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**Corporate civil liability for breaches of customary  
international law**

Are corporations liable for human rights violations?

Dissertation to obtain a  
master's degree in law, in the  
specialty of Law and  
Management

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## **Anti-plagiarism Statement**

I declare that I am the sole author of this dissertation, which is based on my research on the matter. All other sources used in its preparation have been duly referenced. I am aware that the use of works of third parties unless duly identified, amounts to an ethical and disciplinary offence.

## **Acknowledgments**

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## **Number of characters**

I declare that the present dissertation occupies a total of 134.367 characters, including spaces and footnotes.

## **References and citations**

This dissertation follows the quoting provisions of Portuguese Norms 405-1 and 405-4 of the Portuguese Quality Institute. All references are listed in full in the bibliography.

## **List of abbreviations and acronyms**

<b>ATS</b>	Alien Tort Statute
<b>BHR</b>	Business and Human Rights
<b>CIL</b>	Customary International Law
<b>IMT</b>	International Military Tribunal
<b>ICC</b>	International Criminal Court
<b>ICJ</b>	International Court of Justice
<b>NCP</b>	National Contact Point
<b>OECD</b>	Organization for Economic Co-operation and Development
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>SCC</b>	Supreme Court of Canada
<b>TVPA</b>	Torture Victims Protection Act
<b>UN</b>	United Nations
<b>UNGPs</b>	United Nations Guiding Principles on Business and Human Rights
<b>US</b>	United States

## **Abstract**

Transnational corporations have been in the limelight for many years due to human rights abuses committed in the course of their business activities and operations. Various civil liability cases have been filed in the courts of law by victims alleging transnational human rights violations during the last decades.

Considering that Courts and scholars across the globe have different perspectives on this subject and considering that corporations have been, for many years, in somewhat of a liability gap for transnational human rights violations, the research question to be answered is whether there exists a universally accepted norm of customary international law on corporate civil liability.

This dissertation was written by conducting a literature review in combination with a comparative legal analysis between the approach of Civil Law systems and Common Law systems, with a particular focus on the case law of the United States of America and Canada.

In reply to the main research question, it is argued that there is no evidence to point to a custom of holding corporations civilly liable in customary international law. However, one needs to consider that civil liability, even if under international law, shall be enforced by States, and redress to victims should also be provided under domestic law, which means that complementary responsibility exists between States and transnational corporations.

**Keywords:** business and human rights; transnational corporations; globalisation; corporate liability; Alien Tort Statute; human rights abuses; customary international law.

## Resumo

Há muitos anos que as empresas transnacionais estão na ribalta, em consequência das graves violações de direitos humanos cometidas no exercício da sua atividade. Nas últimas décadas, foram intentados nos tribunais vários processos de responsabilidade civil por vítimas que alegam violações transnacionais dos direitos humanos.

Tendo em conta que os tribunais e os académicos de todo o mundo têm uma perspetiva diferente sobre este assunto e considerando que as empresas se têm encontrado num hiato de responsabilidade por violações transnacionais de direitos humanos, a questão que se pretendeu responder é se existe uma norma universalmente aceite de direito internacional consuetudinário sobre a responsabilidade civil das empresas.

A metodologia utilizada foi essencialmente uma combinação de revisão da literatura com uma análise jurídica comparativa entre a abordagem dos sistemas romano-germânicos e dos sistemas de *Common Law*, com especial incidência na análise da jurisprudência dos Estados Unidos da América e do Canadá.

Em resposta à principal questão de investigação, argumenta-se que não existem provas que apontem para a existência de um costume de responsabilização civil das empresas no direito internacional consuetudinário. No entanto, há que ter em conta que a responsabilidade civil, ainda que ao abrigo do direito internacional, deve ser aplicada pelos Estados e que o ressarcimento das vítimas deve ser efetuado também ao abrigo do direito interno, o que significa que existe uma responsabilidade complementar entre os Estados e as empresas transnacionais.

**Palavras-chave:** empresas e direitos humanos; empresas transnacionais; globalização; responsabilidade civil das empresas; Alien Tort Statute; violações de direitos humanos; direito internacional consuetudinário.



## Introduction

After the Second World War, the booming economic growth and development gave rise to a scenario where transnational corporations were able to thrive and prosper. Although corporations have positively impacted our lives in many ways, they have also been notorious for gross human rights violations throughout the years. The concerning rise of these types of cases has made for a very important question, which is: how can we hold corporations accountable for their actions?

Given the exponential growth of these entities in numbers, size, and especially power, it is undeniable the influence they have in the countries they operate in. Over the years, transnational corporations “became the central focus of business and human rights concerns because their scope and power expanded beyond the reach of effective public governance systems<sup>1</sup>”, hence depending on the size of the country and the corporation, the latter can even exert more economic power than the first one.

Thus, the present dissertation is embedded in the business and human rights field. In essence, the issue of business and human rights represents a smaller version of a greater problem in modern governance. This problem pertains to the increasing disparities between the extent and influence of economic factors and players and the ability of societies to effectively deal with the negative outcomes that arise as a result<sup>2</sup>.

Aside from the manifest difficulty in holding accountable very powerful enterprises, there are many legal and practical challenges to bringing up a claim for human rights abuses. Focusing on the available civil mechanisms, the success of a civil liability claim depends heavily on the legal framework of access to justice in a particular jurisdiction. In today’s world, victims of human rights violations perpetrated by transnational corporations face many challenges which thwart their legal right to access

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<sup>1</sup> RUGGIE, John G. (2013). *Just Business: Multinational Corporations and Human Rights* (p. 15), W. W. Norton & Company, 1st edition.

