NEVSUN V. ARAYA: A BLUEPRINT FOR PROTECTING HUMAN RIGHTS THROUGH TORT LAW

INTRODUCTION

An important issue affected by the globalization of the world's economy is the distribution of worldwide labor through outsourcing of production.[1] Political discourse related to this issue has focused on its impact on employment for many working class citizens who have experienced less demand for their services.[2] Indeed, many politicians have campaigned on promises to bring jobs back home.[3] Another concern is that corporate wage savings are facilitated by the lower leverage and protection for workers in countries with lax employment laws.[4] Even though domestic corporations may not intend to incorporate forced labor or other human rights abuses into their supply chains, it is important to hold corporations accountable for indifference to such practices.

There are several potential solutions, but each involves sensitive considerations because of the multinational nature of modern industry. Traditionally, international law has centered around notions

1 *See, e.g.*, Michael Collins, *The Long-Term Problem of Outsourcing*, INDUSTRY WEEK (Feb. 18, 2021), https://www.industryweek.com/the-economy/competitiveness/article/21155621/the-longterm-problem-of-outsourcing ("The two biggest problems facing American manufacturing are the trade deficit and outsourcing").

2 *See, e.g.*, *Three-in-Ten Say Increased Outsourcing of Jobs Has Hurt Their Job or Career*, PEW RSCH. (Jan. 22, 2018), https://www.pewresearch.org/ft_18-01-17_laborforcetrends_feature/.

3 *See, e.g.*, Heather Long, *Trump Vows 5 Million Jobs, Most of Any President*, CNN (Jan. 20 2017, 3:08 PM), https://money.cnn.com/2017/01/20/news/economy/donald-trump-jobs-wages/index.html; Todd Spangler & Dave Boucher, *Joe Biden Promises Michigan Workers: He'll Tax Companies That Move Jobs Overseas*, DETROIT FREE PRESS, (Sept. 9, 2020, 7:21 AM), https://www.freep.com/story/news/politics/elections/2020/09/09/joe-biden-michigan/5755797002/.

4 This may occur in underdeveloped nations that are flush with natural resources. *See, e.g.*, *Nevsun v. Araya*, 2020 SCC 5 (CanLII) (Eritrean refugees were employed in a local mine owned by a Canadian corporation). Alternatively, American companies may outsource manufacturing labor to developed nations that employ forced labor, such as the current controversy regarding the Xianjing region of China, in which China has been accused of forcing Muslims to work in factories. *See, e.g.*, Vicky Xiuzhong Xu et al., *Uyghurs for Sale: 'Re-education', Forced Labour and Surveillance Beyond Xianjing*, AUSTL. STRATEGIC POL'Y INST. (Mar. 1, 2020), https://www.aspi.org.au/report/uyghurs-sale. Additionally, there has been sporadic, and sometimes successful, litigation for environmental disasters caused by European corporations and their subsidiaries in underdeveloped nations, highlighting an area beyond labor law in which Western ventures have come under fire for a carefree attitude toward foreign populations. *See, e.g.*, *Vedanta Resources PLC and another v. Lungowe and others*, (2019) UKSC 20 (holding that English courts could hear suits by Zambian nationals for environmental harms allegedly caused by the Zambian mining subsidiary of an English company).

of state sovereignty, which limits the scope of feasible approaches to human rights issues in the global supply chain, since they occur abroad.[5] Governments are measured and careful in their rebuke of foreign governments even for offences that could be considered outrageous if they occurred domestically.[6] However, over the past century, state sovereignty has come into tension with universal human rights, which has arguably transformed international law, placing constraints on sovereigns' powers and their agents when conducting war or otherwise engaging in conflict.[7] Indeed, treaties and international agreements have paved the way for international criminal proceedings against individuals,[8] shaping international attitudes in favor of prosecuting agents of sovereign powers who previously were immune from punishment.[9] A key aspect of this evolution was the recognition that human rights transcend the relationship between citizens and their governments, and that governments cannot be allowed to deprive any person of universal rights, regardless of state sovereignty.[10]

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5 *See, e.g.*, G. Edward White, *A Customary International Law of Torts*, 41 VALPARAISO L. REV. 755, 764 (2007) (citing Blackstone's understanding that most violations of the law of nations, as international law was broadly known, were committed by "whole states or nations" and for which war was the only recourse).

6 An example of this is the murder of Saudi journalist, Jamal Khashoggi, in which United States intelligence and government found and acknowledged complicity by the Crown Prince Mohammed bin Salman. The United States imposed sanctions on the hit team but not the Crown Prince. *See* Nabih Bulos, *Biden Response to Report on Khashoggi Killing Angers Both Saudi Arabia and Its Critics*, L.A. TIMES (Mar. 2, 2021, 10:54 AM), https://www.latimes.com/world-nation/story/2021-03-02/biden-response-khashoggi-report-angers-saudi-arabia-and-critics.

7 *See, e.g.*, Philippe Kirsch, *Applying the Principles of Nuremberg in the International Criminal Court*, 6 WASH. U. GLOBAL STUDIES L. REV. 501, 502 (2007) (discussing the legacy of the Nuremberg trials after World War II and how they went beyond previous criminal trials for violations of the law of war, holding high level officials and private citizens accountable for "some of the most serious crimes known to humanity").

8 *See, e.g.*, Rome Statute of the International Criminal Court, July 1, 2002, 2187 U.N.T.S. 90.

9 *See* Robert H. Jackson Center, *The Influence of the Nuremberg Trial on International Criminal Law* (Tove Rosen ed. 2003), https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/. "By introducing the new principles of Crimes Against Peace and Crimes Against Humanity, Nuremberg effectively fathered a globalized concern towards certain attitudes in war and, by extension, for the rights of all human beings suffering the effects of certain modes of violence." *Id*.

10 *See Nevsun*, *supra* note 4, at para. 110 ("A central feature of the individual's position in modern international human rights law is that the rights do not exist simply as a contract with the state. While the rights are certainly enforceable against the state, they are not defined by that relationship").

