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Canadian Corporations Bound by the Phoenix: Setting the Path for the United States

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ABSTRACT

This Note argues that the United States courts have jurisdiction to consider corporate liability for international law violations of human rights under the reasoning of the Supreme Court of Canada, in *Nevsun Resources Ltd. v. Araya*. The United States Supreme Court has escaped holding such liability exists, but Canada has outlined how countries, such as the United States, no longer can avoid holding corporations liable under customary international law. Corporate liability for human rights violations committed abroad is a cutting-edge issue. The United States Supreme Court has considered the issue before, but the Court used different analyses and was without any precedent to refer to. In prior decisions, the Court rationalized that customary international law was not influential enough and that Congress needed to be involved to hold corporations liable for such violations. However, the Supreme Court of Canada's decision demonstrates that the United States' justices who previously decided against adoption of corporate liability under customary international law no longer can defend their antiquated arguments. This issue is bound to be in front of the Court again and will be highly publicized because of the trending rise of importance of human rights. The United States Supreme Court must conform to the customary international law holding corporations liable for international law violations of human rights.

I. INTRODUCTION

Workers rolled in hot sand and were beaten until unconscious. Workers laid on the ground with their limbs tied up, so their skin burned in the blazing sun. Workers were confined to camps. Workers being treated inhumanely is not a thing of the past.

The concept of human rights has been present for centuries, and consequently, human rights violations have occurred for centuries as well.[1] The end of slavery in the nineteenth century and the liberation of Nazi Camps, in addition to the end of World War II in the mid-twentieth century, were significant turning points that changed human rights.[2] Today, people universally recognize the significance of these events because they helped establish equality, fairness, and health amongst persons.[3]

As time goes on, people and their respective governments are becoming less accepting of human rights violations that occur in and out of their countries.[4] However, corporations, particularly those that are multinational, presently are not legally bound to practice basic human rights.[5] Instead, they threaten, beat, tie up, overwork, underpay, and confine individuals to ensure

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[1] *See* SAMANTHA POWER & GRAHAM ALLISON, REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT, 5-6 (Palgrave Macmillan 2000).

[2] *Id.* at 8-9.

[3] Emmanuelle Jouannet, *What is the Use of International Law*?, *in* 1 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW 57 (Hélène Ruiz-Fabri et al. eds., Oxford Univ. Press 2006).

[4] *See* Max Rosner, *Human Rights*, OUR WORLD IN DATA, https://ourworldindata.org/human-rights (last visited Nov. 24, 2020).

[5] *See* Nicolás Carrillo-Santarelli, *Corporate Human Rights Obligations: Controversial but necessary*, Business & Human Rights Resource Centre, https://www.business-humanrights.org/en/blog/corporate-human-rights-obligations-controversial-but-necessary/ (last visited Nov. 24, 2020); *see also* David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931, 947 (2004). *See generally* Jesner v. Arab Bank PLC, 138 S. Ct. 1386, 1408 (2018).

high work efficacy.[6] Disturbingly, these corporations have not been held civilly liable for such tortious acts.[7]

Not all countries take the same stance on human rights.[8] The United States, Canada, and the United Kingdom all have similar human rights standards,[9] yet none allowed corporations in their respective countries to be held liable for international law violations prior to 2019.[10] The United States continues to place barriers which stop victims of these atrocious acts from bringing their claims,[11] but Canada and the United Kingdom have finally decided that victims deserve to have their day in court and possibly be granted compensation for being treated inhumanely.[12]

In February 2020, the Supreme Court of Canada made a landmark judgment by deciding that corporations incorporated in Canada may be held liable for customary international law violations, even if committed abroad.[13] The closely divided decision in *Nevsun Resources Ltd. v. Araya* (hereinafter "*Nevsun*") determined liability could exist through the doctrine of adoption of

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[6] *See* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 11-12 (Can.); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013).

[7] *See Jesner*, 138 S. Ct. at 1408; *Kiobel*, 569 U.S. at 124.

[8] Onyi Lam & Drew DeSilver, *Countries have different priorities when they review each other's human rights records*, PEW RESEARCH CENTER (Mar. 20, 2019), https://www.pewresearch.org/fact-tank/2019/03/20/countries-have-different-priorities-when-they-review-each-others-human-rights-records/.

[9] *Compare* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2019 Country Reports on Human Rights Practices (Mar. 11, 2020) (reporting the U.S. government is cooperative and responsive to human rights groups views and penalizes for many human rights violations), *with* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2019 Country Reports on Human Rights Practices: United Kingdom (reporting the United Kingdom government is also cooperative and responsive to human rights groups views and penalizes for many human rights violations), *and* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2019 Country Reports on Human Rights Practices: Canada (reporting the Canadian government is particularly cooperative and responsive to human rights groups views and penalizes for many human rights violations).

[10] *See Jesner*, 138 S. Ct. at 1403; *Nevsun*, 2020 SCC 5 at para. 122.

[11] *See Jesner*, 138 S. Ct. at 1407; *Kiobel*, 569 U.S. at 124-25; Sosa v. Alvarez-Machain, 542 U.S. 692, 715 (2004).

[12] *See Nevsun*, 2020 SCC 5 at para. 11-12; Vedanta Res. PLC v. Lungowe [2019] UKSC 20, para. 60-62 (appeal taken from England).

[13] *Nevsun*, 2020 SCC 5 at para. 132.

customary international law because no conflicting law is in place and there is no tenable reason for refuting corporate liability.[14] Canada joined a minority, but rapidly increasing number of countries, to set such precedent and take a stand against human rights violations.

While the *Nevsun* opinion was being written, the United Kingdom determined that tort liability existed for corporations in international actions of human rights violations.[15] Although the United Kingdom Supreme Court's approach was different due to the nature of the claims, both the United Kingdom and Canada believe a duty of care is owed to persons that work for parent companies that are located in the worker's country.[16] In contrast, the United States Supreme Court in their recent decision in *Jesner v. Arab Bank PLC* (hereinafter "*Jesner*") agreed, in part, with the dissenting judges in *Nevsun*.[17] They both held that because corporations have never been legally liable to such tortious acts, they should not be held liable until and unless the legislature dictates they should be.[18]

This Note argues that the Supreme Court of Canada, in *Nevsun Resources Ltd. v. Araya*, was correct in concluding it has jurisdiction to hear a case concerning corporate liability for international law violations of human rights, and, therefore, the United States Supreme Court does as well. Part II of this Note addresses the history of customary international law (CIL), the doctrine of adoption of customary international law, the act of state doctrine, and recent cases involving corporate liability for international tortious acts. Part III addresses how customary international law enables courts to allow for corporate liability, why the decision can be a judge-

[14] *Id.*

[15] *Vedanta*, [2019] UKSC 20 at para. 60-62.

