THE GREAT LAKES REGION OF AFRICA

On 30 September 2011, Mr Paul Dewar of the New Democratic Party (NDP) introduced the Bill for An Act respecting corporate practices relating to the purchase of minerals from the Great Lakes Region of Africa (Bill C-571). The bill proposed the imposition of a duty upon Canadian corporations to exercise human rights due diligence whenever they deal with minerals originating in the Great Lakes Region. Bill C-571 sought to empower the Extractive Sector Corporate Social Responsibility Counsellor to produce an annual report that would be submitted to the Canadian Minister of International Trade. The report would state the corporations that the Counsellor had reasonable grounds to believe were not complying with

[473] See Our Commons, "Response Speech by Mr John Rafferty" (3 March 2009) online <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

the human rights due diligence and other CSR measures. Bill C-571 never made it past the first reading and was never reintroduced. The sponsor of the Bill, Mr Dewar lost his seat in 2015.

At about the same time when the two bills – Bill C-300 and Bill C-571 – were being defeated in the Canadian Parliament, the American legislature was also debating Section 1502 of the Wall Street Reform and Consumer Protection Act. Section 1502 required extractive corporations to disclose whether their supply chain contained minerals originating in the Democratic Republic of Congo or any other country in the Great Lakes Region. Section 1502 passed, and it became an important human rights instrument along with the Alien Tort Claims Act (ATCA). These two pieces of legislation, particularly ATCA, became a veritable tool for corporate accountability champions regarding the extraterritorial activities of US extractive corporations. While a lot of progress was being made in the United States regarding legislations, all legislations were failing in Canada.

4.4. BILL FOR AN ACT TO AMEND THE FEDERAL COURTS ACT (INTERNATIONAL PROMOTION OF HUMAN RIGHTS)

Peter Julian re-introduced the bill for An Act to amend the Federal Courts Act (international promotion and protection of human rights) to the 41st Parliament (Bill C-323-41st) on 5 October 2011. Bill C-323 was a reworked version of the two previous bills by the same Peter Julian. This new bill proposed an amendment to the Federal Courts Act that would

> expressly permit persons who are not Canadian citizens to initiate tort claims based on violations of international treaties to which Canada is a party if the acts alleged occur outside Canada. It also sets out the manner in which the Federal Court and the Federal Court of Appeal can exercise their jurisdiction to hear and decide such claims.[474]

[474] Open Parliament, "Bill C-323 (Historical) An Act to amend the Federal Courts Act (international promotion and protection of human rights)" online <https://openparliament.ca/bills/41-2/C-323/?tab=major-speeches>.

This new bill mirrored the United States of America's Alien Torts Claim Statute (ATS) which established a right of action for foreign litigants in US courts. It was the legal basis for several legal actions against US corporations for human rights violations in the Third World.[475] While presenting Bill C-323-41st, Julian underscored the fact that "Canada's judicial system protects Canadians from abusive conduct by corporations or individuals and should no longer permit some Canadian corporations to violate human rights abroad". He was echoing the position that what was good for Canadians locally should be good for other people outside Canada. Since Canada, through its judicial system, was doing everything to protect the rights of Canadians against human rights violations from corporations within Canada, the same initiative ought to be extended to Third World people as well. Unfortunately, Bill C-323-41st also died after that first reading.

4.5. BILL FOR AN ACT TO ESTABLISH THE OFFICE OF THE COMMISSIONER FOR RESPONSIBLE BUSINESS CONDUCT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

On March 29, 2022, the parliamentarian representing Edmonton Strathcona, Heather McPherson presented a private member bill for An Act to establish the Office of the Commissioner for Responsible Business Conduct and to make consequential amendments to other Acts (Bill C-263-44th).[476] The purpose of Bill C-263-44th or the Responsible Business Conduct Abroad Act is to establish the office of a Commissioner "to monitor and, when appropriate, investigate the business activities of entities that operate abroad or import goods

[475] *Ibid.*

[476] See Parliament of Canada, "C-263 An Act to establish the Office of the Commissioner for Responsible Business Conduct Abroad and to make consequential amendments to other Acts" online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-263>. The full text of the bill is available at https://www.parl.ca/DocumentViewer/en/44-1/bill/C-263/first-reading.

into Canada for the purpose of reporting on the entities' compliance with international human rights law."[477]

The bill listed the international human rights instruments that the Commissioner's mandate would cover in its schedule[478] and granted the Governor in Council the power to add or delete international law instruments to the schedule.[479] The bill also made a very important transitional provision regarding the office of the Canadian Ombudsperson for Responsible Enterprise (CORE), an office which I discussed extensively in chapter 2. The bill provides that whoever holds the office of the CORE at the time when the bill comes into force would automatically become the Commissioner envisaged under this bill.[480]

In effect, this bill looks to shore up the powers of the CORE and elevate the office of the CORE up to that of a commissioner. This would ensure that the office had all the necessary powers. According to the parliamentary Hansard, this bill has only undergone its first reading.[481] The bill was read for the first time on March 29, 2022, and it remains to be seen what the fate of the bill would be.