<sup>2</sup> Id. at p. 15.

justice. These barriers to access justice can be of either legal, jurisdictional, procedural, or financial nature<sup>3</sup>.

One of these barriers is that corporations have grown into overly complex legal structures, which hinders the possibilities of accountability<sup>4</sup>. The fact that most of these violations are conducted in underdeveloped or/and very corrupt countries deepens the 'conflict' because, on one side, we have very powerful economic entities with access to all types of resources, and, on the other, we have poor and underprivileged people with negligible access to everything, even the most basic utilities.

On the other hand, the debate on whether corporations could (or should) be considered subjects of international law and, consequently, duty bearers of international obligations has been around for years, and we have yet to reach a conclusion. But is it necessary to have subjectivity under international law to be held accountable?

Lastly, there is also the question of whether corporate civil liability is part of customary international law. There are multiple ways of approaching this question. Some authors argue that corporations are not considered subjects of international law, thus lacking subjectivity to be held civilly liable under it<sup>5</sup>. A number of authors, one example being ANDREW CLAPHAM, assert that corporations' subjectivity is not mandatory for them to be able to be held accountable for violations of fundamental human rights<sup>6</sup>. Other scholars, one of them being WILLIAM S. DODGE, advocate that such custom does not need to exist because what matters is whether the concrete norm at stake could be violated by corporations, and in that case, corporations could indeed be held civilly accountable<sup>7</sup>.

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<sup>3</sup> ZERK, Jennifer (2014). *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights* (p. 64). OHCHR. Available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>4</sup> Id. at p. 65.

<sup>5</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 US 108 (2013). Available at: <https://supreme.justia.com/cases/federal/us/569/10-1491/case.pdf>.

<sup>6</sup> CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 79). Oxford University Press.

<sup>7</sup> Brief of International Law Scholars as Amici Curiae in Support of Petitioners, *Jesner v. Arab Bank, PLC* (p. 12). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2994127](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994127).

Taking this into consideration, the purpose of the present dissertation is to dig deep into corporate accountability in the international legal context in order to assess, first, how transnational corporations could be held accountable for human rights violations. Second, whether we can conclude that corporate civil liability is considered a specific, universal, and obligatory norm of customary international law. Lastly, I will analyse the international law framework for seeking redress and then dissect the approach to the question of corporate civil liability under the domestic laws of different States.

Despite the barriers, violations of human rights carried out by corporations have reached courts in some parts of the world, especially in Common Law countries, by victims intending to seek redress through judicial claims under international law.

The research was conducted by combining a literature review of main works on business and human rights and corporate accountability with a comparative legal analysis that included the study of selected cases of American and Canadian jurisprudence on transnational violations of human rights by corporations.

The present dissertation is organised as follows. Chapter I provides a general overview of the soft-law framework under which corporations operate. Chapter II analyses the evolution of corporate liability under customary international law while emphasising that corporate criminal liability does not serve as an adequate avenue for redressing victims of human rights violations. Lastly, Chapter III provides a comparison between the enforcement of corporate civil liability in civil law systems and common law systems, focusing on American and Canadian jurisprudence, where there are a fair amount of corporate civil liability cases. The American case law analysis will fall on three cases: *Kiobel v. Royal Dutch Petroleum Co.*; *Jesner v. Arab Bank, PLC*; and *Nestlé, USA, inc v. Doe*. While the analysis of Canadian case law will rest on one single case: *Araya v. Nevsun*.

## Chapter I - Business, human rights and legal personality

Business, human rights and legal personality have shaped business relationships over the past decades and provide for never-ending discussions. Capitalism has brought the world the hunger for generating revenue, but sometimes, this revenue comes at a cost. The exploration of poor populations worldwide, and the mistreatment of the environment, both in order to achieve bigger and bigger profits, have originated unspeakable human rights abuses.

This first chapter aims to provide a broad overview of the business and human rights field and frame key concepts that are crucial for the matters that are further being discussed, such as globalisation and the role played by transnational corporations. It is also important to analyse the soft law instruments that are already in place and serve as guidelines for the lawful conduct of enterprises. Lastly, the subjectivity of transnational corporations and customary international law as a possible source of corporate civil liability from the violation by multinational corporations of *jus cogens* human rights norms will be addressed.

First and foremost, it is crucial to mention that the present dissertation focuses on corporate accountability instead of corporate responsibility. These two concepts, although related, are very distinct.

On the one hand, corporate accountability refers to a company's legal obligation to take responsibility for its actions and be answerable to external entities, such as governments, stakeholders and stockholders and the broader community<sup>8</sup>. This concept includes being transparent about its operations and financial performance, complying with legal and regulatory requirements, and taking responsibility for any negative impacts on society or the environment. Corporate accountability is often enforced through legal or regulatory mechanisms, such as audits, investigations, and sanctions<sup>9</sup>.

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<sup>8</sup> MULGAN, Richard (2000). *Accountability: an ever expanding concept?* (p. 558). Public Administration Vol. 78 No. 3, (555-573). Available at: [https://crawford.anu.edu.au/pdf/staff/richard\\_mulgan/MulganR\\_02.pdf](https://crawford.anu.edu.au/pdf/staff/richard_mulgan/MulganR_02.pdf).

<sup>9</sup> Id. at p. 561.

On the other hand, corporate responsibility refers to a company's voluntary actions to promote social and environmental well-being beyond its legal obligations. This includes adopting ethical business practices, such as reducing its environmental footprint, investing in social causes, and engaging with stakeholders to address their concerns<sup>10</sup>. Corporate responsibility is often driven by a company's values and mission and is seen as a way to build trust and a good reputation amongst the community.