[16] *Nevsun*, 2020 SCC 5 at para. 11-12; *Vedanta*, [2019] UKSC 20 at para. 60-62.

[17] Jesner v. Arab Bank PLC, 138 S. Ct. 1386, 1407 (2018).

[18] *Id.*; *Nevsun*, 2020 SCC 5 at para. 132.

made decision and not a legislative act, and why there would not be foreign relations issues nor economic and policy issues when courts find jurisdiction to hear a case concerning corporate liability for international law violations. Part IV concludes.

II. BACKGROUND

Customary international law refers to legal norms that arise from international practices.[19] Customary international law enables courts to hold corporations liable for international law violations of human rights.[20] To understand the authority of international law and the courts, two things must be considered. First, one must consider the historical and current implications of doctrinal law. Second, one must consider the implications of case law. This section analyzes both with respect to Canada and the United States.

A. Historical and Current Implications of Doctrinal Law

The act of state doctrine provides that a national court is unable to adjudicate cases regarding the lawfulness of the sovereign acts of a foreign state.[21] The framework of the doctrine can be found in old English cases.[22] Since its early application, the English doctrine has developed. The court in *Yukos Capital SARL v. OJSC Rosneft Oil Co.* pointed out limitations and exceptions; one being that "the doctrine will not apply to foreign acts of state which are in breach of clearly established rules of international law, or are contrary to English principles of public

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[19] Connie de la Vega, *Customary International Law*, *in* 1 ENCYCLOPEDIA OF HUMAN RIGHTS 451 (David P. Forsythe ed., Oxford Univ. Press 2009).

[20] *See, e.g.*, Statute of the International Court of Justice, art. 38 (June 26, 1945).

[21] R v. Bow St. Metro. Stipendiary Magistrate, *Ex parte* Pinochet Ugarte [2000] 1 AC 147 (HL), [269] (appeal taken from England).

[22] *See* Blad v. Bamfield (1674), 36 Eng. Rep. 992; Duke of Brunswick v. King of Hanover (1848), 49 Eng. Rep. 724.

policy, as well as where there is grave infringement on human rights."[23] The English courts, as well as Australian courts, struggle to apply the doctrine because it was created in an earlier era and is largely defined by limitations.[24]

Canadian law, although rooted in English law, has incorporated similar principles of the act of state doctrine into its law instead of upholding the doctrine. *Buttes Gas & Oil Co. v. Hammer* demonstrates the two principles that Canadian law has adopted.[25] The first principle is referred to as the conflict of laws.[26] This is the general principle that "no state will apply a law of another which offends against some fundamental morality or public policy."[27] The second principle is judicial restraint.[28] This is the principle that courts will refrain from making conclusions which appear to legally bind foreign states.[29]

The doctrine of adoption of customary international law, (hereinafter "doctrine of adoption") also known as the English doctrine of incorporation, is the principle "that customary rules are to be considered part of the law of the land and enforced as such, with the qualification that they are incorporated only so far as is not inconsistent with the Acts of Parliament or prior judicial decisions of prior authority."[30] If not inconsistent, the country adopts and upholds the law as its own. This doctrine of automatic judicial incorporation has been recognized for

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[23] [2012] EWCA (Civ) 855 [69] (Eng.).

[24] *Nevsun*, 2020 SCC 5 at para. 132 (citing Habib v. Australia, [2010] 183 FCR 62, para. 51 (Austl.)).

[25] Buttes Gas & Oil Co. v. Hammer, [1982] AC 888 [931-32] (Eng.).

[26] *Id.*

[27] Laane v. Estonian State Cargo & Passenger S.S. Line, [1949] S.C.R. 530, 545 (Can.). This simply means that a state will not adopt a law of another state if it is against its fundamental morality or public policy.

[28] *Buttes*, [1982] AC 888 at 931-32.

[29] Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 47 (Can.).

[30] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 41 (7th ed. Oxford Univ. Press, 2008).

centuries in Canada and was most recently confirmed in *R. v. Hape*.[31] Justice LeBel, in *Hape*, held that "the court may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law."[32]

Customary international law is integrated into transcribed law.[33] An authoritative source of international law and customary international law is the Statute of the International Court of Justice.[34] The statute accepts the application of international custom, as evidenced by general practice, international conventions, whether general or particular, and the general principles of law recognized by civilized nations.[35]

There are two requirements for a customary international law to be recognized by Canada: (1) be general practice and (2) be *opinio juris*.[36] To be general, the practice must be sufficiently widespread, representative, and consistent.[37] To be *opinio juris* ("opinion of the law"), the practice must be "undertaken with a sense of legal right or obligation."[38] *Opinio juris* is "distinguish[able] from mere usage or habit."[39]

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[31] R. v. Hape, [2007] 2 S.C.R. 292, para. 39 (Can.).

[32] *Id.*

[33] *See* Statute of the International Court of Justice, art. 38 (June 26, 1945).

[34] Statute of the International Court of Justice, art. 38 (June 26, 1945) ("1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; and (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law . . . .").

[35] *Id.*

[36] *See* North Sea Cont'l Shelf (Ger. V. Den.; Ger. V. Neth.), Judgment, 1969 I.C.J. 3, ¶71 (Feb. 20); Int'l Law Comm'n, Rep. on the Work of its Seventy-Third Session, U.N. Doc. A/73/10, at 120 (2018).

[37] Int'l Law Comm'n, Rep. on the Work of its Seventy-Third Session, U.N. Doc. A/73/10, at 120 (2018).

[38] *Id.*

[39] *Id.*; *see generally* North Sea Cont'l Shelf (Ger. V. Den.; Ger. V. Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

It is important to recognize that within customary international law there are preemptory norms, also known as *jus cogens*, which Canada recognizes as a "fundamental tenant of international law that is non-derogable."[40] *Jus cogens* is "a norm that enjoy a higher rank in the international hierarchy than treaty law and even ordinary customary rules."[41] Two universally accepted *jus cogens* norms are prohibitions on torture[42] and slavery.[43] The legal liability imposed on those that break *jus cogens* norms do vary based on other laws states have.[44]

Customary international laws become integrated in Canadian law through the doctrine of adoption.[45] The United States, however, adopts customary international law through judicial application without the intervention of Congress.[46] The modern view, as provided by the Restatement, is that "customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."[47] Section 102 of Restatement (Third) of the Law of Foreign Relations Law of the United States reiterates this notion.[48] The

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[40] Kazemi Estate v. Islamic Republic of Iran, [2014] 3 S.C.R. 176, para. 47 (Can.) (citing JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW (2nd ed. 2008)). Non-derogable rights are "legal rights that must be fully honored" (not taken away or compromised). *Right*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[41] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, ¶15 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 14, 1999).