4.6. BILL FOR AN ACT RESPECTING THE CORPORATE RESPONSIBILITY TO PREVENT, ADDRESS AND REMEDY ADVERSE IMPACTS ON HUMAN RIGHTS OCCURRING IN RELATION TO BUSINESS ACTIVITIES CONDUCTED ABROAD

On the same day, March 29, 2022, Peter Julian presented a bill for An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights

[477] Ibid s. 7(1).
[478] Ibid s. 7(2). Some of these include the Abolition of Slavery Convention, Forced Labour Convention, International Convention on the Elimination of all Forms of Racial Discrimination, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Minimum Age Convention, Worst Forms of Child Labour Convention etc.
[479] *Ibid* s. 7(3).
[480] *Ibid*. s. 22.
[481] See House of Commons, "House of Commons Debates" (March 29, 2022) 151:48 Official Report (Hansard) (House Publication, Canada) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-48/hansard>.

occurring in relation to business activities conducted abroad (Bill C-262-44th).[482] Bill C-262-44th or the Corporate Responsibility to Protect Human Rights Act drew inspiration from Canada's commitment and obligation under the United Nations Guiding Principles on Business and Human Rights when the bill says in its preamble[483] that

> Whereas, the right to a remedy is a core tenet of the international human rights system, and the need for victims to have access to an effective remedy is recognized in the United Nations Guiding on Business and Human Rights … and ensuring that affected individuals have access to an effective remedy is a vital part of a state's duty to protect against business-related human rights violations … affective state-based judicial mechanisms are at the core of ensuring access to an effective remedy.

The bill imposed a duty to prevent human rights violations for every entity and it also created liability where violations occur.[484] In a similar fashion to Bill C-263-44th, this bill listed several IHRL instruments in its schedule that would be remediable in Canada when the bill becomes law. It also includes "the right to a healthy environment". The bill required business entities to conduct human rights due diligence procedures to identify, stop or mitigate adverse impacts of their business activities on human rights.[485]

Most importantly, the bill established a right of action for any person who suffers adverse impacts because of the business practices of a business entity abroad.[486] Litigants from the Third World would automatically have a right of action in Canada. But rather than seek to amend the Federal Courts Act to accommodate legal action for these class of claims, this bill permits the victim to bring an action in the superior court of a province. According to the

[482] See House of Commons Canada, "Bill C-262 An Act respecting the corporate responsibility to prevent, address and remedy adverse impact son human rights occurring in relation to business activities conducted abroad" (First Session, Forty-fourth Parliament, 70-71 Elizabeth II, 2021-2022) online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-262/first-reading>.
[483] *Ibid* at Preamble.
[484] *Ibid* s. 6.
[485] *Ibid* s. 7 – 9.
[486] *Ibid* s. 10.

parliamentary Hansard, this bill has only undergone its first reading.[487] The bill was read for the first time on March 29, 2022, and it remains to be seen what the fate of the bill would be.

After considering the fate of five out of seven of these private member bills, it is safe to conclude – at least for now – that the Canadian legislature is satisfied with the current situation in the Canadian extractive sector in Third World states. The Canadian legislature has adopted a hands-off approach regarding the legislation of justiciability or even an Act for accountability to govern the activities of the Canadian corporations doing extractive business in Third World states. But do the fates suffered by these bills mean that nothing can be done regarding the Bill for an Act regarding the justiciability of these violations? My answer is no.

4.7. PROPOSAL FOR LEGISLATION BY THE CANADIAN GOVERNMENT

Private members' bills have the lowest success rate among all the forms of bills that come before the Canadian parliament.[488] Most private members' bills either fail or become dormant.[489] They rarely ever pass or go on to become law. The problem is further exacerbated when such a bill has great socio-economic and political consequences. This kind of private member bill has an even higher failure rate. The SCC has noted the notoriety of the failure of politically charged private members' bills as follows:

> The White Paper pointed out that up to that time, more than **20 private members' bills had been introduced in the House of Commons** with the purpose of either prohibiting the publication of opinion surveys or controlling the methodology of such surveys published **during campaigns**. Although **none of these bills were passed**, they were **reflective of the public concern over this issue**, since the sponsors of the bills represented different regions of the country, as well as the various political parties which have been represented in the House of Commons over the past 30 years.[490] (Emphasis mine)

---

[487] See House of Commons, "House of Commons Debates" (March 29, 2022) 151:48 Official Report (Hansard) (House Publication, Canada) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-48/hansard>.
[488] See Open Parliament "Bills & Votes" online: <https://openparliament.ca/bills/>.
[489] *Ibid.*
[490] *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877 at para 4.

This notoriety can assist to forecast the very probable failure of the two bills that are currently still live before the Canadian Parliament. In the face of this notorious failure, the Federal Executive has an important role to play. Private members' bills fail because they lack the support of the government of the day. Government-backed bills or "Government bills" on the other hand have the highest success rate among all the kinds of bills that are presented to Parliament.[491] The government of the day whips the necessary support and votes for the eventual success of these bills through the deployment of its vast political resources. Therefore, these bills routinely pass in the Canadian Parliament and go on to receive the assent necessary for them to become law.[492]

My suggestion here is that the Canadian Federal Executive needs to work with the Canadian Parliament to fill the lacuna that currently exists from the work the Canadian courts have done so far. The Canadian executive arm can either draft and present its own fresh bill or adopt and finetune one or more of the legislative ideas contained in the private members' bills already presented to the Canadian Parliament. This government bill would be presented as a bill for an act to procure the protection of international human rights through responsible and accountable corporate practices abroad. This legislative and executive synergy can assist to fill the governance gap in the legal framework. A bill emanating from this synergy stands a greater chance of passage into law than all the private members' bills that have been presented so far.

I am mindful of the argument that could be made as a counter to how my proposed Parliamentary Act would change the approaches of judges if enacted. Parliamentary Acts, in the same manner as common law frameworks, are subject to judge's interpretation. In the circumstances, would it not be possible still for a judge to interpret the enacted statute through the prism of his own political and judicial philosophy?