While corporate responsibility is a voluntary commitment to promote the welfare of populations and the environment, corporate accountability is a legal obligation for companies to be accountable for their actions. Both concepts are crucial for the sustainable and responsible conduct of corporations, but they have different implications and drivers.

In the past, the strong reliance on corporate responsibility programmes and the lack of legislative action by governments steered corporations to do virtually whatever they pleased, misleadingly publicising voluntary compliance. DWIGHT JUSTICE illustrates this point by stating that corporations were using corporate responsibility to go around regulations and not beyond them, thus becoming a substitute and not a complement to respecting human rights imperatives<sup>11</sup>. Nowadays, after many years of human rights abuses, the forces are inevitably changing from corporate responsibility to corporate accountability.

### **1.1. Transnational Corporations and Globalisation**

Transnational corporations may be defined as an economic entity of private law with legal personality which conducts business in at least two countries<sup>12</sup>. These types of corporations operate “under a system of decision-making permitting coherent policies

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<sup>10</sup> RAMASASTRY, A. (2014). *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability* (p. 245), HUM. RTS. 237. <https://digitalcommons.law.uw.edu/faculty-articles/734/>.

<sup>11</sup> Dwight Justice as cited in CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 196-197). Oxford University Press.

<sup>12</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. (2003). *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (p. 7). United Nations. Available at: <https://digitallibrary.un.org/record/501576>.

and a common strategy through one or more decision-making centres, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources, and responsibilities with the others<sup>13</sup>”.

The concept of transnationality when describing a corporation comes from the fact that, despite being composed of many different entities (each with a different identity and operating in different legal jurisdictions), it is only one single corporation<sup>14</sup>. Defining the nationality of these corporations is an increasingly difficult task because they carry out business operations in multiple Countries, for example, having their headquarters in one country, being incorporated according to the laws of another, the *de facto* operations of the company being conducted in another country, and the majority of their workforce originating in yet another country.

Entities such as the ones described above started to form as early as the 19th century. Globalisation, however, came to accentuate these phenomena, with the help of the harmonisation of people’s behaviour: starting from how we dress, what we eat, the harmonisation of our preferences, such as the music we listen to, the shows and films we watch, etc. The standardisation of people's preferences around the globe originated the growth and success of big corporations: today, commonly known as transnational corporations.

It is largely known that globalisation has made room for the development of transnational corporations and vice-versa, and its impact is more and more evident. ANDREW CLAPHAM approached the undeniable repercussions of globalisation in the international relations of the States. According to CLAPHAM, States are losing their influence to non-state actors, paving the way for the lack of accountability of these entities. Big corporations control more resources than most small States, which awards

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<sup>13</sup> United Nations, (1990). *Development and International Economic Co-Operation: Transnational Corporations – Annexe: Proposed Text of the Draft Code of Conduct of Transnational Corporations* (p. 5), E/1990/94 in Economic and Social Council, Official Records, Supplement No. 1.

<sup>14</sup> RIGAUX, F. (1991) as cited in CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 199). Oxford University Press.

them an influence capable of determining the course of political matters and economic policies and the capability of overwhelming local cultures and populations<sup>15</sup>.

Globalisation is thus eroding the authority of States, which can sometimes frustrate their task of protecting human rights. The very fact that States are losing their influence does not mean that they do not have the power to revert this and enforce laws to hold multinational corporations accountable because “human rights abuses are committed by legal entities, not by an abstract phenomenon named globalization<sup>16</sup>”.

In 2020, the top ten richest corporations combined had a higher gross domestic product than all other countries (individually considered) except for The United States and China<sup>17</sup>. Great economic power must be followed by great accountability mechanisms, especially in what concerns the protection of human rights.

As mentioned, transnational corporations can take on the role of compliance of their conduct with human rights imperatives in accordance with soft law instruments or hard law instruments. The lack of sufficient hard law instruments and the proliferation of soft law instruments for compliance with human rights standards have led to a form of social washing by companies which pretend to respect human rights through their corporate social responsibility programmes. However, their initiatives are undertaken selectively, based on what the company voluntarily chooses to address or to comply with. Ideally, companies should respect all human rights imperatives, not only the ones they choose to cope with, especially because the ones they pick can be the issues they are most comfortable addressing and not others, at times, more important issues.

## **1.2. Corporate accountability derived from non-binding instruments**

Over the past decades, several attempts have been made to develop global standards to hold companies accountable for their involvement in human rights abuses. The present section will provide a timeline and explanation of these instruments.

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<sup>15</sup> CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 4). Oxford University Press.

<sup>16</sup> CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 8). Oxford University Press.

<sup>17</sup> (n.d.), *Companies more profitable than countries*. ABC Finance Limited. Retrieved January 17, 2023, from <https://abcfinance.co.uk/blog/companies-more-profitable-than-countries/>.

### **1.2.1. The Organization for Economic Co-operation and Development Guidelines for Multinational Enterprises**

The OECD Guidelines for Multinational Enterprises were created in 1976 and consist of voluntary principles and standards for the lawful conduct of business and compliance with human rights. These guidelines are currently endorsed by the 51 adhering governments (the 38 OECD member States, plus 13 non-OECD States that have expressly adhered to them).