That international law has shown itself to be amenable to change in the criminal sphere brings hope that it could also develop to recognize civil remedies for those who have suffered the deprivation of their human rights by private actors. Common law jurisdictions pose promising venues for such claims, because judges have the power to alter the law to recognize new torts or extend existing ones to new situations.[11] In the United States, the Alien Tort Statute ("ATS") provides a statutory framework for tort victims to bring suit for claims arising under international law.[12] The United States Supreme Court has yet to find liability for domestic corporations employing forced labor abroad, but has supported a relatively expansive construction of the types of international law violations that would be actionable under the ATS.[13]

In contrast, in 2020, Canada's Supreme Court issued a landmark decision in *Nevsun v. Araya*, which authorized Canadian courts to recognize new torts for violations of customary international law.[14] The case presented a framework and rationale for providing tort victims an avenue for civil redress that could be influential in other common law jurisdictions, including the United States.[15] However, a vigorous dissent opposed the majority's decision and echoed the views of American jurists and commentators opposing common law remedies against domestic corporations, including arguments of

11 *See, e.g.*, Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1541 (1997) (discussing the factors which have led to the recognition of new torts in American jurisdictions including intentional infliction of emotional distress, strict products liability, invasion of privacy, and wrongful discharge from employment).

12 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

13 The Supreme Court recently addressed corporate liability under the ATS in *Nestle v. Doe*, in which the Court held that domestic corporations may be held liable under the ATS, but only on the basis of domestic activity, while the plaintiffs at bar only plead general corporate activity such as providing supplies to farmers employing slave labor in the Ivory Coast. *Nestle v. Doe*, 141 S.Ct. 1931 (2021).

14 *See Nevsun*, 2020 SCC at para. 127 (Ruling that the plaintiffs' claims may proceed based on the recognition of new nominate torts inspired by customary international law or directly for breaching customary international law).

15 *See* Beatrice A. Walton, *Nevsun Resources Ltd. v. Araya*, 115 AM. J. INT'L L. 107, 110 (2021) ("*Nevsun* may well prove a watershed moment for human rights plaintiffs in Canada seeking to invoke customary international law. The opinion also provides a model for other national courts looking to make use of customary international law more generally.").

judicial restraint and executive dominion over foreign relations matters.[16]

Evaluating the strengths and weaknesses of such arguments involves several considerations, including the nature and formation of customary international law; the conditions under which advocates have successfully persuaded judges to recognize new torts; and the feasibility of applying criminal law to corporate directors in lieu of civil redress. Different legal systems, as well as diverse litigants, also factor into the viability of incorporating customary international law into domestic tort law in a given legal system. Overall, however, tort law seems to provide an appropriate avenue for holding domestic corporations accountable in their global operations.

I. BACKGROUND

International law has two primary means of being created: treaties and custom.[17] Treaties are multilateral agreements by which nations bind themselves voluntarily and expressly, while customary international norms are the subject of "tacit" agreement among nations[18] and become binding upon two conditions: widespread and consistent state practice and *opinio juris*, or the subjective belief in a

16 *See Nevsun*, *supra* note 4, para. 148 (Brown & Rowe, JJ., dissenting in part) (summarizing their position that the approach taken by the majority is contrary to the doctrine of incrementalism in judicial lawmaking, and would involve an unconstitutional encroachment of the judiciary upon foreign relations). *See also Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (urging federal courts to be cautious in crafting new remedies for violations of customary international law even though the ATS authorizes such remedies because they may have "adverse foreign policy consequences").

17 *See* Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE. L.J. 202, 204 (2010) ("[t]here are two basic types of international law - treaties and customary international law." William S. Dodge, Brief of International Law Scholars as Amici Curae in Support of Respondents, P. 8, *Nestle U.S.A., Inc. v. Doe*, 141 S. Ct. 1931 (2021).

18 *See* Igor I. Lukashuk, *Customary Norms in Contemporary International Law*, *in* THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY: ESSAYS IN HONOR OF KRYSZTOF SKUBISZEWESK 487, 488 (Jerzy Maarczyk ed., 1996) ("[T]he consent of independent subjects lies at the root of every international legal norm. It is the only means of creating norms. That is the only way to set the content of the norm and vest it with legal force. Consent has two modes of expression. One of them is in the clearly expressed, generally written, shape of a treaty. The other entails the unwritten form of custom which in the majority of cases is generated not by clearly expressed, but by tacit consent (*tacitum pactum*)").

legal obligation.[19] Because custom is premised upon tacit consent, nations may try to remove themselves from being bound by a particular norm through the concept of persistent objection.[20] However, there is a subset of customary international norms called *jus cogens* from which no State may derogate[21] (for example, the prohibition of torture).[22] However, identifying customary norms beyond *jus cogens* is more contentious because of their lack of formal substantive definition and reliance on similarly amorphous agreement among States.

It is uncontested that customary international law evolves over time.[23] Norms, by definition, invoke notions of currency and change, but the identification of new norms by judges is not always straightforward.[24] One way that norms are identified is through consulting national court decisions or scholarly literature,[25] but this affords discretion to domestic judges who may not give much weight

19 *See* Odile Ammann, *The Legal Effect of Domestic Rulings in International Law*, *in* DOMESTIC COURTS AND THE INTERPRETATION OF INTERNATIONAL LAW 133, 142 (2020) ("States also collectively provide evidence of the two constitutive elements of [customary international law], State practice and *opinio juris*"); Eric Engle, *U.N. Packing the State's Reputation? A Response to Professor Brewster's "Unpacking the State's Reputation*," 114 PENN STATE L. REV. PENN STATIM 34, 37 (2010) ("[t]he second necessary element of customary international law is opinio juris – that not only do states act as they do, but they also believe that they are obligated to act as they do.")

20 *See* Bradley & Gulati, *supra* note 17, at 204 (2010).

21 *See* Kamrul Hossain, *The Concept of Jus Cogens and the Obligation Under the U.N. Charter*, 3 SANTA CLARA J. INT'L. L. 72, 73 (2005) ("*[j]us cogens*, the literal meaning of which is "compelling law," is the technical term given to those norms of general international law that are, in fact, a set of rules, which are peremptory in nature and from which no derogation is allowed under any circumstances.") (internal citation omitted).

22 *See* Erika de Wet, *The Prohibition of Torture as an International Norm of* jus cogens *and Its Implications for National and Customary Law*, 15 EURO. J. INT'L. L. 97 (2004).

23 *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) ("it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.")

24 *Cf. Sosa*, 542 U.S. 692 at 2765, *with id*., at 2771 (Scalia, J., dissenting in part) (disagreeing with the majority's position that federal courts in principle have the authority to recognize torts under the ATS).