[42] *Kazemi*, 3 S.C.R. at para. 152.

[43] David Weissbrodt & Anti-Slavery International, Office of U.N. High Comm'r for Human Rights, Abolishing Slavery and its Contemporary Forms, U.N. Doc. HR/PUB/02/4, ¶6 (2002).

[44] *Kazemi*, 3 S.C.R. 176, para. 60 (holding that the *jus cogens* norm of prohibitions on torture cannot create liability and redress on foreign officials due the State Immunity Act).

[45] Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 86-87 (Can.).

[46] Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

[47] RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 note 3 (AM. LAW INST. 1987).

[48] *Id.* § 102 ("(1) A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create

Supreme Court in *Sosa v. Alvarez-Machain* affirmed that the Alien Tort Statute (ATS) allows the acceptance of customary international law.[49] The Alien Tort Statute provides: "[t]he 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."[50]

B. Implications of Case Law

The United States Supreme Court has repeatedly rejected corporate liability for international law violations.[51] In *Kiobel v. Royal Dutch Petroleum Co.*, the Court held that Nigerian nationals could not obtain relief from corporations for violations of customary international law that occur outside the United States because the presumption against extraterritoriality applied to claims under the Alien Tort Statute.[52] Most recently, the Court rejected corporate liability in *Jesner v. Arab Bank, PLC,* where the defendant allegedly supported international terrorism by financing suicide bombings in Israel through its New York branch and making martyrdom payments to the families of deceased bombers. [53] The Court held that because corporations have never been legally liable to tortious acts committed abroad, they should not be

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law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.").

[49] 542 U.S. at 727. The court stated the limitations considered when adopting customary international law is whether "a claimant has exhausted any remedies available (1) in the United States legal system; and (2) perhaps, in other fora, such as international claims tribunals." *Id.*

[50] 28 U.S.C. § 1350 (1940). The law of nations is the same notion as customary international law.

[51] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013) (evading the question of whether corporations could be held liable for tortious act when "all relevant conduct took place outside of the United States."); *Sosa*, 542 U.S. at 725 (holding that the Court in narrow circumstances may recognize a common-law cause of action for present-day law of nations, and corporate liability for international tort law violations is not one).

[52] 569 U.S. 108, 124 (2013). The court also stated that the Alien Tort Statute permits only three claims: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *Id.* at 119.

[53] 138 S. Ct. 1386, 1393-94 (2018).

liable unless the legislature ultimately says so.[54] Also, the Court reasoned that courts cannot hold corporations liable for violations of customary international law because of the Alien Tort Statute.[55] The Court agreed with a circuit court's preceding interpretation of the statue to apply only to natural persons and thus not corporations.[56]

The Supreme Court of Canada, prior to 2020, also did not hold corporations liable for international law violations. In *Kazemi Estate v. Islamic Republic of Iran*, the S.C.C.[57] examined whether a state could be held liable for damages when Iranian officials beat, sexually assaulted, and tortured a Canadian citizen who eventually died because of her injuries.[58] The S.C.C. was unable to give the right to remedy because "the peremptory norm prohibiting torture has not yet created an exception to *state immunity* from civil liabilities in cases of torture committed abroad."[59]

The S.C.C. recently in *Nevsun* was able to distinguish its holding from *Kazemi* because the defendant was not a state, but a corporation.[60] Nevsun Resources Ltd., a Canadian mining company based in British Columbia, owns a 60% interest in Bisha Mining Share Company which operates the Bisha mine in Eritrea.[61] In *Nevsun*, refugees from Eritrea claimed that Nevsun

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[54] *Id.* at 1403.

[55] *Id.* at 1407.

[56] *Id.* at 1395-96, 1407 (citing *Kiobel*, 621 F.3d 111, 134-37 (2d Cir. 2010)).

[57] For the purposes of this Note, the Supreme Court of Canada may be referred to by the acronym "S.C.C." when referring to the Supreme Court of Canada to avoid confusing it with the opinions of the United States Supreme Court.

[58] [2014] 3 S.C.R. 176, para. 1391 (Can.).

[59] *Id.* at para. 153 (finding that the State Immunity Act blocked the right to remedy) (emphasis added).

[60] Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 121-22 (Can.).

[61] *Id.* at para. 7.

Resources had been complicit in breaches of international human rights law.[62] These breaches included forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity by the Eritrean government through its subsidiary, Bisha.[63]

Nevsun Resources brought a motion to strike the pleadings pursuant to the act of state doctrine and proposed that the customary international law claims should be struck for having no responsible prospect of success.[64] Both the trial and appellate judges denied Nevsun Resources' motions.[65] The lower courts found that there were no grounds asserted by Nevsun Resources in which the Eritrean workers' claims should be struck based on breaches of customary international law.[66]

The Supreme Court of Canada then examined two questions on appeal: (1) whether the act of state doctrine formed part of Canadian common law, and (2) whether customary international law prohibitions against forced labor; slavery; cruel, inhuman or degrading treatment; and crimes against humanity grounded a claim for damages under Canadian law?[67] The majority, by a 5-4 decision, held that the act of state doctrine did not make the claim non-justiciable because the doctrine was not ratified by Canadian jurisprudence and because the doctrine's underlying principles of conflict of laws and judicial restraint did not bar the Eritrean worker's claims.[68] Justice Abella, writing for the majority and in response to the second

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[62] *Id.* at para. 4.

[63] *Id.*

[64] *Id.* at para. 5.

[65] *Id.*

[66] *Id.*at para. 20.

[67] *Id.* at para. 26.

[68] *Id.* at para. 57-59.

question, held that "it is not *plain and obvious* to me that the Eritrean worker's claims against Nevsun based on breaches of customary international law cannot proceed."[69] Ultimately, the majority reasoned the case should proceed to trial to determine whether the alleged breaches were made and what remedies were appropriate.[70] The reason being was that Canadian domestic law recognizes customary international law vis-à-vis the doctrine of adoption, the claims were based on *jus cogens* norms opposing forced labor, and customary international law is binding on corporations.[71]

Two of the four dissenting justices, Brown and Rowe, agreed with the majority regarding the dismissal of the act of state doctrine, but disagreed that customary international law allows the workers to bring new tort claims in court.[72] Brown and Rowe argued that "international law cannot require Canadian law to take a certain direction, except inasmuch as Canadian law allows it."[73] They, like the majority in *Jesner*,[74] believed that "such a change [as presented in this case] would require an act of a competent legislature. It does not fall within the competence of this Court, or any other."[75] Brown and Rowe did believe that the proposed torts of slavery and forced labor would pass their test of recognizing a new tort.[76] However, they reverted back to broadly concluding that the case was not the time to determine if such liability exists on corporations

[69] *Id.* at para. 132.