It is a very broad instrument as it not only concerns human rights but also intends to safeguard other important matters such as competition, consumer interests, science and technology and anti-corruption. Indeed, the OECD guidelines only started to foresee dispositions towards the respect of human rights by enterprises after its revision in 2011, in the same year of publication of the UNGPs and after their adoption. The objective of this revision was to be in consonance with the UNGPs.

Thus, in what concerns human rights, it recognises that although governments are the ones that must protect human rights, business enterprises have to respect them. The guidelines establish that business enterprises should address adverse human rights impacts resulting from their activity by conducting due diligence to identify and seek ways to prevent or mitigate them. This involvement in adverse human rights impacts can be direct or indirect, for example, through the conduct of a partner entity.

While exercising their duty of care, meaning while conducting human rights due diligence to their operations, should corporations identify an adverse impact caused by their business activities, whether directly or indirectly, corporations themselves, via internal policies, or the Governments, through State cooperation, should enable remediation to the victims<sup>18</sup>.

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<sup>18</sup> OECD (2011). *OECD Guidelines for Multinational Enterprises* (p. 34), OECD Publishing. Available at: <https://www.oecd.org/daf/inv/mne/48004323.pdf>.

The OECD Guidelines offer a non-judicial mechanism to provide remedies that allows anyone to submit a complaint to a National Contact Point when they consider that a corporation has not complied with the Guidelines<sup>19</sup>.

National Action Plans are policy documents under which a country outlines a number of priorities and measures to facilitate the adoption and execution of international diplomas in a particular policy area<sup>20</sup>, in this case - business and human rights. The United Kingdom was the first to enact a National Action Plan in 2013. As of the date of writing of the present dissertation, over 40 countries have developed or are in the process of developing National Action Plans on business and human rights.

### **1.2.2. The International Labour Organization Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy**

The International Labour Organisation is the only UN agency with a tripartite structure that gives a voice to everyone involved: workers, employers, and Governments. It was founded in 1919 and includes, as of today, 187 member states.

The Declaration of Principles Concerning Multinational Enterprises and Social Policy has a wide reach, as it applies not only to corporations themselves but also to employers and workers' organisations.

Generally speaking, corporations must respect human rights. Therefore, it requires them to take specific steps. According to the Declaration, this means that corporations should ensure that they: "(i) avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and (ii) seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations,

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<sup>19</sup> (n.d.). *OECD National Contact Points*. National Actions Plan on Business and Human Rights. Retrieved February 15, 2023, from <https://globalnaps.org/issue/oecd-national-contact-points-ncps/>.

<sup>20</sup> (n.d.). *About*. National Actions Plan on Business and Human Rights. Retrieved February 15, 2023, from <https://globalnaps.org/about/>.

products or services by their business relationships, even if they have not contributed to those impacts<sup>21</sup>”, despite the location where they operate.

The Declaration establishes standards in employment, namely the abolition of child and forced labour, the elimination of discrimination in the workplace, the need for social security and security of employment. It also sets the standards for working conditions, such as wages, sufficient conditions of work, health, and safety.

It provides direct guidance to enterprises on social policy and inclusive, responsible, and sustainable workplace practices. In this light, ANDREW CLAPHAM states that “despite the fact that the Tripartite Declaration contains only recommendations, the Declaration provides material evidence that the international labour law regime has come to include human rights obligations for national and multinational enterprises<sup>22</sup>”. However, we cannot refer to the norms established by the Declaration as mandatory because there are, materially, no consequences to those who violate them.

It also contemplates access to effective remedies for victims of human rights violations. It states that:

As part of their duty to protect against business-related human rights abuses, governments should take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction any affected worker or workers have access to effective remedy<sup>23</sup>.

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<sup>21</sup> International Labour Organization (2022). *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (p. 5), 6th Edition. Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

<sup>22</sup> CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 215). Oxford University Press.

<sup>23</sup> International Labour Organization (2022). *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (p. 18), 6th Edition. Available at: [https://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/---emp\\_ent/---multi/documents/publication/wcms\\_094386.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf).

However, the burden lies firstly on Governments. They are the ones that should take the necessary steps for corporations to be held liable for non-observance of their duty of care towards the strict fulfilment of the standards established therein.

### **1.2.3. The United Nations Global Compact**

The effects of globalisation propelled the creation of the Global Compact, by the United Nations, in the year 2000, as a way to promote corporate social responsibility and sustainability around the globe. The UN Global Compact establishes ten principles related to the subjects of human rights, Labour, Environment, and Corruption. In particular, two principles relate to human rights, which are: (i) “Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights”; and; (ii) “Principle 2: make sure that they are not complicit in human rights abuses”.

The first principle deals with companies' duty to respect human rights by taking active measures to identify adverse human rights impacts through due diligence. Besides respecting human rights, this principle states that businesses should also endorse human rights by promoting their protection.

The second principle extends the obligation of respecting human rights to those who are not necessarily directly involved in the illegal acts but that, in some way, are helping the perpetrators to continue the violations. Complicity is categorised as either: (i) direct complicity, which occurs when a business offers products or services that it is aware will be utilised to commit the abuse; (ii) beneficial complicity, which occurs when, even though a company did not cause by itself the human rights violations, it benefitted in some way from said abuse; and (iii) silent complicity, which happens when a business remains passive before recurrent violations of human rights<sup>24</sup>.

Nowadays, it is important to know what being complicit in human rights violations means, and it is also vital that corporations are aware that they could be liable

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<sup>24</sup> (n.d.). *Principle Two: Human Rights*. United Nations Global Compact. Available at: <https://unglobalcompact.org/what-is-gc/mission/principles/principle-2>.

for it. Complicity in this context has acquired a meaning of its own, illustrating the ability of corporations to play a role in human rights abuses indirectly<sup>25</sup>.