25 *See* Philip M. Moremen, *National Court Decisions as State Practice: A Transnational Judicial Dialogue*, 32 N.C. J. INT'L. L. 259, 261 (2006) ("[t]he creation of state practice through national court decisions can be seen as a way for national courts to play a role in what has been called a transnational judicial dialogue between courts. That is, the cross-pollination between national court decisions may harmonize the law in participating countries, creating consistent state practice and, hence, customary international law") (internal citation omitted). *See also* Ammann, *supra* note 19, at 142 ("from the perspective of the sources of international law, domestic rulings can collectively contribute to the formation and modification of international law").

to judges in other States.[26] It also seems inevitable that judges considering claims under customary international law are often operating with minimal legislative guidance.[27] Judges may be reticent to operate without statutory backing in areas that are international in nature,[28] cognizant that their decisions may have extraterritorial effect.[29]

Conversely, tort law provides an appropriate means for redressing injuries suffered from breaches of customary international law. Unlike criminal penalties, which have thus far been the primary modern means for holding non-state entities liable for violations of international law, civil remedies focus more on compensating victims. Furthermore, tort law is largely a creature of common law.[30] Therefore, redressing civil wrongs through tort law seems to be appropriate, provided it is consistent with the underlying conditions for creating new torts and for enforcing international law.

In *Nevsun v. Araya*, the Canadian Supreme Court set out a rationale for why private claims under customary international law are viable in Canadian courts,[31] at least when brought against a Canadian corporation for human rights abuses committed against foreign laborers abroad.[32] The plaintiffs were Eritrean refugees who immigrated to Canada and filed suit in British Columbia against

26 *See* Ammann, *supra* note 19, at 144 ("the reluctance to deem domestic rulings authoritative on the international plane likely goes back to the controversial nature in domestic law").

27 *See, e.g.*, *Sosa*, 542 U.S. 692 at 2761 (describing the caution judges must take in considering new causes of action under the ATS, which provides for federal jurisdiction over civil actions for violations of "the law of nations").

28 *See Sosa*, 542 U.S. 692 at 2763 (discussing the potential adverse foreign policy consequences if judges do not exercise restraint in finding civil liability for violations of the law of nations).

29 *See* Dan Priel, *"That Is Not How the Common Law Works": Paths to Tort Liability for Harassment*, 52 OTTAWA L. REV. 87, 101 (2021) (citing the Court of Appeals of Ontario's reluctance to recognize a new tort for harassment based on the institutional limits of courts; *see also id*. at 89 (describing the Court of Appeals' view on the incremental nature of common law change as weighing against the creation of new torts without legislative backing).

30 *See, e.g.*, Robert J. Kaczorowski, *The Common-Law Background of Nineteenth Century Tort Law*, 51 OHIO ST. L.J. 1127, 1129 (1990) (tracing the early history of tort law to two common law causes of action).

31 *See Nevsun*, 2020 SCC at para. 132 ("Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not 'plain and obvious' to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed.")

32 *See id.* at para. 122.

Nevsun Resources, a Canadian corporation who owned the Bisha mine in Eritrea through a local subsidiary, the Bisha Company. The Bisha Company hired a South African company to construct the mine, who subcontracted with the Mereb Construction Company, which was controlled by the Eritrean Military, and Segen Construction Company, which was owned by Eritrea's only political party.[33] These latter two companies conscripted Eritrean nationals through the country's National Service Program. Under the Program's original enactment in 1995, conscripts were to serve an eighteen-month term in military service or to assist in public projects. However, the period of conscription was extended indefinitely in 2002, and the plaintiffs were conscripted and forced to work in the Bisha mine.[34] They claimed that they were subjected to punishments including being ordered to roll in hot sand while being beaten with sticks, having their arms and legs tied together and being left in the hot sun, and being barred from leaving without permission, with those who left without authorization being severely punished and their families threatened.[35]

When the case came before the supreme court, the majority began by tracing the modern history of human rights law after World War II, and concluded that human rights are not meant to be aspirational and idealistic, but real and enforceable.[36] After establishing the philosophical grounds for their position, the majority turned to doctrine holding, via the doctrine of adoption, that customary international law is automatically incorporated into Canadian

33 See *id.* at para. 8.

34 *See id*. at par. 8-10.

35 *See id*. at para. 11-15.

36 *See id*. at para. 1 ("[T]his appeal involves the application of modern international human rights law, the phoenix that arose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined these norms was to be identified and addressed.")

common law.[37] They found that the claims pled by the plaintiffs constituted *jus cogens* norms of customary international law.[38]

Four justices disagreed with the majority's position in two separate opinions. The justices first contested the notion that customary international law recognizes civil liability for human rights abuses.[39] They drew a sharper distinction between acts and remedies, arguing that for a customary norm to become binding, the international community must not only recognize that certain conduct is prohibited, but also that a particular remedy follows from its violation.[40]

They also stressed the importance of incrementalism in judicial lawmaking,[41] setting forth a three-part approach to guide judges in determining whether to amend the common law to incorporate customary international law.[42] Under this analysis, the dissent argued that criminal law is the optimal avenue for addressing violations of *jus cogens* norms such as those pled by the plaintiffs.[43] Further

37 *See id*. at para. 90 ("Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation"); *see also id*. at para. 87 (citing Blackstone's *Commentaries on the Laws of England: Book of the Fourth* (stating that "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")).

38 These claims were for crimes against humanity, slavery, forced labor, and cruel, inhuman and degrading treatment. *See id*. at para. 100-03. The plaintiffs pled these claims along with traditional tort claims including conversion, battery, false imprisonment, conspiracy, and negligence. *Id*. at para. 4. The Supreme Court of Canada upheld the Court of Appeals' ruling that the customary international law claims could proceed to trial, and not merely their conventional tort claims. *Id*. at para. 6.

39 *See id*. at para. 193 ("[T]he majority writes that '[t]he prohibition against slavery too is seen as a peremptory norm'. We are uncertain how it deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition.").

40 *Id*. at para. 201-02 (Brown and Rowe JJ., dissenting) ("That criminal liability arises from customary international law has been accepted by the states of the international community since Nuremberg. It is precisely this acceptance that creates customary international law. Outside the sphere of criminal law, there is no corresponding acceptance-of-liability rules regarding individuals.").

41 *See id*. at para. 148 (construing the doctrine of adoption to allow courts to "convert prohibitive rules into liability rules…would be inconsistent with the doctrine of incrementalism and the principle of legislative supremacy").

42 *See id*. at para. 175 (To determine whether a statute stands in the way of incorporating customary international law into the common law via the doctrine of adoption, "[w]e would suggest that courts should follow a three-step process. First, precisely identify the norm. Second, determine how the norm would best be given effect. Third, determine whether any legislation prevents the court from changing the common law to create that effect.").