---

[491] See Open Parliament "Bills & Votes" online: <https://openparliament.ca/bills/>.
[492] *Ibid*.

My response to this question is a qualified no, it would not be possible. The separation of powers is a cornerstone of modern representative democracies. It enjoins each arm of government to stay within its constitutional mandate and respect the constitutional mandate of other arms of government. It requires the legislature to make laws, the executive to act on such laws and the judiciary to interpret the laws.

The room for judicial discretion and a judge's political and judicial philosophies opens when the wordings of legislations are loose and subject to several possible interpretations. It is at this point that the judiciary exercises its inherent jurisdictional discretion to fill available voids. This judicial discretion remains only so long as Parliament has not realized the folly of its own law-making and taken measures to correct its loose language. I am mindful of the fact that Parliament cannot completely eradicate situations where judicial discretion becomes necessary. The science of language is a subjective art. Therefore, there would always be room for the philosophy-based exercise of judge's discretion in the application of the law.

However, there are provisions of law that are capable of being so tightly worded that they open no room for variation and discretion. An instance of such legal provision is the provision on the existence of rights. A provision that provides "notwithstanding any provision to the contrary, all girls have the right to enter a room" is a very clear provision. I use this example because it is very similar to what I have in mind for the legislative proposal. A Parliamentary act providing that "notwithstanding anything to the contrary, all human rights violations committed by Canadian corporations outside Canada are justiciable under the Federal Courts Act" is a very clear provision. It can be backed up by a definitions clause which sets out a list of the courts in the Federal Courts Act, the meaning of Canadian corporations, and a list of human rights violations. The draft of such a bill already exists.

The different legislative proposals considered in this chapter have unambiguously captured my intendment with this justiciability Act. Bill C-262-44th or the Corporate

Responsibility to Protect Human Rights Act provides a very great example of the type of wording that I have in mind for the legislative effort that I propose. My proposal does not speak to the litigation or merits of the plaintiffs' case. That would remain a very big hurdle they have to cross. My proposal is concerned with establishing in very clear terms that all forms of human rights violations committed by Canadian corporations in the Third World are justiciable in Canada.

Hence, there is proof that my proposal for a justiciability Act is wordable in unambiguous and simple language. It does not touch on a matter that lends itself to diverse interpretations. It does not touch on the merits of the plaintiffs' claims. It only establishes the existence of a right to claim. Therefore, it either is or is not. Any judge that interprets clearly worded laws outside of the ordinary, clear, and unambiguous meanings opens themselves to accusations of judicial irresponsibility and encroachment of legislative prerogative. This is a very strong accusation, and a Judge worth their chair would ordinarily steer clear of any interpretation that could open them up to such accusations.

It is also reasonable to argue that my proposed legislation might suffer the same discretionary interpretation as the common law framework before judges with a different judicial philosophy than the philosophy that such legislation would espouse. But that argument is wrong. It is wrong because it does not consider the possible precision of the language that has already been used to clearly word the justiciability of these claims in the bills. I've considered these precise provisions under the legislative history section of this chapter.

Another counterargument to my proposal could be that the act is a surplusage because the common law framework already covers the field. This argument would also be reasonable. But it would also be wrong. Anyone with the opportunity to empirically juxtapose *Nevsun* with the other judgments would reach a completely different conclusion. Empirical analysis has revealed that only one judge – Justice Brown – has ruled that all violations are justiciable

without an act. The wrongness of this argument becomes more pronounced when the position of this lone judge is considered against the chorus of the six other Justices – Campbell, Gerow, Brown, Rowe, Côté and Moldaver – who have ruled that an act of the Canadian Parliament would be necessary for these violations to be justiciable in Canada.

The last counterargument that I will consider concerns the need to insulate the Canadian legal system from the possible barrage of litigation that might follow the enactment of a justiciability Act. The defendants who raised forum non-conveniens challenges to the plaintiffs' claims argued that the legislative history of this kind of bill and the Federal Executive's refusal is suitable policy measures that should not be disturbed. This argument posits further that if these policy measures are disturbed, Canadian corporations will lose their competitive advantage in the global extractive sector. I will respond to this argument using both empirical evidence and ethical considerations.

Empirical evidence has shown that only four sets of plaintiffs have received preliminary judgments regarding the justiciability of their claims between 2000 and 2020. One set of claims was struck out at the preliminary stage, one was settled with civil reparations and public apology after the failure of the defendant's justiciability challenge, one was settled with civil reparations without public apology, and the last one is still pending in court. None of these claims has ever been decided on the merits.

The fact that only four claims have received judgment does not empirically point to the possibility of a deluge of cases. The assumption that the number of cases would increase after a justiciability Act is passed does not take cognisance of the context in which these litigations arise. For instance, the jurisprudentially significant judgment in *Nevsun* might never have been delivered if the plaintiffs had not escaped from Eritrea. The *Garcia Appeal* might never have overturned *Garcia* if the evidence of Rotondo's escape leading to the non-viability of Guatemala as a forum had not been admitted by the BCCA. The challenging contexts within

which these litigations emerge make more litigation improbable than probable. So, empirical data does not support the argument that a barrage of claims would follow the passage of a justiciability Act. Therefore, it is wrong.