[70] *Id.* at para. 131.

[71] *Id.* at para. 90, 95, 102.

[72] *Id.* at para. 135-36 (Brown, Rowe J.J., dissenting).

[73] *Id.* at para. 152.

[74] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

[75] *Nevsun*, 2020 SCC 5 at para. 153.

[76] *Id.* at para. 247.

because the executive branch and Parliament have the resources to respond to such issues, and "hard cases make bad law."[77]

The remaining two dissenting judges, Moldaver and Côté, agreed with Brown and Rowe regarding their reasoning for objecting to the adoption of customary international law, but also disagreed with the majority's analysis of the act of state doctrine.[78] Côté, writing on his and Moldaver's behalf, asserted that there is a second "branch" to the doctrine which was not discussed by the majority: the non-justiciability branch.[79] "The non-justiciability branch of doctrine is concerned with judicial abstention from adjudicating upon the lawfulness of actions of foreign states."[80] Côté determined that the case at issue required the S.C.C. to ascertain whether Eritrea violated its obligations under international law; thus, this was not a case of considering the legality of the acts of another state incidentally, but a non-justiciable case.[81]

While the Supreme Court of Canada was making its decision on *Nevsun*, the United Kingdom Supreme Court[82] set precedent for the state in April 2019 when the U.K.S.C. unanimously held that a parent corporation can be held liable under civil law for human rights violations and environmental harm caused by its foreign subsidiary.[83] In the case, Konkola Copper Mines (located in Zambia), owned mostly by Vedanta (a United Kingdom corporation), allegedly released toxic materials into the local watercourses in Zambia, causing harm to locals'

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[77] *Id.* at para. 255-56.

[78] *Id.* at para. 267.

[79] *Id.* at para. 275-76.

[80] *Id.* at para. 286 (referencing Buttes Gas & Oil Co. v. Hammer, [1982] AC 888, 931 (Eng.)).

[81] *Id.* at para. 306-10.

[82] For the purposes of this Note, the United Kingdom Supreme Court may be referred to by the acronym "U.K.S.C." in place of "Court" to avoid confusing it with the opinions of the United States Supreme Court.

[83] Vedanta Res. PLC v. Lungowe [2019] UKSC 20, para. 60-62 (appeal taken from England).

health and farming activities.[84] Local Zambians sued under common law negligence and breach of statutory duty.[85] The United Kingdom Supreme Court held that "the liability of parent companies in relation to the activities of their subsidiaries is not, of itself, a distinct category of liability in common law negligence."[86] However, the U.K.S.C. noted there are circumstances in which a parent company might have a duty of care to third parties harmed by its subsidiary company, and it determined that this case was one of those circumstances.[87] The U.K.S.C. noted they could hear the case also because "there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction."[88] Ultimately this United Kingdom Supreme Court decision is an example of how public principles against human rights violations can be recognized by judicial action in domestic tort law. The same principle should apply in the United States.

III. ANALYSIS AND IMPLICATIONS OF CORPORATE LIABILITY FOR CUSTOMARY INTERNATIONAL LAW VIOLATIONS

The process of adopting customary international law through the courts is not simple and is not something the courts take lightly. Deciding if customary international law mandates the recognition of corporate liability for international law violations of human rights requires many considerations. The S.C.C. analyzed whether customary law truly supported recognizing

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[84] *Id.* at para. 1-2.

[85] *Id.* at para. 3.

[86] *Id.* at para. 49.

[87] *Id.* at para. 53-55. "Even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent does not merely proclaim them, but takes active steps, by training, supervision and enforcement, to see that they are implemented by relevant subsidiaries. Similarly, it seems to me that the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so." *Id.* at 53.

[88] *Id.* at para. 88 (referring to the possibility that Zambia's court system may not give them a fair trial).

corporate liability for international law violations, whether the court had the power to decide such, and whether it was too risky to decide because of foreign relations, policy, and economic issues.[89] As discussed in this section, the S.C.C. correctly decided that customary international law mandates such a finding, the Court had the power to decide such, and making the decision was not too risky.[90] The S.C.C.'s analysis thus permits the analysis of whether the United States Supreme Court could do so as well; the following section establishes that the United States can and should follow the precedent of Canada.

A. Customary International Law Supports Corporate Liability

It is generally uncontested that the Supreme Court of Canada has the authority to adopt customary international laws categorized as *jus cogens* norms through the doctrine of adoption.[91] It is also generally uncontested that the United States Supreme Court has the same authority through traditional judicial application.[92] Thus, so long as a customary international law is proven to exist, both states have the authority to apply the law judicially.[93] Although the majority and two of the dissenting justices in *Nevsun* disagree on the application (or lack thereof) of the act of state doctrine, for the purpose of this Note it is appropriately assumed that the majority was correct in their analysis.[94]

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[89] Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 50, 86, 94, 112-13 (Can.).

[90] *Id.*

[91] *Id.* at para. 83-86.

[92] Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004) ("[C]ourts [can] recognize private causes of action [under the ATS] for certain torts in violation of the law of nation . . . ."). There is some debate whether the power really can be used – this note takes the position that the courts have and thus can use the power, but are just hesitant to use it, as explained in subsection B of this Note.

[93] *Id.*; *Nevsun*, 2020 SCC 5 at para. 95-97.

[94] *Nevsun*, 2020 SCC 5 at para. 57, 275-76.

The Supreme Court of Canada did not err in finding that customary international law supported the adoption of corporate liability for human rights violations committed abroad.[95] The dissenting justices in *Nevsun*[96] and the United States Supreme Court were incorrect to assume differently.[97] The Supreme Court of Canada proved that there was a general practice and that the practice was *opinio juris*, as required by common law; the Court sufficiently demonstrated such customary international law existed by looking at various sources.[98]

Justice Abella's first source was policies.[99] More than 50 states, including Canada and the United States, have adopted responsible business conduct (RBC) plans based off the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.[100] A significant portion of these vital plans focuses on human rights.[101] In fact, the first line of the United States RBC is "[t]he United States is committed to promoting human rights."[102] Many states have also openly supported the United Nations Guiding

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[95] *Id.*

[96] *Id.* at para. 265, 313.