43 *See id*.

weighing against allowing novel tort claims under customary international law was that they perceived the proposed torts to be either covered by pre-existing ones or too ill-defined for judicial recognition.[44] The justices further reasoned those torts that were specific or novel enough to qualify should not be recognized based on conduct that occurred abroad.[45] The dissenters ultimately concluded that recognizing the plaintiffs' claims under customary international law would encroach upon the proper roles of both the legislature and executive branches.[46]

The majority rebutted these argument by relying on principle over substance, arguing that international law must carry force[47] and that domestic judges not only interpret international custom but develop it through their rulings.[48] They invoked the expressive function of the law, which in its view necessitated causes of action that fit the unique harm incurred by human rights abuses more evocatively than battery or conversion.[49] This seems sensible, especially in light of the motivating factors that led to the development of international law since World War II: principally that crimes against human rights must

44 *See id*. at para. 244-46 (finding that the proposed torts of cruel, inhuman or degrading treatment should fail because any conduct captured by it would also be captured by the extant torts of battery or intentional infliction of emotional distress and that crimes against humanity "is too multifarious a category to be the proper subject of a nominate tort. Many crimes against humanity would be already addressed under extant torts").

45 *See id*. at para. 251-52 ("[I]n our view, proposed torts should not be recognized for the first time in a proceeding based on conduct that occurred in a foreign territory, where the workers in this case had no connection with British Columbia at the time of the alleged torts, and where the British Columbian defendant has only an attenuated connection to the tort.").

46 *See id*. at para. 262 (Brown and Rowe JJ., dissenting) ("The creation of a cause of action or breach of customary international law would require the courts to encroach on the roles of both the legislature by creating a drastic change in the law and ignoring the doctrine of incrementalism, and the executive by wading into the realm of foreign affairs.").

47 *See supra* note 32.

48 *See Nevsun*, *supra* note 4, at para. 70 ("Canadian courts, like all courts, play an important role in the ongoing development of international law."); *see also id.* at para. 71 ("Since international law not only percolates down from the international to the domestic sphere, but . . . also bubbles up, there is no reason for Canadian courts to be shy about implementing and advancing international law.") (internal quotation marks omitted) (internal citation omitted).

49 *See id*. at para. 126 ("While courts can, of course, address the extent and seriousness of harm arising from civil wrongs with tools like an award of punitive damages, these responses may be inadequate when it comes to the violation of the norms prohibiting forced labor, slavery; cruel, inhuman or degrading punishment, or crimes against humanity.").

be prevented and punished.[50] Considering the rarity with which international criminal tribunals have been assembled to prosecute war criminals in the decades since World War II,[51] It seems that civil remedies provide a feasible alternative means for enforcing international law, particularly when those accused are citizens of the country in which suit is brought, as in *Nevsun*. Still, in order to evaluate whether the Canadian Supreme Court's decision can offer a viable model for other courts to follow, further analysis of the issues presented by the case merit analysis, not least because the majority's position merely held that the plaintiffs' claims were not precluded as a matter of law.[52]

The Supreme Court's opinion in *Nevsun* extended the rationale of its decision in *R. v. Hape*,[53] where the Court denied a defendant's claim that he was denied the protections of the Canadian Charter of Rights and Freedoms[54] when he was convicted of money laundering with evidence obtained by the Royal Canadian Mounted Police in Turks and Caicos.[55] The Court held that because customary international law requires deference to other nations' sovereignty, and the Charter of Freedoms is silent on its extraterritorial application, the Charter is presumed not to apply extraterritorially when it conflicts with another state's sovereignty.[56]

In *Hape*, the Court also discussed the nuances of extraterritorial application of domestic law, explaining that prosecuting Canadians in Canada for conduct that occurred abroad did not offend customary international law principles such as state sovereignty.[57] They cited the

50 *See supra* note 32; *see also* Rosen, *supra* note 9 ("The Nuremberg trials established that all of humanity would be guarded by an international legal shield and that even a Head of State would be held criminally responsible and punished for aggression and Crimes Against Humanity.").

51 *See id.* ("Up until the present the international community has been very reluctant to enforce international criminal law. It has only been done a couple of times in history, without doubt due to the specific circumstances and the political climate at the time.").

52 *See Nevsun*, *supra* note 4, at para. 132.

53 2007 SCC 26.

54 *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

55 *See Hape*, *supra* note 50, at para. 2-13.

56 *See id.* at para. 33.

57 *See id*. at para. 66.

Crimes Against Humanity and War Crimes Act,[58] which allows prosecution of Canadians who commit crimes against humanity outside of Canada.[59] The Court concluded that enforcement of the Act in Canada would be a valid exercise of extraterritorial jurisdiction, in contrast with laws that would allow Canadian officials to enforce Canadian law in a foreign state's territory by arresting offenders abroad.[60] The Court also cited the Criminal Code,[61] which deems certain acts such as torture to be committed in Canada when the person who committed it is a Canadian citizen or normally resides in Canada.[62] The Court's discussion lays a foundation for applying customary international law in Canadian courts to domestic corporations for acts that occurred abroad.

II. THE PROBLEM

If legally sound, the approach taken by the majority in *Nevsun* seems to be an appropriate approach to holding domestic corporations accountable for complicity in human rights abuses. However, there are several obstacles, both legal and practical, to overcome for incorporating customary international law into domestic tort law.[63] Allowing private suits would stretch international law from its original understanding as primarily intended to govern the relations between sovereigns.[64] But when the defendant is a domestic corporation, foreign policy considerations that counsel against broad

58 S.C. 2000, c. 24.

59 *See Hape*, *supra* note 50, at para. 66.

60 *See id*.

61 R.S.C. 1985, c. C-46.

62 *See Hape*, *supra* note 50, at para. 66.

63 Even the Canadian Supreme Court's ruling in *Nevsun* did not award damages for breaches of customary international law, it merely found that the plaintiffs' claims were not invalid as a matter of law. Nevertheless, it was seen as a landmark decision because of the Court's strong language in support of the claims, and Nevsun settled with the plaintiffs shortly after the decision. *See* Bernise Carolino, *Nevsun Settles with Eritrean Plaintiffs in Relation to Landmark Supreme Court of Canada Case*, CANADIAN LAWYER (Nov. 5, 2020), https://www.canadianlawyermag.com/practice-areas/litigation/nevsun-settles-with-eritrean-plaintiffs-in-relation-to-landmark-supreme-court-of-canada-case/334916*; see also Nevsun*, *supra* note 4, at para. 146 (Rowe & Brown, JJ., dissenting) ("We can only understand the inevitable effect of [the majority's] reasons to be that, if the facts pleaded by the workers are proven, the workers' claim should succeed.").