Secondly, arguing that the imperative to protect the competitiveness of a wrongdoer from justice trumps the imperative to protect women from gang rapes, people from extra-judicial killings, forced labour and servitude is ethically problematic. Canada's track record on IHRL does not suggest that it is a state that values profits over lives. Instead, its pioneering work in the IHRL sphere suggests its willingness to work toward meeting its IHRL obligations to all persons, no matter their station and economic status.

The sum of Canada's contributions to IHRL does not suggest that its legal system needs insulation from litigation by Third World peoples looking to remediate the violation of their rights. Instead, the empirical analysis indicates that wrongdoers might be trying to insulate themselves from liability for their wrongdoing by using Canada as a shield. Hence, the argument that the Canadian legal system needs insulation from these suits is also wrong. It is neither backed by Canada's IHRL history nor supported by the outcome of the empirical analysis of the decided cases.

4.8. CHAPTER CONCLUSION

I began this chapter by looking to answer the question of whether the Canadian Federal Executive and the Canadian Parliament can fill the governance gap in the legal framework for the justiciability of human rights violations committed by Canadian corporations against Third World victims in Third World states. I answered this question in the affirmative. Then I proceeded to show how this parliamentary act can be achieved. I also considered some of the possible counterarguments against my proposal.

Therefore, I conclude that the Canadian Federal executive and the Canadian Parliament should not shy away from the fulfilment of Canadas's IHRL responsibility. It is no gainsaying

that *Nevsun* has made Canada one of the best frontiers for expanding business and human rights law. Therefore, Canada must deepen its efforts further by enacting this justiciability Act. This would further enhance Canada's reputation as a pioneering state regarding the expansion of IHRL. It would also protect the reputation of the many Canadian corporations that do not violate human rights wherever they do extractive business in the Third World.

CHAPTER FIVE: GENERAL CONCLUSION AND RECOMMENDATIONS FOR FUTURE RESEARCH

5.1. GENERAL CONCLUSION

When I began this journey, I mentioned that most of the electrical and electronic gadgets we depend on for our everyday lives probably contain minerals extracted from Third World mines by Third World people. I also highlighted several human rights violations that are visited upon these Third World people working in these mines. I stated that my main objective for undertaking this research is to produce a one-stop guide for Third World people, their lawyers and stakeholders on the justiciability of these human rights violations committed by Canadian corporations doing business in the extractive industries of their respective Third World states. To achieve my objective, I framed an overarching research question and three sub-research questions to guide my project. I methodically answered these three sub-questions in Chapters 2, 3, and 4 of this thesis.

In chapter 2, I found that Canada has obligations under IHRL that apply to Canadian corporations doing business in the extractive industries of Third World states. I also found that one of these obligations is to ensure the remediation of human rights violations committed by Canadian corporations in Third World states' extractive industries. However, I found that the implementation measures that the Canadian Federal Executive had put in place to achieve the aim of this remediation fell short of IHRL standards. This implementation gap has far-reaching consequences for the justiciability of these violations in Canada.

Therefore, I conducted an empirical examination of the judgments handed down by Canadian courts regarding the justiciability of these human rights violations in chapter 3. I wanted to see how the courts determined whether these violations were justiciable in Canada without an implementation statute. I found that the SCC had settled any controversy regarding the justiciability of these claims if they are based on a breach of *jus cogens* and CIL norms. I

found that by virtue of the SCC judgment in *Nevsun*, any lawsuit alleging human rights violation based on *jus cogens* and CIL norms is justiciaible in Canada. However, the *Nevsun* judgment did not address the controversy regarding the justiciability of non- *jus cogens* and non-CIL violations. I found a very heightened contention between the Justices in the other judgments that I considered regarding whether an act of the Canadian Parliament is necessary for the justiciability of all the other violations in Canada. In the advent of this unresolved contention between the Justices, I decided to look further for possible answers. This led me to my inquiry in Chapter 4.

In chapter 4, I examined whether the Canadian Federal Executive and the Canadian Parliament can resolve the contention regarding the justiciability of all human rights violations committed by Canadian corporations against Third World victims. I resolved this question in the affirmative. I found that the Canadian Federal Executive and the Canadian Parliament can work together to create an Act that affirms the justiciability of all these violations in Canada.

Having answered the three sub-questions I framed for this research, as shown above, I conclude that the answer to my overarching question of whether human rights violations committed by Canadian corporations in the extractive industries of Third World states are justiciable in Canada is a qualified yes. It is a qualified yes because only the violations arising from *jus cogens* and CIL norms are currently justiciable in Canada without requiring an Act of Parliament because of *Nevsun*. Controversy exists between the Justices regarding the justiciability of all the other human rights violations that are not based on *jus cogens* or CIL norms. It is this continuing contention that I recommended an Executive-Legislature synergy to resolve.

It is crucial to assess how far I have been able to deliver on my ambition to create a guide on the justiciability of these violations. First, I have created a succinct empirical analysis of all the judgments delivered between 2000 to 2020 on the justiciability of these violations. I

hope this concise analysis can assist Third World victims and their lawyers in conducting a preliminary self-assessment of the justiciability of their own cases before the commencement of their litigation process.

Second, the deductions I made based on the empirical analysis highlight several chokepoints that policymakers might assess to set their agenda regarding the justiciability of these violations in Canada. The findings of my empirical research can ground an argument for the creation of further measures by the Canadian Federal Executive on the justiciability of these violations in Canada. My suggestion regarding the need for a justiciability Act in Chapter 4, based on my empirical deductions from Chapter 3, can be used by policymakers and stakeholders to propose how the Federal Executive and the Canadian Parliament can resolve the contention regarding the justiciability of these violations in Canada. Non-governmental stakeholders like Amnesty International and the Canadian Network on Corporate Accountability might also add this empirically-based project to their arsenal for advocating the justiciability and remediation of these violations in Canada.