[97] Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1410 (2018).

[98] *Nevsun*, 2020 SCC 5 at para. 112-15.

[99] *Id.* at 115.

[100] OECD, *About Responsible Business Conduct*, https://mneguidelines.oecd.org/about.htm (noting that the countries that adopt such instruments include the largest markets in the world).

[101] *See* U.S. Dep't of State, Office of Commercial and Business Affairs, Responsible Business Conduct: First National Action Plan for The United States of America (2016); OECD, OECD Guidelines for Responsible Business Conduct & Sector-Specific Guidance: Manual for Canada (2019).

[102] U.S. Dep't of State, Office of Commercial and Business Affairs, Responsible Business Conduct: First National Action Plan for The United States of America, at 2 (2016), https://2009-2017.state.gov/documents/organization/265918.pdf.

Principles on Business and Human Rights (UNGPs).[103] The principles within are not binding on a state; however, they suggest (1) states have a duty to protect human rights, (2) there is "corporate responsibility to respect human rights," and (3) states have an obligation to provide plaintiffs access to remedies for human rights abuses by corporations.[104]

Policies such as RBCs and the UNGPs demonstrate that most states are unified in their position that corporations no longer can disregard human rights and should be held to a certain standard. These adopted policies further prove that human rights norms – *jus cogens* norms – have indeed been present and recognized by both Canada and the United States for the past few years. The Supreme Court of Canada recognized such policy as proof of unity in finding corporate liability for international tortious violations.[105] To the contrary, the United States has not considered such, but yet strikingly believes "U.S. companies are among the global leaders in RBC and are widely recognized for their commitment to promoting human rights [and] respecting the rule of law."[106] Thus, as leaders and respecters of the law, the United States judiciary should recognize corporate liability for tortious acts committed abroad against humans.

Justice Abella's second source was academia.[107] Many academic commentators believe customary international law mandates that private actors, such as corporations, be held liable for

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[103] U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, *GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK*, U.N. DOC. HR/PUB/11/04 (2011).

[104] *Id.* at 1.

[105] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 115 (Can.).

[106] U.S. Dep't of State, *supra* note 102, at 4.

[107] *Nevsun*, 2020 SCC 5 at para. 111-13.

tortious acts committed abroad for various reasons, but mostly in support of human rights.[108] Professor Stephens insists that "[t]he context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors[] [as] [h]uman rights law in the past several decades has moved decisively to prohibit violations by private actors."[109] The S.C.C. in Nevsun agreed.[110]

Similarly to Professor Stephens, Professor Koh conceives that:

> [T]he commonsense fact remains that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals act through corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation?[111]

Professor Koh further reasons that non-state actors like corporations can be held accountable for violations of international criminal law and thus concludes it would not "make sense to argue that international law may impose criminal liability on corporations, but not civil liability."[112] Justice Abella, in agreeance with academia, believed it was "not plain and obvious that corporations today enjoy a blanket exclusion under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law or indirect involvement in complicity offenses." [113] Although not mentioned in *Nevsun*, it is

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[108] *See* Harold H. Koh, *Separating Myth from Reality about Corp. Resp. Litig.*, 7 J. INT'L ECON. L. 263, 265 (2004); Beth Stephens, The Amorality of Profit: Transnational Corporations and Human Rights, 20 BERKELEY J. INT'L L. 45, 73 (2002).

[109] Beth Stephens, The Amorality of Profit: Transnational Corporations and Human Rights, 20 BERKELEY J. INT'L L. 45, 73 (2002).

[110] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 111 (Can.). The Court reasonably presumes corporations are private actors. *Id.*

[111] Harold H. Koh, *Separating Myth from Reality about Corp. Resp. Litig.*, 7 J. INT'L ECON. L. 263, 265 (2004).

[112] *Id.*

[113] *Nevsun*, 2020 SCC 5 at para. 113 (quoting Koh, *supra* note 111, at 265, 267) (internal quotation marks omitted).

important to note that no demand exists that "there be sufficient international consensus with regard to the mechanisms of enforcing these [customary international law] norms."[114]

The majority in *Jesner*,[115] *Kiobel*,[116] and the dissent in *Nevsun* all disagreed with Justice Abella.[117] The majority in *Jesner* believed that "customary international law does not generally require corporate liability, so declining to create it under the Alien Tort Statute cannot give other nations just cause for complaint against the United States."[118] However, the majority did not offer an analysis for this conclusion; the majority focused more on the concept that the U.S. could escape a complaint.[119]

In *Kiobel*, the majority agreed with the lower courts in deciding the Alien Tort Statute does not require corporate liability because the law of nations is to be applied to only three categories: violation of safe conducts, infringement of the rights of ambassadors, and piracy.[120] The dissent in *Jesner*, however, emphatically disagreed because the First Congress explicitly stated lawsuits could be brought under "the law of nations" so that the district courts could develop the categories of allowable claims brought under customary international law.[121] The

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[114] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1420 (2018) (referencing that *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) did not say that such a consensus was necessary).

[115] *Id.* at 1419.

[116] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108. 124-25 (2013).

[117] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 128 (Can.).

[118] *Jesner*, 138 S. Ct. at 1392.

[119] *Id.*

[120] *Kiobel*, 569 U.S. at 119.

[121] *Jesner*, 138 S. Ct. at 1427 (Sotomayor, J., dissenting).

dissent, in alliance with Justice Abella, stated that "the conclusion that corporations may be held liable . . . for violations of the law of nations is not of recent vintage."[122]

The dissenting justices in *Nevsun* did not agree with Justice Abella for a few reasons, but primarily because they did not think that there was enough evidence that corporate liability for tortious crimes committed abroad existed in customary international law.[123] The dissent pointed to a 2007 United Nation's report which states that "*preliminary* research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law."[124] Although it is possible that preliminary research completed by the United Nations over ten years ago did not show the uniform existence of corporate liability for tortious acts committed abroad, one must consider three things. First, this research was merely preliminary research, not a completed, rigorous study. Second, the data when compared to today may no longer be accurate because of its age. Third, the United Nations has made significant strides since to show how crucial it is for corporations to acknowledge they owe a duty to humans to not violate their rights – this is demonstrated through the 2011 UNGPs (mentioned above).[125]

The strongest counterevidence the dissent believed existed is that there is no case law holding corporations liable for such tortious acts committed abroad.[126] While this was true when

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[122] *Id.* at 1426. The dissent points out how more than a 100 years ago, the Attorney General acknowledged that corporations could be held liable under the Alien Tort Statute. *Id.* (citing Mexican Boundary – Diversion of the Rio Grande, 26 Op. Att'y Gen. 250, 252 (1908)).