64 *See* White, *supra* note 5, at 764 (citing Blackstone's understanding that "most violations of the law of nations were committed by 'whole states or nations,' in which case "recourse can only be had to war.')

judicial forays into international law without statutory backing are less significant, if not absent altogether.[65]

Even outside the area of international law, judges are often reluctant to recognize new torts.[66] Advocates have mounted campaigns in courts and law journals to gain recognition of new torts based on changing societal conditions and inadequate existing remedies with mixed success.[67] Questions of adequacy can be analyzed by considering the animating principles of tort law, which have been debated for decades, as scholars and judges have sought to make sense of the often-disparate outcomes of tort cases by alluding to moral or economic theories.[68] These rationales help to understand whether it is advisable to recognize new torts or rely on existing torts with amplified damage awards to redress the uniquely abhorrent nature of human rights abuses.[69]

States have an obligation to meet their responsibilities under international law.[70] Although it is true that criminal law seems most natural for holding individuals and entities accountable for crimes

65 *See Nevsun*, *supra* note 4, at para. 132 ("Nevsun is a company bound by Canadian law."). United States Supreme Court case law also implicitly recognizes a distinction between foreign and domestic corporations. *Compare Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (holding that foreign corporations may not be sued in U.S. courts under the Alien Tort Statue), *with Nestle v. Doe*, *supra* note 13 (holding that because of the presumption that the ATS is only applicable to domestic conduct, the plaintiffs' allegations of only general corporate activity occurring to the United States was not enough to confer jurisdiction).

66 *See* Bernstein, *supra* note 11, at 1539 ("Though forewarned by the historian S.F.C. Milsom that their hopes are doomed to be dashed, scholars and activists continue to believe that new causes of action can right neglected wrongs and tighten the fit between injuries and remedies.").

67 *See id*. (describing three factors that influence whether efforts to persuade courts to recognize new torts have been successful, as in intentional infliction of emotional distress, or have failed, as in the proposed torts of suppression and sexual fraud).

68 *See* Cristina Carmody Tilley*, Tort Law Inside Out*, 126 YALE L.J. 1320 (2017) (discussing the evolution of prevalent scholarly conceptions of tort law from a system of achieving corrective justice for plaintiffs to one centered on pursuing instrumental social policy goals).

69 *See* Scott Hershovitz, *Treating Wrongs as Wrongs*, 10 J. TORT L. 1, 19 (2017) (discussing the normative goals of tort damages from a moralistic point of view); *see also* Steven Shavell, *On the Proper Magnitude of Punitive Damages*, 120 HARV. L. REV. 1223, 1224-25 (2007) (describing the economic rationales of punitive damages, as articulated by Judge Richard Posner).

70 *See, e.g.*, Vienna Convention on the Law of Treaties art. 26*, opened for signature* May 23, 1969, 1155 U.N.T.S. 331("requiring parties to carry out their treaty obligations in good faith*); see also* Ammann, *supra* note 19, at 133 ("[D]omestic courts enable States to meet their international obligations."); *id*. at 137 ("By enforcing international law domestically, [courts] allow States to respect their international obligations.").

against humanity, it is not clear that in the context of corporate-subsidiary relationships abroad, that vicarious criminal liability is the ideal means of enforcement.[71] To the extent that judges have the legal capacity to create torts under international law, it may therefore be preferable for countries to meet their international obligations through the common law, and if legislatures find the outcomes to be unjust, they may define the proper scope of enforcement by statute.

II. APPROACH

A. Contextualizing the Problem: Corporate Regulation Over International Law

If tort law were to provide an outlet for human rights claims, it would be an incursion of private law into international law, a potential expansion that nonetheless appears firmly grounded in the early treatises of international law and the English common law.[72] The conduct actioned upon in *Nevsun* or similar cases may be understood consistently with the principles underlying the incorporation of internationally practiced mercantile rules into cases before domestic courts.[73] Additionally, the normative justifications for making such rules enforceable domestically are pertinent to holding domestic corporations as legitimate subjects of corporate regulation by the government.[74]

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71 *See* Robert Luskin, *Caring About Corporate "Due Care": Why Criminal* Respondent Superior *Outreaches its Justification*, 57 AM. CRIM. L. REV. 303 (2020) (arguing that the normative justifications for vicarious liability do not fit the criminal law, although it is enforced).

72 *See* White, *supra* note 5, at 764-67 (discussing the 'principal offences against the law of nations' listed by Blackstone in his restatement of the common law, COMMENTARIES ON THE LAWS OF ENGLAND (1769): safe-conducts or "passports," allowing foreign subjects to be protected from interference from local populations; violations against ambassadors, who were a class of persons engaged in promoting civil relations between nations; and piracy, which preserved commerce on the seas as the other laws protected commercial intercourse on land).

73 That is to the extent that allowing such claims to be brought by ex-employees of the corporation aims at preserving the integrity of the global labor industry, particularly from an international relations standpoint. *Cf*. White*, supra* note 5, at 765 (enforcing violations against safe-conducts "reflected the fact that even though European nations had engaged in war with one another for centuries, no one nation could survive economically without regular commercial contacts with its neighbors, thus, some form of immunity for commercial travelers and foreigners engaged in diplomatic relations with their host nations was imperative").

74 For example, the growth of federal securities law that arose in part as a necessary counterweight to deregulatory incentives that states have to regulate their corporations. *See, e.g.*,

It seems unmistakable that the prevailing view in the times of Blackstone and the drafting of the U.S. Constitution was that international law governed interaction among nations, and was nearly interchangeable with the law of wars.[75] However, judges were empowered to adjudicate disputes of seamen and merchants, of varying nations and with extra-territorial reach by governing conduct occurring in international waters.[76] Enforcing merchant norms was premised upon the necessity of conducting international business without hampering foreign citizens seeking to ply their trade abroad,[77] thereby maintaining international diplomacy.[78] Allowing the regulation of modern trade by sanctioning tort claims for human rights abuses would advance these ends because it promotes the integrity of international trade. It would enhance the commitment of Western businesses operating in underdeveloped nations to refrain from disregarding the conditions of workers in their supply chains and treating them as cheap means to maximize profits.

Holger Spamann, CORPORATIONS § 12.1 (describing how Delaware became the major corporate domicile for companies incorporated in the United States because New York and New Jersey began to protect non-shareholder constituencies through corporate law).

75 *See* White*, supra* note 5, at 764 (reciting Blackstone's understanding of the law of nations as 'rarely being the object of the criminal law of any particular state,' in which case 'recourse can only be had to war"). But considering the international community's resolve following World War II in particular against the undertaking the tremendous costs of war except in extreme circumstances, *see supra* notes 9, 32, private law could provide a needed substitute.