5.2. RECOMMENDATIONS FOR FUTURE RESEARCH

My first recommendation for further work is a study of the impact *Nevsun* has had on the litigation of IHRL violations arising from the extractive activities of Canadian corporations in Third World states since the judgment was delivered in February 2020. Has there been an increase in the number of this kind of cases brought in Canadian courts post-*Nevsun*? If yes, how many cases have been brought, and before which courts? Were justiciability challenges mounted against these cases as well? Have the courts had the opportunity to resolve any of these justiciability challenges? If yes, what were the findings of the court? These are some of the questions that could foreground a post-*Nevsun* empirical case law project on the justiciability of these violations committed by Canadian corporations in the extractive industries of Third World states.

My second recommendation for further research is a thorough socio-legal analysis of the reasons for the failed attempts at legislating the justiciability of IHRL violations by Canadian corporations in the extractive industries of Third World states. I hypothesise that a dissection of the political and economic factors responsible for the repeated failure at legislating justiciability might yield further insights. The work of Tzouvala, a TWAIL scholar, already points to a probable socio-legal explanation for the repeated failures.[493] According to Tzouvala, the equation of civilization with capitalism in any attempt to solve a Third World problem cannot yield positive results. The fixation of the three organs of the Canadian state on the protection of capital at the expense of the human rights of Third World people would continue to be detrimental to the latter while serving the caprices of erring corporations. My research has revealed a socio-economic conversation between the language of the Canadian Federal Executive, the judgments of some of the Justices, and the debates on the justiciability bills before the Canadian Parliament.

The Canadian Federal Executive, the Conservative members of Parliament and the court's legal formalists like Justices Campbell, Gerow, Brown, Rowe, Côtè and Moldaver are on one side of this socio-economic conversation. The Canadian Federal Executive refuses to create any permanent, far-reaching IHRL implementation measures in order not to upset the prevailing competitive advantage of the corporations. The Justices rely on the Canadian Federal Executive's decision to signal the need to immunize the Canadian polity from tortious liability because Canada is not ready to prioritize the human rights of foreign peoples over the competitiveness of the erring Canadian corporations. Therefore, they insist that only an act of the Canadian Parliament can establish the right to justiciability for the Third World victims. The Conservative members of the Canadian Parliament also insist that holding erring Canadian

[493] See Ntina Tzouvala, *Capitalism As Civilization: A History of International Law* (New York: Cambridge University Press, 2020)

corporations accountable would necessarily decimate the competitive advantage of all Canadian extractive corporations. These Canadian Parliamentarians, the Canadian Federal Executive and the Justices of the courts on this side of the conversation curiously equate the insulation of erring corporations with the insulation of the Canadian state and its foreign policy.

On the other side are the legal realists like Justices Brown, Abrioux, Newbury, Abella, Wagner, Karakatsanis, Gascon and Martin and Parliamentary members from the Liberal party, the New Democratic Party (NDP) and Bloc Quebecois. These Justices and Parliamentarians argue that Canada must be forward-thinking about human rights. Canada must take its place of pride in the comity of nations by working to expand the horizons of IHRL, and its reputation cannot derive from corporate competitiveness alone. It must be balanced by contextual judging that does not shy away from deploying IHRL to curb the excesses of erring Canadian corporations. They insist that erring corporations would continue to dent the image of Canada until the Canadian Parliament creates accountability measures against the identified violations.

It would be important to conduct research that dissects these ongoing conversations between the three organs of the Canadian state and how these conversations continue to curtail justiciability.

Lastly, a research exercise on the human rights norms that have achieved the status of *jus cogens* as far as Canadian law is concerned could be worthwhile. This is because it is these norms that the Canadian courts might be compelled to find as justiciable without any contention because of the precedent set by the SCC in *Nevsun*.

BIBLIOGRAPHY

Primary Materials

Legislation

Legislation: Canada

An Act to Amend the Criminal Code (torture), S.C. 1987, c. 10 (3rd Supp.), s. 2.

Bill C-492 *An Act to amend the Federal Courts Act (international promotion of human rights)* 2nd Session, 39th Parliament, 56 Elizabeth II, 2007 House of Commons of Canada.

Bill C-300 *An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries* 2nd Session, Fortieth Parliament, 57-58 Elizabeth II, 2009.

Bill C-354 *An Act to amend the Federal Courts Act (international promotion of human rights)* 2nd Session, 40th Parliament, 57-58 Elizabeth II, 2009 House of Commons of Canada.

Business Corporations Act, S.B.C. 2002, c. 57.

Canadian Business Corporations Act, R.S.C. 1985, C. c-44.

Charter of Human Rights and Freedoms, CQLR c C-12.

Constitution Act, 1867 (UK), 30 & 31, c 3, s 91, reprinted in RSC 1985, Appendix II, No. 5.

Government of Canada, "Order Setting out the MANDATE of the SPECIAL ADVISER to the Minister for International Trade, to be known as the Canadian Ombudsperson for Responsible Enterprise" *Orders In Council* PC Number 2019-0299 dated 8 April 2019.

Inquiries Act (R.S.C., 1985, c. I-11).

Limitations Act, 2002, S.O. 2002, c.24, Sched. B, at s. 4.

Public Service Employment Act (S.C. 2003, c. 22, ss. 12, 13).