[123] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 191 (Can.) (Brown, Rowe J.J., Moldaver, and Côté, dissenting).

[124] *Nevsun*, 2020 SCC 5 at para. 190 (citing John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights: Mapping International Standard of Responsibility and Accountability for Corporate Acts*, ¶34, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007)) (emphasis added).

[125] U.N. Human Rights Office of the High Comm'r, *supra* note 103, at 13-26.

[126] *Id.* at para. 188.

the oral arguments were held and for some time after, this was not true when the opinion was published. It was not true because the United Kingdom recently upheld corporate liability for alike human rights violations and environmental harm.[127] Albeit, the United Kingdom did not explicitly state customary international law principles supported their decision that a United Kingdom-incorporated parent company has a duty of care and is therefore liable to those individuals affected by such negligence.[128] The lower court, however, iterated that even though currently no such duty in jurisprudence has been *explicitly* established, it does not bar such a duty from being established by a court.[129] Thus, the opinion of the United Kingdom Court of Appeals and the Supreme Court both believe corporations have a duty of care to persons without the requirement that other states have adopted such rule because such human rights are required by society.[130]

Although the United Kingdom had not made that case decision before the judgment was rendered,[131] the Court still had proof that more than 40 states hold corporations liable for committing legal wrongs abroad.[132] However, the liability is not civil, but criminal.[133] States holding corporations liable for criminal wrongs is relevant because it demonstrates that Justice

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[127] *Vedanta Res. PLC v. Lungowe*, [2019] UKSC 20, para. 60-62 (appeal taken from England). This means that not only England, but also Wales, Scotland, and Northern Ireland hold that such liability exists.

[128] *Id.*

[129] *Lungowe v. Vedanta Res. PLC*, [2017] EWCA (Civ) 1528 [88] (stating that although "there had been no reported case in which a parent company had been held to owe a duty of care to a person affected by the operation of a subsidiary. That may be true, but it does not render such a claim unarguable. If it were otherwise, the law would never change."). The Supreme Court did not disagree with the appellate court's statement. *Vedanta*, [2019] UKSC 20 at para. 60-62.

[130] *Vedanta*, [2019] UKSC 20 at para. 60-62.

[131] *Id.*

[132] *Prosecutor v. New TV S.A.L.*, Case No. STL-14-05/PT/AP/AR126.1, Judgment, ¶ 52-55 (Oct. 2, 2014).

[133] *Id.*

Abella did not misconstrue the need to hold corporations civilly liable under customary international law because it is clearly accepted that they can be held criminally liable.

Finally, it is important to note that "[i]nternational law not only percolates down from the international to the domestic sphere, but … also bubbles up"[134] and "for a state to adopt a customary international law it need not be "perfectly widespread or consistent at all times."[135] Thus, one state must be the first to outright declare a legal remedy exists for tort liability on corporations for harms committed abroad. Technically, the United Kingdom was that state,[136] however, Canada followed and clearly declared that customary international law gave such authority.[137] The United States Supreme Court was mistaken to believe that customary international law does not support civil liability on corporations for acts committed abroad,[138] as "recognizing the possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development."[139] The United States Supreme Court should uphold customary international law of corporate liability for international tort violations when the next case with such a claim arises.

B. Legislative Action Would Be Redundant Because of Vested Judicial Power

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[134] Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L AND COMP. L. Q. 57, 69 (2011).

[135] *Nevsun*, 2020 SCC 5 at para. 162.

[136] *See Vedanta*, [2019] UKSC 20 at para. 60-62.

[137] *Nevsun*, 2020 SCC 5 at para. 127-28.

[138] *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013); and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

[139] *Nevsun*, 2020 SCC 5 at para. 118.

Ubi jus, ibi remedium – where there is a right, there is a remedy.[140] Victims of human rights abuse deserve legal remedy for the harm caused against them through tortious acts. It is established that slavery and forced labor strip individuals of their inherent rights, and such treatment is not acceptable.[141] Thus, the legislature does not need to explicitly define remedies available to victims when customary international law enables states, particularly Canada and the United States, to adopt such.[142] Both Canada and the United States agree that the law of nations has always been part of the common law and may be incorporated by judicial intervention so long as no conflicting legislation exists.[143]

The Supreme Court of Canada in *Nevsun* was clear in its determination that neither Parliament nor the executive branch needed to dissect and decide whether a civil suit could be brought against a Canadian parent corporation whose subsidiary abroad allegedly violated numerous human rights violations.[144] The S.C.C. agreed with the following statement:

> Unless [a] statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty: but merely the application of the principle ubi jus ibi remedium.[145]

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[140] *Legal Maxims*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[141] *See* 18 U.S.C. § 1589 (2008); Bill S-211, *An Act to enact the Modern Slavery Act and to amend the Customs Tariff*, 1st Sess., 43rd Parl., 2020 (Can.).

[142] *See Sosa*, 542 U.S. at 724; *Nevsun*, 2020 SCC 5 at para. 95-97.

[143] *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 39 (Can.); and *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (stating "clear congressional action trumps customary international law and previously enacted treaties.").

[144] *Nevsun*, 2020 SCC 5 at para. 86.

[145] *Id.* at para. 118 (quoting Sidaway v. Board of Governors of Bethlem Royal Hosp., [1985] 1 AC 871, at 888 (Eng.)).

Overall, the Supreme Court of Canada relied mostly upon the Statute of the International Court of Justice, art. 38; its Parliament's lack of statute forbidding corporate liability; and the doctrine of adoption in determining the legislature does not need to create an express statute for its decision to be permissible.[146]

The United States, if it used the Alien Tort Statute in addition to the same three justifications as Canada (with the equivalent swap of the doctrine of adoption for the traditional judicial application without the intervention of Congress), could enforce corporate liability for international law violations without legislation. However, the United States Supreme Court has been wrong, again and again, in deciding that it is Congress, not the Court, who must make a decision regarding corporate liability for international law violations.[147] The Court each time makes an excuse as to why it cannot make the decision, and thus points the duty towards the legislature.[148] In *Jesner*, the Court erroneously believed the Alien Tort Statute applied to only individual persons and not corporations, although corporations are not disqualified explicitly in the text.[149] In *Sosa*, the Court erroneously believed the Alien Tort Statute applied only to old English law regarding violations of safe conditions to aliens, interference with ambassadors, and piracy.[150] In *Kiobel*, the Court avoided the issue by holding that such an issue must concern the

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[146] *Id.* at 76, 94.