Complicity in human rights abuses can happen when a corporation acts as: (i) an enabler when the violations are only made possible by the actions or omissions of the corporation; (ii) a facilitator, meaning the violations are more easily committed through a set of actions with that objective in mind; or (iii) an exacerbator, when the corporation willingly or negligently worsens the violations committed<sup>26</sup>. In these situations, corporations know or should have known that they were being complicit in human rights abuses. In short, it translates into the concept of ‘aiding and abetting in human rights violations’, which will be debated in Chapter II.

The Global Compact’s principles complement each other by ensuring that direct or indirect involvement is seen and publicised as producing the same results, thus having similar consequences.

#### **1.2.4. The United Nations Guiding Principles on Business and human rights**

The UNGPs<sup>27</sup> are a set of thirty-one principles that intend to establish a framework for the interaction of transnational corporations and other enterprises and the protection of human rights. The Special Representative of the Secretary-General at the time, Professor John Ruggie, was the key figure that helped to develop them<sup>28</sup>. The importance of this instrument lies in being the first document to set a global and authoritative international standard regarding business and human rights.

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<sup>25</sup> HOWEN, Nicholas et al. (2006). *Corporate Complicity & Legal Accountability*, Volume 1: *Facing the Facts and Charting a Legal Path* (p. 3). International Commission of Jurists.

<sup>26</sup> Id. at p. 9.

<sup>27</sup> United Nations (2011). *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*. Available at: [https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr\\_en.pdf](https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf).

<sup>28</sup> United Nations (n.d.). *Special Representative of the Secretary-General on human rights and transnational corporations and other business enterprises*. Office of the High Commissioner. Available at: <https://www.ohchr.org/en/special-procedures/wg-business/special-representative-secretary-general-human-rights-and-transnational-corporations-and-other>.

In particular, addressing the way business pursuits impact communities around the world, namely the adverse human rights effects of their activities. The standard set by the UNGPs rests on three main pillars - Protect, Respect, and Remedy.

The first one is known as the State's duty to protect human rights. It upholds the already existing obligations of States to protect human rights within their borders, namely by regulating the responsibilities of businesses towards human rights, being vigilant and investigating possible human rights violations, and enforcing sanctions on the violators.

The second pillar is the corporate responsibility to respect human rights and “lays out the expectations for companies to take positive steps to avoid harming people’s human rights through their own activities and their business relationships<sup>29</sup>”. This can be achieved by ensuring the compliance of their activities with human rights obligations through conducting due diligence audits to not only their activities but also through the entire supply chain and other business relationships.

The third pillar, and the one most relevant to the present dissertation, is access to remedies for victims of business-related abuses. Effective access to judicial remedies is key for those who have endured violations of their human rights, offering ways to redress the harm they have suffered.

JOHN RUGGIE summarised these three pillars in a simple manner: “states must protect; companies must respect; and those who are harmed must have redress<sup>30</sup>”.

Remedies can be awarded to victims through different mechanisms, whether judicial or non-judicial, meaning through the courts of a certain jurisdiction or mediation, for example. However, the basis under which human rights can be enforced is still very scarce as there are several challenges of practical and legal nature for the access of

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<sup>29</sup> BRIGHT, Claire et al. (2021), *Legal Brief, Human Rights and Environmental Due Diligence* (p. 3). NOVA Centre for Business and Human Rights and the Environment. Available at: <https://www.imvf.org/wp-content/uploads/2021/06/legal-brief-human-rights-and-environmental-due-diligence-ofof.pdf>.

<sup>30</sup> RUGGIE, John G. (2013). *Just Business: Multinational Corporations and Human Rights* (p. 13), W. W. Norton & Company, 1st edition.

effective remedies by victims of human rights abuses<sup>31</sup>. Examples of legal obstacles to bringing up a claim are: (i) the difficulty in attributing legal responsibility to corporations due to their organic complexity<sup>32</sup>; (ii) the struggle in electing a forum that, on one side, grants the plaintiffs a fair trial, and on the other one that accepts to try the case<sup>33</sup>; and (iii) time limitations<sup>34</sup>, which in the specific case of human rights violations can pose a significant barrier, because it may take a long time to investigate and gather evidence to sustain the plaintiffs' claims in court. The practical challenges can also be concerned with: (i) the financial costs of bringing a claim, namely with court fees and lawyers and other legal experts, especially because the victims are usually from low-income countries; (ii) difficulties in the process of investigation and evidence gathering activities<sup>35</sup> in consequence of the burden of proof of the victims; and (iii) corruption and political interference<sup>36</sup>, given the power of the corporations being sued.

The instruments mentioned above are, in essence, soft-law instruments, serving as mere “recommendations”, which can make them seem ineffective due to the lack of an enforceable mechanism and the absence of actual sanctions for the offenders.

Despite this, it is important to acknowledge that the assertion that they do not serve any purpose is unequivocally false. They serve as important instruments that establish harmonised guiding principles for corporations around the globe. Many countries have also incorporated them in different ways under domestic law, particularly through the adoption of National Action Plans on business and human rights.

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<sup>31</sup> MARX, Axel, Dr. et al. (2019). *Access to legal remedies for victims of corporate human rights abuses in third countries* (p. 16), European Parliament.

<sup>32</sup> *Id.* at p. 14.

<sup>33</sup> ROUAS, Virgine (2022). *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (p. 31), University of London Press.