State Immunity Act, R.S.C.1985, c. S-18.

Supreme Court Civil Rules, B.C. Reg. 168/2009.

The Court Jurisdiction and Proceedings of Transfer Act, S.B.C. 2003, c. 28.

Jurisprudence: Canada

642947 Ontario Ltd. v. Fleischer (2001), 56 O.R. (3d) 417 (Ont. C.A.).

Amnesty International Canada v. Canada (Minister of National Defence) 2008 CAF 401.

Araya v. Nevsun Resources Ltd. 2017 BCCA 401.

Bennett Estate v Islamic Republic of Iran 2013 ONCA 623.

Bouzari v. Iran (Islamic Republic) 2004 CarswellOnt 2681.

Bouzari v. Iran (Islamic Republic) 2005 CarswellOnt 292.

Caal Caal v. Hudbay Minerals Inc., 2020 ONSC 415.

Childs v. Desormeaux, [2006] 1 S.C.R. 643.

Cooper v. Hobart, [2001] 3 S.C.R. 537.

Copello v Canada (Minister of Foreign Affairs) 2003 CAF 295.

D. (B.) v. Children's Aid Society of Halton (Region), [2007] 3 S.C.R. 83 (S.C.C.).

D.R. Fraser & Co. v Minister of National Revenue 1948 CarswellNat 16.

Delgamuukw v. British Columbia 1997 CarswellBC 2358.

Fraser v. Canada (Attorney General) 2020 SCC 28.

Garcia v. Tahoe Resources Inc. 2017 BCCA 39.

Hunt v. T & N plc, [1990] 2 S.C.R. 959 (S.C.C.).

Kamloops v. Nielsen, [1984] 2 S.C.R. 2.

Kazemi (Estate) v. Islamic Republic of Iran 2014 SCC 62.

Khadr v Canada 2010 SCC 3.

Kindyslides v John Does 2020 BCCA 330.

Mack v Canada (Attorney General) 2002 CarswellOnt 2927.

Montana Band of Indians v. R 2002 CAF 331.

Nevsun Resources Ltd. v. Araya 2020 SCC 5.

Odhavji Estate v. Woodhouse, 2003 SCC 69.

Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc., 2009 ONCA 256.

Piedra v. Copper Mesa Mining Corp. 2010 ONSC 3253.

R v. Hape 2007 SCC 26.

Shoppers Drug Mart Inc. v. 6470360 Canada Inc., 2012 ONSC 5167.

Suresh v Canada (Minister of Citizenship & Immigration) 2002 SCC 1.

Thomson Newspapers Co. v. Canada (Attorney General) [1998] 1 S.C.R. 877.

United States v. Mcvey 1992 CarswellBC 318.

Williams v. Canada (Attorney General) (2009), 95 O.R. (3d) 401 (Ont. C.A.),

Williams v. Canada (Attorney General), 2009 ONCA 378 (Ont. C.A.

Jurisprudence: United Kingdom

Dadourian Group International Inc. v. Simms, [2006] EWHC 2973, at para. 683 (Ch D), aff'd [2009] ECWA Civ 169 (CA).

Kuwait Airways Corp. v. Iraqi Airways Co. (No. 6), [2002] 2 A.C. 883 (U.K. H.L.).

R. v. Bow Street Metropolitan Stipendiary Magistrate (No. 3), [2000] 1 A.C. 147 (U.K. H.L.).

Trendtex Trading Corp. v. Central Bank of Nigeria, [1977] 1 Q.B. 529 (Eng. C.A.).

Trustor AB v. Smallbone and others (No. 2), [2001] 3 All E.R. 987, at 996 (HC).

Yukos Capital S.A.R.L. v. OJSC Rosneft Oil Co., [2012] EWCA Civ 855 (Eng. & Wales C.A. (Civil)).

Jurisprudence: United States

Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (U.S. C.A. 2nd Cir. 2010), at p. 120 aff'd on other grounds, 569 U.S. 108 (U.S. Sup. Ct. 2013).

International Documents

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51.

International Covenant on Economic, Social and Cultural Rights, 1966, C.T.S. 1976/27; 993 U.N.T.S. 3.

International Covenant on Civil and Political Rights, 1966, C.T.S. 1976/47; 999 U.N.T.S. 171.

International Labour Organization Constitution (Part XIII, Treaty of Versailles 1919).

League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253.

Ruggie John, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UNHRC, 17th Sess, UN Doc A/HRC/17/31 (2011).

Statute of the International Court of Justice, Can. T.S. 1945, No. 7.

Vienna Convention on the Law of Treaties 23 May 1969, UNTS vol. 1155 p. 331.

Secondary Materials

Secondary Materials: Books & Chapters in Books

Allen Fidelis, *Implementation of Oil Related Environmental Policies in Nigeria: Government Inertia and Conflict in the Niger Delta* (Newcastle: Cambridge Scholars Publishing, 2012).

Asbjørn Eide Gudmundur Alfredsson, "The Origins of the Universal Declaration of Human Rights" in Asbjørn Eide Gudmundur Alfredsson eds *The Universal Declaration of Human Rights: a common standard of achievement* (Kluwer Law International, c1999).

Barnett Laura, *Canada's Approach to the Treaty-Making Process* 2008-45-E (Ottawa: Library of Parliament, Legal and Social Affairs Division Publication, 2021).

Brownlie Ian, *Principles of Public International Law* 7th ed (Oxford University Press, 2008) at 41.

Crawford James, *Brownlie's Principles of Public International Law* 9th ed (Oxford: Oxford University Press, 2019).