[147] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1419 (2018); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004); and *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 124-25 (2013).

[148] *See Jesner*, 138 S. Ct. at 1407; *Kiobel*, 569 U.S. at 124-25; and *Sosa*, 542 U.S. at 715.

[149] 138 S. Ct. at 1407.

[150] 542 U.S. at 715.

U.S. with sufficient force.[151] These decisions do not preclude the Court from overturning them in the next applicable case.

The United States Supreme Court has an opportunity in the future to right its wrongs without the intervention of the legislative or executive branch. The executive branch in briefs has even supported overturning the Court's previous decisions to allow liability to extend to corporations.[152] Although Congress has not made any commentary on this exact subject matter, Congress is cognizant of its power to create law excluding corporate liability under its Constitutional powers.[153] Supreme Court justices have noted that if Congress wanted to protect corporations or any other alike entity from civil suits for international law violations that it would have clearly said so.[154] Moreover, the First Congress authorized suit for violations based on "the law of nations" and "treat[ies] of the United States[155] which granted the federal courts jurisdiction over such claims that "Congress did not understand to be static."[156] Therefore, the judiciary would not violate the separation of powers in enforcing liability on corporations.

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[151] 569 U.S. at 124-25. Sufficient force refers to a level of involvement that is required to overcome the presumption against extraterritoriality; a specific level which overcomes the presumption has not been determined. *Id.* at 131-32 (Breyer, J., concurring).

[152] ***See*** Brief for United States as *Amicus Curiae* 5 ("This Court should vacate the decision below, which rests on the mistaken premise that a federal common-law claim under the ATS may never be brought against a corporation"); and Brief for United States as *Amicus Curiae* in *Kiobel* v. *Royal Dutch Petroleum Co.*, O. T. 2012, No. 10-1491, p. 7 ("Courts may recognize corporate liability in actions under the ATS as a matter of federal common law. . . *Sosa*'s cautionary admonitions provide no reason to depart from the common law on this issue").

[153] *See generally* U.S. CONST. art. I. § 8; *id.* art. III, § 2.

[154] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1426 (2018) (stating "[w]here Congress wanted to limit the range of permissible defendants, then, it clearly knew how to do so.").

[155] 28 U.S.C. § 1350.

[156] *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (D. Mass. 1822).

Historically, the United States Supreme Court has made decisions that had potentially serious repercussions.[157] The Court, knowing Congress has the power to overturn its decision with legislation, has made decisions that prioritize the interests of the Constitution and the nation's people.[158] The trend would accordingly continue in affirming that plaintiffs may file civil suits for international law violations made by corporations whose main entity is domiciled in the United States. Usually, so long as judicial law-making "move[s] the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices," then the judiciary has not overstepped their bounds.[159] Some scholars and justices believe holding corporations liable for tortious violations abroad is not the legal next step for the judiciary, and thus for the legislature to decide.[160]

If it is not the next move, then what is? Human rights violations have been held as an illegal practice for many years, and for years individuals have been able to hold others liable for such violations.[161] Thus, the next natural step is holding corporations liable for such heinous acts, as "[t]he rapid emergence of human rights signifie[s] a revolutionary shift in international law, from a state-centric to a human-centric conception of global order."[162]

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[157] *See generally Roe v. Wade*, 410 U.S. 113 (1973); and *Brown v. Bd. of Educ*., 347 U.S. 483 (1953).

[158] *Roe v. Wade*, 410 U.S. 113 (1973); and *Brown v. Board of Educ.*, 347 U.S. 483 (1953). Although there can be issues when Congress cannot do such, here it is assumed possible so long as Congress amended the Alien Tort Statute to explicitly allow liability of corporate entities.

[159] ROBERT J. SHARPE, GOOD JUDGMENT: MAKING JUDICIAL DECISIONS 93 (U. of Toronto Press 2018)

[160] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 227 (Can.).

[161] *See generally* U.S. CONST. amends IX, XIV; Declaration of Independence (U.S. 1766); and Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 1st plan. mtg., U.N. Doc A/810 (Dec. 12, 1948).

[162] Payam Akhavan, Canada and International Human Rights Law: Is the Romance Over?, 22 CANADIAN FOREIGN POL'Y J. 331, 332 (2016).

Asking the Court to reevaluate its previous decisions is not absurd because the judiciary has the power to apply customary international law without interfering with the separation of powers.[163] Throughout the nineteenth and early twentieth centuries, the Court applied customary international law without Congress; thus, the proposition that the Supreme Court can and is obligated to apply customary international law now is not a new theory.[164] As discussed previously in Section A, the law allows for such adoption here.[165] As Justice LeBel wrote years after his decision in *R. v. Hape*, "norm[s] . . . *must* be followed by courts absent legislation which clearly overrules them.[166]

C. Judicial Action that Creates Corporate Liability Is Not Too Risky

There are two main arguments made by opponents that do not believe the judiciary should impose liability on corporations for international tort law violations, even if customary international law demonstrates it should be. First, opponents stress that judicial action will cause foreign relation issues with other states.[167] The majority in *Jesner* believed that if they were to act in favor of imposing corporate liability then it would "discourage[] American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the

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[163] *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1436 (2018).

[164] CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 139 (Oxford Univ. Press 2nd ed. 2015).

[165] *See* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 note 3 (AM. LAW INST. 1987); *see* Statute of the International Court of Justice, art. 38 (June 26, 1945).

[166] Louis LeBel, *A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law*, 65 U.N.B.L.J. 3, 15 (2014) (emphasis added).

[167] *See Jesner*, 138 S. Ct. at 1390 (2018); *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004); *see* Nevsun Res. Ltd. v. Araya, 2020 SCC 5, para. 153 (Can.) (Brown, Rowe J.J., Moldaver, and Côté, dissenting).

safeguards of the United States courts."[168] The majority also believed it "might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights."[169] These policy arguments are contrary to numerous human rights treaties and conventions.[170]

The treaty proposed at a 1955 United Nations convention focusing on human rights explicitly posited that there would be a "greater unity between its Members" because of the pursuance of human rights.[171] United Nations members also conceded in a 2007 treaty that "[m]arkets function efficiently and sustainably only when certain institutional parameters are in place . . . [including] the curtail[ment] [of] individual and social harms imposed by markets. History demonstrates that without adequate institutional underpinning, markets will fail to deliver their full benefits."[172] Also, states appreciate "the importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development."[173]

It, therefore, has been long established that supporting human rights and upholding international tort violations against corporations is part of the foundation of markets and states. So, although the argument is made that corporate investment might be deterred, and

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[168] 138 S. Ct. at 1408.