76 While safe conduct and ambassadorship seem premised upon a sovereign's interest to ensure the safety of individuals within their borders, piracy involved the preservation of the vulnerable shipping routes from predation by pirates flying any flag or no flag at all. *See* White*, supra* note 5, at 767. Though there are significant legal distinction between conduct on international waters and that in sovereign territories, the obligations of individuals in international shipping provides a possible historical basis for the private liability sought by plaintiffs such as those in *Nevsun*. However, another obstacle is that choice-of-law rules affect jurisdiction over conduct that occurs on foreign soil versus that which occurs in international waters, so to extend the spirit of piracy to human rights abuses occurring in foreign jurisdictions may be novel and controversial, and depending on the applicable choice-law-rules, render them moot or exceptional. *See Nevsun*, *supra* note 4, at para. 252 (Brown and Rowe, JJ., dissenting)

"In general, tortious conduct abroad will not be governed by Canadian law, even when the wrong is litigated before Canadian courts. It is the law of the place of the tort that will normally govern. The only exception is when such law is so repugnant to the fundamental morality of the Canadian legal system as to lead the court not to apply it." *Id*. (internal citation omitted).

77 *See* White, *supra* note 5, at 768 ("Blackstone's discussion of piracy stressed the capacity of pirates to disturb the delicacies of high seas commercial intercourse.").

78 See *id*. at 765-68 (explaining that safe-conduct and immunity for foreign citizens or ambassador within Kingdom, and piracy on the high seas, worked to protect commercial and diplomatic intercourse).

As corporate law has developed as a body of law over recent decades, there is increasing tension over how to regulate corporations and temper their inclinations to seek returns for shareholders while encouraging a concern for externalities incurred upon societal interests.[79] Because of the internal affairs doctrine, corporations are largely subject to the law of their state of incorporation, and states are not disposed to regulate them strictly because they can effortlessly reincorporate in another state (or even country).[80] Thus, it is unlikely that corporations will be held accountable under state laws for vicarious human rights abuses abroad.[81] One rationale for federal corporate regulation is that externalities imposed by corporations upon non-shareholders often go unchecked because of states' disinclination to reign in corporations for fear that they will otherwise reincorporate in a state that favors their interests desires their tax dollars. Granted, it would be an unusual regulatory manifestation to provide for civil claims under customary international law, but it yields the conclusion that the balancing of federal versus state interests in regulating corporations would not be an obstacle to providing federal enforcement in some form.[82]

79 *See* Spamann, *supra* note 74, at §12.2 (Two rationales for corporate lawmaking are remedying contracting imperfections between the contracting parties of shareholder and management, and the other to prevent externalities on non-contracting parties, although U.S. corporate law generally downplays the latter while implicitly fearing it with such rules as those precluding law firms from incorporating.).

80 *See id*.

81 *See id*. (The internal affairs doctrine and the doctrine's limiting effects on regulation through corporate law has contributed to the lesser emphasis on an externality-based approach.). The internal affairs doctrine states that claims against a corporation pertaining to its "internal" corporate affairs must be brought under the law of the state of incorporation. The United States Supreme Court has suggested, if not decisively, that the doctrine is founded in the Constitution, *see CTS. Corp v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

82 The broad reach claimed by the internal affairs doctrine may lead to the conclusion that corporations are not viewed as a policy matter (at least) in the United States, as being responsible for non-shareholder constituencies, weighing against the notion that American corporations in Nevsun's position are proper subjects of domestic corporate law, as that term is generally defined. *See* Spamann, *supra* note 74, at § 11 ("[C]orporate law," in distinction from the laws governing corporations, is "the name we give to those legal rules that specifically deal with 'internal governance' – the misleading term for relationships between shareholders and boards, and between shareholders themselves."). Relationships between other constituencies are grouped in with the headings "labor and employment law," "consumer law," "antitrust," "contract law," etc. *Id.* In other words, these areas of law are where we must refer in order to hold corporations accountable for violating the rights of non-shareholders, at least under the prevailing and business-friendly policy of American corporate law. *See id*. at §1.3.

Tort law is an area in which the corporate construct does not protect shareholders through limited liability, which is premised upon contractual notions of consent to limited liability.[83] The human rights abuses suffered by international laborers may similarly be characterized as contractual defects to support the inception of new torts, which scholars have noted as a factor in gaining recognition of new tort causes of action.[84] Countering against this position is that the place in which the injury occurs is an important aspect of personal jurisdiction of courts over the matter, and it may be inadvisable to disrupt the holistic jurisdictional framework to cover international tort liability. To do so could incorporate a policy objective in tort law that looks further than the immediate boundaries of our society, to our role in international society.[85] It can be argued that the increasing global connectivity in business has necessitated new concerns and areas for protection.[86] But the nature of claims against a laborer's ultimate employer may be beyond tort law's traditional concerns, and overlap with employment law.[87]

B. New Torts: Conditions for Inception

Throughout the decades, commentators and litigants have initiated efforts to secure damage awards on novel theories of liability. Some

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83 *See id*. at §1.1 (Limited liability does not extend to most tort liability, as most tort creditors never consented, even implicitly, to the limited liability arrangement.).

84 *See* Bernstein*, supra* note 11, at 1547 (describing the "tort paradox" that arises for parties and scholars proposing the recognition of new torts, that framing the proposed tort in a contractual or property theory enhances the likelihood of success).

85 *See* Tilley*, supra* note 68, at 1320 (arguing that "[t]ort law's stated goal is to construct community," and that "tort doctrine embeds a choice between the morality norms of traditional, closed communities and the efficiency norms of the modern, open community, depending on whether the dispute is local or national in scope").

86 As has motivated the Court of Appeals of Ontario to recognize new torts. *See, e.g.*, *Jones v. Tsige*, 2012 ONCA 32 (CanLII) (recognizing for the first time in Ontario a tort of intrusion upon seclusion, citing the need and "capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of the highly personal information that is readily accessible in electronic form. Technological change poses a novel threat to a right of privacy that has been protected for hundreds of years[.]").