Ike Okonta & Oronto Douglas, *Where Vultures Feast: Shell, Human Rights, and Oil in the Niger Delta* (San Francisco: Sierra Club Books Publishing, 2001).

Jennings Robert & Arthur Watts, *Oppenheim's International Law* (9th ed. 2008), vol. 1.

Kindred Hugh M., "The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach", in Oonagh E. Fitzgerald, ed., The Globalized Rule of Law: Relationships between International and Domestic Law (2006), 5.

Oliver Peter, Patrick Macklem, & Nathalie Des Rosiers, *The Oxford Handbook of the Canadian Constitution* (Oxford University Press Online, 2017).

Pahuja Sundhya & Anna Saunders, "Rival Worlds and the Place of the Corporation in International Law," in Jochan von Bernstorff & Phillip Dann, eds, *The Battle for International Law: South-North Perspectives on the Decolonization Era* (Oxford Scholarship Online, 2019) 141.

Smith Rhona, *International Human Rights Law* 8th ed (Oxford: Oxford University Press 2018).

Sornarajah Muthucumaraswamy, “Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States,” in Craig Scott, ed, *Torture as Tort Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart Publishing, Oxford 2001) 491.

Sossin Lorne, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012).

van Ert Gib, “The Domestic Application of International Law in Canada”, in Curtis A. Bradley, ed., *The Oxford Handbook of Comparative Foreign Relations Law* (New York: Oxford University Press, 2019) 501.

Secondary Materials: Journals

Anthea Roberts, "Comparative International Law? The Role of National Courts in Creating and Enforcing International Law" (2011), 60 I.C.L.Q. 57.

Dodge William S., "Corporate Liability Under Customary International Law" (2012), 43 Geo. J. Int'l L. 1045.

Fairley H. Scott, “International Law Matures within the Canadian Legal System: Araya et al. v Nevsun Resources Ltd” (2021) 99 Can. B. Rev. 193.

Farkas Samuel E., “Araya v Nevsun and the Case for Adopting International Human Rights Prohibitions into Domestic Tort Law” (2018) 76 U. Toronto Fac. L. Rev. 130.

Higgins Rosalyn, “The Relationship Between International and Regional Human Rights Norms and Domestic Law” (1992), 18 Commonwealth L. Bull. 1268, at p. 1273.

Humphrey John, “The Implementation of International Human Rights Law”, (1978) 24 NY L Sch Rev 31.

Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 Can. Y.B. Intl Law 3.

La Forest Gérard V., "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 Can. Y.B. Intl Law 89.

Kennedy Gerard J., "Nevsun, Atlantic Lottery, and the Implications of the 2020 Supreme Court of Canada Motion to Strike Decisions on Access to Justice and the Rule of Law" (2021) 72 UNBLJ 82.

Koh Harold Hongju, "Separating Myth from Reality about Corporate Responsibility Litigation" (2004), 7 J.I.E.L. 263.

Meshel Tamar, "From Nevsun v Araya to the Core: Taking Stock of State-Based Business and Human Rights Grievance Mechanisms in Canada" (2021) 54:1 UBC L Rev 203.

Muchlinski Peter, “Corporate Liability for Breaches of Fundamental Human Rights in Canadian Law: Nevsun Resources Limited v Araya (2019-2020) 2:1 Amicus Curiae 505.

Obi Cyril, “The Geopolitical Consequence of Oil in Africa: The case of Nigeria,” (2020) 26:2 Brown J World Aff 7.

Provost René, "Judging in Splendid Isolation" (2008), 56 Am. J. Comp. L. 125.

Raj Shannon, “Blood Electronics: Congo’s Conflict Minerals and the Legislation That Could Cleanse the Trade” (2011) 84 S. Cal. L. Rev 981.

Schwartz Osnat Grady, "International Law and National Courts: Between Mutual Empowerment and Mutual Weakening" (2015), 23 Cardozo J. Intl & Comp. L. 587.

Thayer William W., “International Arbitration of Justiciable Disputes” (1912-1913) 5 Harv L Rev 416.

Toope Stephen J., “Inside and Out: The Stories of International Law and Domestic Law” (2001), 50 U.N.B.L.J. 11.

Xavier Sujith, “Biased Impartiality: A Survey of Post-RDS caselaw on Bias, Race and Indigeneity” (2021) 99:2 Canadian Bar Review 354.

Zullow Jeremy, “Canadian Litigation for Violations of Customary International Law: Questions Remaining after Nevsun v Araya” (2022) 80 U. Toronto Fac. L. Rev. 122.

Other Sources

“BLOOD AND OIL: A Special Report.; After Nigeria Represses, Shell Defends Its Record”, *New York Times* (13 February 1996), online: < https://www.nytimes.com/1996/02/13/world/blood-and-oil-a-special-report-after-nigeria-represses-shell-defends-its-record.html>.

Dwyer Emily, “Canada’s ‘toothless’ new corporate watchdog is a broken promise and a major setback for human rights” in Business & Human Rights Resource Centre (15 May 2019) online: <https://www.business-humanrights.org/en/blog/canadas-toothless-new-corporate-watchdog-is-a-broken-promise-and-a-major-setback-for-human-rights/>.

Canadian Network on Corporate Accountability, “Government conceals and ignores expert advice on CORE, report leaked by civil society” (25 February 2021) online: <https://cnca-rcrce.ca/2021/02/25/government-conceals-and-ignores-expert-advice-on-core-report-leaked-by-civil-society/>.