[169] *Id.* at 1406.

[170] *E.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, 222 (1955).

[171] *Id.*

[172] John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Business and Human Rights: Mapping International Standard of Responsibility and Accountability for Corporate Acts*, ¶1, U.N. Doc. A/HRC/4/35 (Feb. 9, 2007).

[173] G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, at 122 (Oct. 24, 1970).

consequently affect other states' economies, the larger risk is ignoring human rights because they are the legal infrastructure of states regardless of their status.[174] Contrary to the majority of the United States Supreme Court in *Jesner*,[175] the Supreme Court of Canada in *Nevsun* appropriately confirmed that "the deference accorded by comity to foreign legal systems 'ends where clear violations of international law and fundamental human rights begins.'"[176]

Second, opponents that do not support imposing liability on corporations for international tort law violations stress that the "court may not be in a position to appreciate the economic and policy issues underlying the choice"[177] because "[g]overnment departments have the resources to study and evaluate policy options [and] [t]he legislative process . . . consider[s] . . . competing viewpoints."[178] But as Judge John Marshall opined, "[I]t is emphatically the province and duty of the judicial department to say what the law is."[179] Thus, it is within a Supreme Court's reach to determine that a *jus cogens* norm is a law, which is customary, and therefore, judicially enforceable without the advice of the executive or legislative branch in the United States or Canada. Here, courts are not examining facts which, admittedly, sometimes require resources to evaluate; the courts here are examining public international law, which is law, *not* fact.[180]

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[174] *Id.*

[175] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406-08 (2018).

[176] *Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 50 (Can.) (quoting R. v. Hape, [2007] 2 S.C.R. 292, para. 52 (Can.)).

[177] *Id.* at para. 226 (quoting Watkins v. Olafson, [1989] 2 S.C.R. 750, 760-61 (Can.)).

[178] *Id.* at para. 227 (quoting ROBERT J. SHARPE, GOOD JUDGMENT: MAKING JUDICIAL DECISIONS 93 (U. of Toronto Press 2018)).

[179] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[180] *Nevsun*, 2020 SCC 5 at para. 96 (quoting Gib van Ert, *The Reception of International Law in Canada: Three Ways We Might Go Wrong*, CENTRE FOR INT'L GOVERNANCE INNOVATION 6 (Jan. 11 2018), https://www.cigionline.org/sites/default/files/documents/Reflections%20Series%20Paper%20no.2web.pdf).

International law "not only maintain[s] the peace between States, but [] protect[s] the lives of individuals, their liberty, their health, [and] their education."[181] The majority in *Jenser* believed that the judiciary allowing corporate liability for international tort violations for impeding on human rights is a "no-win proposition,"[182] but there is no circumstance whatsoever that justifies human rights violations.[183] While members of courts nationwide used to be nervous to make a decision holding corporations liable to customary international law violations, especially those related to human rights violations, the trend is shifting away.[184] "The fact that international human rights arguments . . . [can cause] political discourse is not a reason to shy away from their use."[185]

IV. CONCLUSION

"Too many workers stand before their [corporate] employers, not as adult persons with rights, but as powerless . . . servants totally dependent on the will and interests of the employers."[186] Corporations incorporated in the United States are able to escape liability for customary international law violations committed against workers abroad. Prior to February 2020, corporations in Canada also escaped such liability. This changed when the Supreme Court

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[181] Emmanuelle Jouannet, *supra* note 3.

[182] *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1412 (2018).

[183] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, 1465 U.N.T.S. 85 (referencing the specific human right violation committed by torturing a human).*

[184] *See Nevsun*, 2020 SCC 5 at para. 132; *see also* Vedanta Res. PLC v. Lungowe [2019] UKSC 20, para. 60-62 (appeal taken from England).

[185] LABOR AND EMPLOYMENT RELATIONS ASSOCIATION, HUMAN RIGHTS IN LABOR AND EMPLOYMENT RELATIONS: INTERNATIONAL AND DOMESTIC PERSPECTIVES, 8 (James A. Gross & Lance Compa 2009).

[186] *Id.* at 20.

of Canada deemed that customary international law demands that the state hold corporations liable for international law violations of human rights.[187]

Various sources, including treaties, reports, and academia, confirm that customary international law supports holding corporations liable for tortious acts committed outside the state.[188] Holding corporations liable for such acts is not a drastic jump because they are held liable for similar criminal acts.[189] Neither the United States nor Canada need legislative or executive intervention to hold corporations liable because the law of nations is a part of the common law.[190] Thus, so long as no conflicting legislation exists, the judiciary has discretion to grant plaintiffs the opportunity to seek justice and ultimately be recognized as a *human*.[191] Opponents stress that judicial action will cause foreign relation issues[192] and that the Court is not able to evaluate economic and policy issues that can be affected by such a decision.[193] However, basic human rights are recognized as *jus cogens* norms and thus they cannot be legally ignored.[194] In fact, recognizing human rights helps relations among states.[195]

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[187] *Nevsun*, 2020 SCC 5 at para. 96.

[188] *Id.* at para. 111-13, 115, 119.

[189] *Id.* at para. 96.

[190] *R. v. Hape*, [2007] 2 S.C.R. 292, at para. 39 (Can.); and *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 136 (2d Cir. 2005) (stating "clear congressional action trumps customary international law and previously enacted treaties.").

[191] *Id.*

[192] *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1390 (2018); *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004); *see Nevsun Res. Ltd. v. Araya*, 2020 SCC 5, para. 153 (Brown, Rowe J.J., Moldaver, and Côté, dissenting).

[193] *Nevsun*, 2020 SCC 5 at para. 226.

[194] *See* U.N. Human Rights Office of the High Comm'r, *supra* note 103, at 1; Weissbrodt & Anti-Slavery International, *supra* note 43.

[195] *See* Ruggie *supra* note 172; G.A. Res. 2625 (XXV), *supra* note 173.

The Supreme Court of Canada was not far-reaching in its opinion as some claim; it was a fair, legal, and representative take on modern international human rights law. As Justice Abella perfectly highlighted, the case is "the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses."[196] Accordingly, the United States Supreme Court should follow Canada's precedent in finding that customary international law imposes liability on corporations for international law violations of human rights.

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[196] *Nevsun*, 2020 SCC 5 at para. 1.