87 However, gaps in employment law may conversely leave subcontractors such as those in *Nevsun* unprotected and require new solutions such as tort remedies. *See, e.g.*, Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts*: *An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PENN. J. L. AND SOC. CHANGE 53, 55 (2015) (discussing the lack of protections for subcontractors in comparison to employees).

have become common law staples,[88] others have gained traction in some jurisdictions,[89] and others have not.[90] Common law judges look backward and scrutinize whether a cause of action resembles an existing tort or theory of liability.[91] If it is too similar to an existing one, they will be unlikely to recognize a new tort,[92] while if it is distinctive, judges appear prone to consider whether the lack of applicable remedy reflects an inadequacy of the tort system, which the recognition of a new tort could cure.[93] Factors courts have considered include moral and economic concerns that are incorporated into theories of liability[94] and damages.[95] The majority in *Nevsun* found that they were sufficiently deplorable to require unique causes of action, a judgment that was based on a concern for the expressive function of tort law that overrides efficiency goals served by punitive damages, which the dissent advocated to meet the significance of the harms suffered.[96] Efficiency concerns could be misplaced when human rights are at issue. Additionally, dominant theories behind punitive damages may fit well or poorly with the

88 *See* Bernstein, *supra* note 11, at 1541 (intentional infliction of emotional distress, strict products liability, invasion of privacy, and wrongful discharge from employment).

89 *See id*. at 1543 (spoliation has found acceptance in a few states); *see also Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 (holding that there is no currently recognized tort of harassment in Ontario).

90 *See* Bernstein, *supra* note 11, at 1543 (discussing failed efforts to gain recognition for the proposed tort of suppression, which would remedy the abridgement of one's free speech by private individuals).

91 *See* Bernstein, *supra* note 11, at 1545 (citing William Prosser's discussion of the evolution of intentional infliction of emotional distress in common law from assault, a medieval variant on trespass, then arose actions for indignities suffered by passengers of common carriers, before finally being recognized that "outrageous" behavior required its own tort).

92 *See, e.g.*, *Merrifield*, *supra* note 89 (harassment as plead in the case is too similar to intentional infliction of emotional distress).

93 *See Jones*, *supra* note 86 (seclusion of privacy covers conduct that violates a claimant's rights and is not adequately covered by existing torts).

94 *See, e.g.*, Tilley, *supra* note 68, at 1332 (citing Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 33 (1972) ("Posner's seminal article *A Theory of Negligence*, [which] states that the purpose of tort 'is to generate rules of liability that if followed will bring about, at least approximately, the efficient – the cost-justified – levels of accidents and safety.'")).

95 *Compare* Shavell, *supra* note 69, at 1223 (analyzing Judge Posner's opinion in *Mathias v. Accor Economy Lodging, Inc*., 347 F.3d 672 (7th Cir. 2003), which upheld a punitive damage award 37 times greater than compensatory damages on an economic rationale, *with* Hershovitz, *supra* note 69, at 18-19 (discerning a morality-based approach of punitive damages in the seminal property case, *Jacques v. Steenberg Homes, Inc.*, 209 Wis. 2d 605 (1997), in which $100,000 in punitive damages were upheld for trespassing with nominal compensatory damages). Shavell rejects the idea that punitive damages reflected an efficient outcome and sums up the case as standing for the message that "Steenberg wronged the Jacques, and rather seriously so." *Id*. at 19.

96 *See Nevsun*, *supra* note 4, at para 126. *Cf*. *id*. at para. 221 (Brown and Rowe JJ., dissenting).

harms suffered in such cases because they are a vehicle to accomplish specific efficiency and deterrence functions.[97]

Multiple factors work against those trying to change tort law, but they are arguably met when it comes to tort victims bringing claims for violations of norms that have gained universal recognition as harmful to worldwide public welfare and consciousness.[98] The factors that led the Court of Appeals of Ontario to reach divergent outcomes in recognizing new torts several years apart may support the acceptance of human rights claims in the domestic tort system,[99] but whether there is widespread acceptance of liability rules against private defendants for human rights abuses cuts in both directions when one surveys international legal developments and decisions.[100] In terms of the harm suffered, it bears some resemblance to the offense to dignity that contributed to the establishment of intentional infliction of emotional distress in common law jurisdictions.[101] One important factor is whether the harm can be characterized as a

97 *See supra* note 96. The harm rationales for punitive damages and human rights abuses share some similarities, specifically that punitive damages compensate those that defendants don't value highly enough to protect and are unable to bring suit due to practical obstacles.

98 Of the three "paradoxes" noted by Bernstein, *supra* note 11, which she argues must be navigated in order to achieve recognition as new torts, human rights claims such as those at issue in *Nevsun* appear to be viable candidates. They fit with the "novelty paradox" because they are grounded in recognized rights under customary international law, *see id*. at 1544-47; the "tort paradox," that new torts should be posed under property theories or contract theories to gain recognition, *id*. at 1547-52, because there are contract or property-based analogies to be made; and the "agency paradox," under which advocates of new torts are less successful when speaking prospectively of harms rather than ones they experienced. *Id*. at 1552-59. In human rights cases, the plaintiffs would be victims who suffered harm first-hand.

99 *See Jones*, *supra* note 86; *Merrifield*, *supra* note 89; *Nevsun, supra* note 4, at para. 125 ("Refusing to acknowledge the differences between existing domestic torts and forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity, may undermine the court's ability to adequately address the heinous nature of the harm caused by this conduct."); *see also id*. at para. 244-46 (Brown and Rowe JJ., dissenting) (finding that some of the conduct plead by the plaintiffs falls under existent torts, cutting against recognizing new torts).

100 For example, the United States Supreme Court has yet to enforce the ATS against American corporations, most recently declining to do so in *Nestle*, *supra* note 13. But other international cases arguably support the opposite conclusion and may support *opinion juris* for enforceable human rights norms. *See, e.g.*, Walton, *supra* note 15, at 112 (citing the UK Supreme Court's decision in *Vedanta Resources PLC and Another v. Lungowe and Others*, [2019] UKSC 20 (UK), and The Hague district court's ruling in *Kiobel v. Dutch Shell*, C/09/540872/HAZA 17-10 (Jan. 5, 2019)). However, those cases proceeded under the law where the harms occurred, unlike the claims invited by the *Nevsun* court to bring claims under domestic or international law. *See Nevsun*, *supra* note 4, at para. 127.