<sup>34</sup> SKINNER, Gwynne et al. (2013). *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (p. 38), the International Corporate Accountability Roundtable, CORE, the European Coalition for Corporate Justice.

<sup>35</sup> MARX, Axel, Dr. et al. (2019). *Access to legal remedies for victims of corporate human rights abuses in third countries* (p. 16), European Parliament.

<sup>36</sup> *Id.* at p. 17.

Additionally, the UNGPs have been endorsed by many international organisations, such as the International Labour Organization, the OECD, and the European Union. Notwithstanding, these instruments will not, by themselves, be enough to regulate the conduct of transnational corporations<sup>37</sup>.

The multitude of soft-law instruments makes it difficult for enterprises to understand all of their human rights obligations. In order to mitigate this situation, the United Nations Human Rights Council in Geneva adopted, in 2014, a resolution for the elaboration of a binding treaty in business and human rights, which could potentially help to clarify the business responsibilities of transnational corporations (and other business enterprises) under human rights law<sup>38</sup>.

### **1.3. Transnational corporations as possible subjects of international law**

Another important question concerns the international subjectivity of transnational corporations and whether this is a precondition for them to have international obligations following the traditional postulates of international law. The question is, what role do they play in the international law scene, if any.

Firstly, it is essential to consider that transnational corporations have amassed tremendous diplomatic and economic power, making it unacceptable to let them slip through the gaps of liability.

Following the end of the Cold War and the bipolar world system in 1989, globalisation evidenced the decline of the supremacy of the States - until then, the primary subjects of the international community - and a multitude of non-state actors began to play an increasingly relevant role in international relations, such as multinational corporations, non-governmental organisations, terrorist groups, among others. The State-

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<sup>37</sup> D'ASPREMONT, Jean. (2011), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (p. 276), Routledge.

<sup>38</sup> United Nations (n.d.). *BHR Treaty Process OHCHR and business and human rights*. Office of the High Commissioner. Available at: <https://www.ohchr.org/en/business-and-human-rights/bhr-treaty-process>.

centric paradigm rests on two axioms: “the supremacy of the state over civil society and the predominance of the States in the sphere of international politics<sup>39</sup>”. This standard no longer crystallises modern-day reality, as many other types of entities began to acquire more political relevance<sup>40</sup>.

In spite of this, some may argue that juridical entities, particularly transnational corporations, are not “subjects” of international law, thus having neither rights nor obligations under it, which prohibits them from suing or being sued for violations of international law.

Although it is clear that corporations are not on the same level as States on the international law plane, corporations possess immense wealth and power, enough to influence actions and decisions of, for example, developing countries, mostly known for corruption. These entities compete actively with States for decision-making power in issues of international politics that impact their business. The supranational dimension of multinational corporations has created new institutional centres of power, allowing them to circumvent state machinery and exert direct influence on States<sup>41</sup>.

In this sense, it is impossible not to mention that these entities' power has paved the way for gross human rights violations throughout the years. Therefore, it is safe to assume that they are bearers of (at least) some duties or expectations under international law, being one of those duties the respect for human rights, not only because that is a duty of humanity at large<sup>42</sup>, even recognised as an obligation *erga omnes*<sup>43</sup>, but also because some human rights norms, as already discussed, enjoy the status of *jus cogens* norms.

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<sup>39</sup> MILARDOVIĆ, Anđelko et al. (2008). *The Globalization of Politics* (p. 88). Political Science Research Centre Zagreb.

<sup>40</sup> Id.

<sup>41</sup> MUCHLINSKI, Peter T. (2001). *Human rights and multinationals: is there a problem?* (p. 40), *International Affairs* (Royal Institute of International Affairs 1944-) Vol. 77, No. 1, pp. 31-47.

<sup>42</sup> Note that, according to the preamble of the Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on 10 December 1948, "every organ of society (...) shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction".

<sup>43</sup> D'ASPREMONT, Jean. (2011), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (p. 45). Routledge.

Considering the many different perspectives on the subjectivity of non-state actors, a few of them will be analysed to corroborate my point of view on the matter:

ANDREW CLAPHAM argues that, comparably to individuals, corporations have some international legal rights and obligations, leading to the inevitable conclusion that “international rights and duties depend on the capacity of the entity to enjoy those rights and bear those obligations; such rights and obligations do not depend on the mysteries of subjectivity<sup>44</sup>”.

THOMAS KLEINLEIN talks about the constitutional approach to non-state actors in which he reflects that in the international law scene, the focus on the interests of States is being shifted towards the *realisation of community interests, the promotion of global public goods<sup>45</sup> and serving global welfare*. In order to achieve this, it is deemed insufficient to only rely on subjectivity, as it might be an “empty shell” not fit to accomplish it. Under this approach, non-state actors, despite bearing some international rights and obligations, do not occupy the place of subjects in the international legal order. Therefore, not enjoying the rights to participate in law-making processes<sup>46</sup>. Regarding the connection between national and international law, it allows the direct applicability of international legal norms to corporations within the context of domestic law<sup>47</sup>.

On the other hand, authors such as ERIC DE BRABANDERE note that even though it is possible to attribute obligations on entities that are not formally considered subjects of international law, it is doubtful whether corporations can be held liable for human rights obligations *beyond the confinements of international criminal law<sup>48</sup>*.

Lastly, in the Reparations case before the ICJ, when answering the question of whether the United Nations possessed the capacity to bring an international claim, the Court reflected that recognition of international personality of the organisation did not

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<sup>44</sup> CLAPHAM, Andrew (2006). *Human rights obligations of non-state actors* (p. 68-69). Oxford University Press.