Canadian Network on Corporate Accountability, “News release: Government of Canada turns back on communities harmed by Canadian mining overseas, loses trust of Canadian civil society” (11 July 2019) online: <https://cnca-rcrce.ca/2019/07/11/news-release-government-of-canada-turns-back-on-communities-harmed-by-canadian-mining-overseas-loses-trust-of-canadian-civil-society/>.

Global Affairs Canada, "Corporate Social Responsibility, Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian International Extractive Sector" (March 2009) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse-2009.aspx?lang=eng>.

Global Affairs Canada, "Multi-Stakeholder Advisory Body on Responsible Business Conduct abroad" (17 January 2018) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/advisory_body-groupe_consultatif.aspx?lang=eng>.

Global Affairs Canada, "Responsible Business Conduct Abroad" (28 April 2022) online: <https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-rse.aspx?lang=eng>.

Global Affairs Canada, News Release "The Government of Canada brings leadership to responsible business conduct abroad" (17 January 2018) online: <https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html>.

House of Commons, "House of Commons Debates" (March 29, 2022) 151:48 Official Report (Hansard) (House Publication, Canada) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-48/hansard>.

House of Commons, "House of Commons Debates" (March 29, 2022) 151:48 Official Report (Hansard) (House Publication, Canada) online: <https://www.ourcommons.ca/DocumentViewer/en/44-1/house/sitting-48/hansard>.

House of Commons Canada, "Bill C-262 An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad" (First Session, Forty-fourth Parliament, 70-71 Elizabeth II, 2021-2022) online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/C-262/first-reading>.

Lim Jolson, "Civil Society, labour groups resign in protest from federal panel on corporate responsibility abroad" iPolitics (July 11 2019) online: <https://ipolitics.ca/2019/07/11/civil-society-labour-groups-resign-in-protest-from-federal-panel-on-corporate-responsibility-abroad/>.

Mining Weekly, "Court case sets precedent for claims arising from overseas activities of Canadian miners" (30 July 2019) online: <https://www.miningweekly.com/article/court-case-sets-precedent-for-claims-arising-from-overseas-activities-of-canadian-miners-2019-07-30/rep_id:3650>.

Open Parliament "Bills & Votes" online: <https://openparliament.ca/bills/>.

Open Parliament, "Bill C-323 (Historical) An Act to amend the Federal Courts Act (international promotion and protection of human rights)" online <https://openparliament.ca/bills/41-2/C-323/?tab=major-speeches>.

Our Commons, "Private members' Business, Corporate Accountability of Mining, Oil and Gas Corporations in Developing Countries Act" by Hon. John Mckay (3 March 2009) online: <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#SOB-2634035>.

Our Commons, "Response Speech by Mr. Ron Cannan" (3 March 2009), available online at <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

Our Commons, "Response Speech by Mr. Paul Crête" (3 March 2009) online: <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

Our Commons, "Response Speech by Mr John Rafferty" (3 March 2009) online <https://www.ourcommons.ca/DocumentViewer/en/40-2/house/sitting-22/hansard#Int-2634046>.

Parliament of Canada, "C-263 An Act to establish the Office of the Commissioner for Responsible Business Conduct Abroad and to make consequential amendments to other Acts" online: <https://www.parl.ca/legisinfo/en/bill/44-1/c-263>.

Parliament of Canada, C-300 40th Parliament, 2nd Session (January 26, 2009, to December 30 2009) "An Act respecting Corporate Accountability for the Activities of Mining, Oil or Gas in Developing Countries" online: <https://www.parl.ca/LegisInfo/en/bill/40-2/c-300>.

Pilkington Ed, "Shell pays out $15.5m over Saro-Wiwa Killing", *The Guardian* (9 June 2009) online: <https://www.theguardian.com/world/2009/jun/08/nigeria-usa>.

Rights Action, "Pan American Silver forced to offer a settlement to Guatemala victims of mining repression and violence" (31 July 2019) online: <https://us9.campaign-archive.com/?u=ea011209a243050dfb66dff59&id=2ab9bc4f1a>.

Searcey Dionne & Eric Lipton, "What to Know About Mining in Congo", *New York Times* (20 November 2021), online: <https://www.nytimes.com/interactive/2021/11/29/world/congo-cobalt-artisanal-mining.html?>.

The Canadian Museum of Human Rights, "A Universal Commitment: The People of the Universal Declaration of Human Rights", online: <https://humanrights.ca/story/a-universal-commitment>.

The World Bank, "GDP per capita (current US$) – Ecuador" online: <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=EC>.

Wells Jennifer, "Canada has a new watchdog for corporate ethics. But where are its teeth?" The Star (9 April 2019) online: <https://www.thestar.com/business/opinion/2019/04/09/canada-has-a-new-watchdog-for-corporate-ethics-but-where-are-its-teeth.html>.

Alabi Samsudeen, “Silencing the Guns: Making a Case for an African Union-driven intervention on Conflict Minerals (LLM International & European Law, Vrije Universiteit Brussels, 2021) [Unpublished].

VITA AUCTORIS

NAME:	Samsudeen Olalekan Alabi
PLACE OF BIRTH:	Offa, Nigeria
YEAR OF BIRTH:	1990
EDUCATION:	Obafemi Awolowo University, LLB., Ile-Ife, Nigeria, 2014
	Nigerian Law School, B.L., Kano, Nigeria, 2015
	Vrije Universiteit Brussels, LLM., Brussels, Belgium, 2021
	University of Windsor, LLM., Windsor, Canada, 2022.