101 *See* Bernstein, *supra* note 11 (indignity and "outrage" were keys to the expansion of the tort of intentional infliction of emotional distress).

property violation or contractual deficiency.[102] In cases like *Nevsun*, where there is a form of employment relationship, it seems feasible that contractual deficiencies could be conceived. Perhaps under a Lockean conception of ownership of one's labor could property theory be invoked to support new torts in a labor context.[103]

The majority in *Nevsun* seemingly adopted the view that international law does not prescribe liability rules, rather it defines norms of conduct and leaves nations to enforce them as they see fit,[104] with an eye on the fact that they are obligated to enforce compliance among their citizens.[105] The dissenting justices in Nevsun contended that human rights abuses are properly addressed through international criminal law.[106] International criminal tribunals have been assembled only a handful of times since they were originally embraced after World War II,[107] and in circumstances which were not relevant to the conduct at issue,[108] at least with respect to corporations like Nevsun.[109] It would involve vicarious criminal liability, which could be viewed as overly exacting on domestic corporations. Moreover, some scholars have criticized the current application of vicarious

102 *See* Bernstein, *supra* note 11 (the "tort paradox"). On this view, the coercive nature of the laborers' employment relationship could be cast as a contractual deficiency that justifies remediation through tort, a factor that Bernstein argues has currency when advocating for recognition of new torts.

103 *See, e.g.*, Karen I. Vaughn, *John Locke and the Labor Theory of Value*, 2 J. LIBERTARIAN STUD. 311 (1978) (discussing Lockean labor theory from an economic perspective).

104 *See Nevsun*, *supra* note 4, at para. 192 (Brown and Rowe, JJ., dissenting in part) ("[W]e are uncertain how [the majority] deduces the potential existence of a liability rule from this uncontroversial statement of a prohibition.").

105 *See, e.g.*, Ammann, *supra* note 19, at 139 ("[I]n some cases, international law explicitly requires or empowers States not only to give effect to their international obligations domestically, but also to interpret them. The domestic judicial application and enforcement of international law is sometimes explicitly mandated by international law.").

106 *See Nevsun*, at para. 209 (Brown and Rowe, JJ., dissenting in part) (arguing that international law is adopted into domestic common law only in the proper form for enabling the mandatory rule of international law, and for human rights abuses, criminal law is the ideal area).

107 *See* Rosen, *supra* note 9 (discussing the tribunals following the Rwanda genocide and the breakup of Yugoslavia, and discussing the enactment of the Rome Statue establishing the International Criminal Court in 2002). Since the International Court was instituted, only 48 people have been indicted, with virtually all of them charged with at least one count of murder. *See https://www.icc-cpi.int/cases?field_defendant_t=702* (listing 48 defendants).

108 *Id*.

109 However, the military conscription program at issue would be the subject matter of international criminal tribunals, although they have only been assembled after human rights crises of much greater scale, such as the civil war in Rwanda and the breakup of Yugoslavia. The fact that international criminal tribunals have been so rare may evoke tort concepts such as recurring miss scenarios, perhaps favoring the implementation of a tort remedy. *See supra* note 96.

liability criminal law, so it may be better addressed through tort.[110] Since criminal prosecution for human rights abuses don't seem forthcoming beyond episodes of egregious violence and murder, perhaps civil judgements can fill the void, providing necessary deterrence in the legal area in which vicarious liability is more firmly rooted.[111]

C. Fitting into National Frameworks

In the United States, human rights litigation has been marshalled under the Alien Tort Statute, which does not confer jurisdiction to federal courts to hear claims for conduct that occurred abroad[112] and precludes suit against foreign corporations.[113] The door is theoretically open for suit against domestic corporations as long as it alleges domestic conduct beyond mere "general corporate activity."[114] On the specific facts of the *Nevsun* case, it may be different, because the plaintiffs were refugees who may have been able to access federal courts without the grant of jurisdiction conferred by the ATS. Even if a plaintiff were able to make specific allegations of domestic conduct sufficient to constitute aiding and abetting human rights crimes, it seems unlikely that the Supreme Court is likely to extend the ATS to broadly cover human rights abuses within supply chains because it would disfavor American corporations with respect to foreign ones, as the Court has precluded suit against foreign corporations.

The Alien Tort Statute is arguably a historical anomaly, enacted in 1789 and essentially dormant for nearly two centuries until it was

110 *See* Luskin*, supra* note 71, at 303-06 (arguing that the cost-spreading rationale that predominates in policy justifications for respondeat superior liability does not transfer to the criminal law, while deterrence policies are not served by uncalibrated incentives).

111 *See id*. at 317 (The traditional deterrence rationale for respondeat superior does not support application in criminal law, and the "risk shifting" or "deep pocket" principles are well-suited to civil tort law, but not criminal law.).

112 *See Nestle*, *supra* note 13.

113 *See Jesner*, *supra* note 65.

114 *See Nestle*, *supra* note 13, at 1935-36.

revived by litigants in the 1980s.[115] Canada is an example of a common law jurisdiction which does not have such a statute, and arguably operates with the original common law principles of incorporating customary international law into domestic common law. Perhaps the Canadian approach can be interpreted through the State Immunity Act, which precludes suit against foreign sovereigns.[116] The statute formalizes the axiomatic international law doctrine of sovereign immunity. Because sovereign immunity is so widely recognized, the truth is that the State Immunity Act is probably not necessary, since under international law a sovereign may not be sued without consent.[117] But it arguably shows that the Canadian Parliament has shown the capability and proclivity to expressly bar claims due to international law concerns.

CONCLUSION

The human rights abuses that may occur in corporate supply chains broadly reflect the harms that tort law seeks to remedy. Tort law is capable of evolving and adapting to capture newfound harms that develop alongside society. As commerce becomes more globally interconnected, tort law may have to expand beyond the national community when considering the costs incurred by negligently contracting with firms who obtain their labor forces through oppressive means or subject them to cruel supervision. Concerns for incrementalism in the common law can be soothed by considering that remedies may only be applied to domestic corporations subject to our laws, or those with enough domestic presence to confer jurisdiction. Conversely, international law is expansive enough to

115 *See* CONG. RSCH. SERV., *The Alien Tort Statute: A Primer*, at 6 (June 1, 2018), at https://crsreports.congress.gov/product/pdf/R/R44947/4.

116 The Statute was discussed by the both the majority and dissent positions in *Nevsun*, with the majority finding the Court's decision in *Kazemi v. Republic of Iran*, 2014 SCC 62 (finding the Republic of Iran not liable for torture), as standing for the proposition that states are uniquely exempt from civil rights claims, while the dissent held that it was reflective of the need for legislative backing before awarding damages to human rights plaintiffs.

117 This is why, for example, the United States passed the Federal Tort Claims Act, waiving the protection of sovereign immunity and subjecting itself and its agents to suit for certain claims. *See, e.g.*, 32 C.F.R. § 536.85 ("The FTCA is a limited waiver of sovereign immunity without which the United States may not be sued in tort.").

harbor private causes of action, and is clearly concerned with putting a stop to human rights abuses. Courts can be a forum for meeting international obligations to enforce human rights, and legislatures can modify any remedies through statute.

Ezra Isaacs