<sup>45</sup> D’ASPREMONT, Jean. (2011), *Participants in the international legal system, multiple perspectives on non-state actors in international law* (p. 42). Routledge.

<sup>46</sup> Id. at p. 46.

<sup>47</sup> Id. at p. 47.

<sup>48</sup> Id. at p. 273.

mean that its rights and obligations are the same as the ones enjoyed by States<sup>49</sup>. Applying this analytical framework to the present discussion, we can conclude that the rights and duties of a non-state actor are thus dependant on the purposes and functions of the subject<sup>50</sup>, based on the fact that, as stated in the advisory opinion, “the subjects of law in any legal system are not identical in their nature or in the extent of their rights and their nature depends upon the needs of their community<sup>51</sup>”.

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<sup>49</sup> Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion) [1949] ICJ Reports 174, at p. 9. Available at: <https://www.icj-cij.org/sites/default/files/case-related/4/004-19490411-ADV-01-00-EN.pdf>.

<sup>50</sup> Id at p. 10.

<sup>51</sup> Id. at p. 8.

## **Chapter II - Corporate civil liability for breaches of customary international law**

### **2.1. Introduction**

Now that the subjectivity of transnational corporations has been discussed, it will be now subject of discussion what may be framed as the legal basis for corporate civil liability resulting from human rights violations.

A corporation is a legal person that has no special immunity under domestic law. Its form of juridical person allows it to be treated, to an extent, similarly to an individual in many areas of law, namely, the ability to sue and to be sued<sup>52</sup>. In this regard, there is a discussion about whether corporate liability forms part of customary international law. Thus, being necessary to first explain the concept of customary international law and its evolution.

Customary international law was considered the first form of international regulation. Evolving through the years, it has helped govern the relationship between international actors. Article 38 of the Statute of the International Court of Justice defines customary international law as “international custom, as evidence of a general practice accepted as law”.

Contrary to treaty law, which is formed through international law-making regimes, customary international law is derived from common international practices of States. Therefore, it is not considered an intentional law-making process. M. Giuliano and G. Barile (both Italian international lawyers)<sup>53</sup> even characterise it as a spontaneous law-making process.

To be considered customary international law, the law must fulfil a twin principle: (i) it must amount to a general and consistent State practice (also known as *usus*), and (ii)

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<sup>52</sup> CHRISTENSEN, David D. (2005). *Corporate liability for overseas human rights abuses: the Alien Tort Statute after Sosa v. Alvarez-Machain* (p. 1238), 62 Wash. & Lee L. Rev. 1219. <https://scholarlycommons.law.wlu.edu/wlulr/vol62/iss3/8/>.

<sup>53</sup> CASSESE, A. (2005). *International Law* (p. 156). Oxford University Press, 2nd edition.

the international community has to believe that this general and consistent practice is a legal obligation (also known as *opinio juris*).

The developments of customary international law in the past centuries have transformed the perspective on the formation of CIL norms. The traditional position defends that the development of a CIL norm would have to be immemorial, meaning in practice that nobody alive remembered the origin of the said norm. This implied that a substantial amount of time would have to go by for a custom to acquire the customary international law status. Nowadays, the modern approach accepts the formation of customary international law within a relatively short span of time. The ICJ has even stressed that “the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law<sup>54</sup>”.

International law “emerged” to govern the relationships between States (Positivist view of international law - State sovereignty) and has a premise that dictates that States can only be legally bound by those obligations to which they voluntarily consent. However, since World War II, there has been a dramatic shift in how international law is perceived because as globalisation became more prominent, other international actors also started to play an especially important role, truly acting as players in the international law scene.

World War II highlighted the existence of human rights inherent to each human’s condition, despite a State’s law dictating otherwise, as was the case of Germany towards the extermination of Jews. Following an overly sensitive period in the World’s history, the Vienna Convention defined the special category of norms called *Jus cogens*, in 1969, in its article 53. Even though the concept was already familiar within Customary international law, it was only by this article that it was established that “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law”.

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<sup>54</sup> International Court of Justice (1969). *The North Sea Continental Shelf, Judgment, ICJ Reports* (p. 43).

*Jus cogens* norms are defined fundamental principles of international law under which no derogation is allowed, and in the hierarchy of international law, they occupy the first place. These norms are special in their nature, as they determine the invalidity *ab initio* of other contradicting norms<sup>55</sup>. Thus, *jus cogens* norms can only be modified by a norm of the same character.

Although there is not a consensus on the exact list of *jus cogens* norms, the international community has established examples of such norms, which are the prohibition of torture, the prohibition of slavery and slave trade, the prohibition of genocide and the prohibition of aggression<sup>56</sup>, just to name a few.

Pursuant to their importance in international law, when a *jus cogens norm* is disrespected, the perpetrator must be punished. However, transnational corporations have enjoyed impunity for violations of *jus cogens* norms solely by relying on the argument of lack of subjectivity under international law and by the inertia of the States to punish them effectively.

## **2.2. Historical background of the paradigm change in international criminal law**

After the end of the Second World War, it was decided through the London Charter that war criminals would be tried at Nuremberg. The International Military Tribunals at Nuremberg became one of the main sources of liability for violations of human rights under customary international law<sup>57</sup>. However, the IMT was established with only criminal jurisdiction. Thus, no civil liability measures were imposed upon offenders. The Nuremberg tribunals also excluded jurisdiction over legal persons; therefore, it did not solve the question of whether corporate liability existed under customary international law.

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<sup>55</sup> CASSESE, A. (2005). *International Law* (p. 205-206). Oxford University Press, 2nd edition.

<sup>56</sup> KACZOROWSKA, Alina (2010). *Public International Law* (p. 50). Routledge, 4th edition.

<sup>57</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 27, (2nd Cir. 2010). Available at: [https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv\\_opn-2011-03-27.pdf?ts=1410917507](https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv_opn-2011-03-27.pdf?ts=1410917507).

The fact that the IMT did not hold jurisdiction over legal persons does not mean automatically that corporate liability does not exist in international law<sup>58</sup>. The refusal of international organisations to impose criminal liability on corporations is solely connected to the fact that a corporation is clearly unable to act with criminal intent. The fact that criminal punishment is ineffective when it comes to achieving its goals when applied to a corporation does not necessarily imply that international law deems corporations exempt from being punished altogether under international law<sup>59</sup>.

The defendants at the IMT - the nazi that were being tried - raised the lack of precedent of punishing individuals for their actions under international law. However, the IMT expressly rejected their argument and held that individuals could be punished for violations of international law<sup>60</sup>. In relation to this, it is incorrect to say that the only recognised form of liability for violations of human rights is individual criminal liability. Before the IMT punished individuals for these kinds of breaches, there was no precedent for prosecuting individuals under international criminal law; therefore, *mutatis mutandis*, it can be questioned why the lack of precedent of holding corporations liable for human rights violations at the civil level persists.

In the words of WILLIAM S. DODGE:

The limitations of these tribunals' jurisdiction to natural persons does not reject the applicability of customary international law to juridical persons, any more than the limitations of these tribunals' jurisdiction to certain offences, places, and times reject the existence of other norms of customary international law or customary international law's applicability to other places and times<sup>61</sup>.

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<sup>58</sup> Id. at 12-13.

<sup>59</sup> Id. at p. 36.

<sup>60</sup> DANFORTH, Matthew E. (2011). *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations* (p. 672), Cornell International Law Journal, Vol. 44.

<sup>61</sup> Brief of International Law Scholars as Amici Curiae in Support of Respondents, Nestle USA, Inc. & Cargill, Inc. v. Doe I (p. 18). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3716485](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3716485).

If the paradigm changed with the Nuremberg tribunals in order to hold individuals accountable for the human rights violations perpetrated during the Second World War II, several factors point to the conclusion that transnational corporations can also be held accountable for the same violations in the future.

Customary international law's objective is, by means of the protection of human rights, to safeguard people from these offences, despite the juridical form embodied by the perpetrator. Thus, civil liability for violations of human rights should be the only option in ascertaining compensation to victims of human rights abuses because other forms of indemnification will never reflect the gravity of these violations nor provide actual redress to these victims of the harm they have or possibly will endure throughout their lives.

The International Commission of Jurists even argued that “when the legal accountability of a company entity is sought, the law of civil remedies may often provide victims with their only legal avenue to remedy. This is because the law of civil remedies will always have the ability to deal with the conduct of companies, individuals and state authorities<sup>62</sup>”.

The acts that are illegal under international law are largely accepted or/and codified in the main international law instruments and obligate States to take the appropriate measures to ensure that the conducts are prevented or, if they have already taken place, that they are punished accordingly. Thus, customary international law has been invoked as a possible avenue for compensation for victims in American and Canadian courts, which will be the object of discussion in the following chapter.

### **2.3. The insufficiency of corporate criminal liability to address human rights violations**

Criminal law may punish corporations that have knowingly infringed human rights norms. The criminal liability of corporations is not foreseen in the Rome Statute of

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<sup>62</sup> HOCTOR, Leah et al. (2006). *Corporate Complicity & Legal Accountability, Volume 3: Civil Remedies* (p. 5), International Commission of Jurists.

the International Criminal Court. However, it is largely understood that serving as the act that established the international court, it was written with the purpose of gathering consensus amongst international actors. Considering that corporate criminal liability was not even foreseen in some domestic jurisdictions, it was not the place to implement novel concepts that would lead to debate<sup>63</sup>. Notwithstanding, it is a concept familiar to many countries, namely the US and most European countries.

Corporate criminal liability is a way of holding corporations accountable for acts or omissions committed by their employees or directors that conflict with criminal laws. In these cases, if a corporation is found to have knowingly contracted with individuals who committed crimes against humanity, it may be charged with being complicit in those crimes.

In the United States of America, the scope of corporate criminal liability is extremely broad, given that corporations can be punished for almost every crime, except for crimes that have to be imminently committed by natural persons, such as, for example, rape and homicide. A corporation can be held criminally liable for crimes perpetrated by its agents or directors within the scope of the employment relationship that ties them to the company and with the intention of obtaining a benefit for the business<sup>64</sup>.

Turning to the European landscape, corporate criminal liability was well thought out for economic crimes, namely money laundering, bribery of public officials, fraud and tax evasion. In order to establish corporate criminal liability, it must be demonstrated that the offence was committed by one or more individuals acting on behalf of the corporation and had the authority to make decisions on its behalf. Europe being a Continent composed of a significant number of different countries, it has proved to be useful to analyse the regime of a few specific countries briefly.

To illustrate, in the Netherlands, corporate criminal liability is regulated under the Dutch Criminal Code and the Economic Offences Act. Dutch criminal law does not make

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<sup>63</sup> RUTH-MARIA WETZEL, Julia (2016). *Human Rights in Transnational Business, Translating Human Rights Obligations into Compliance Procedures* (p. 47-48). Springer.

<sup>64</sup> KHANNA, V. S. (1996) *Corporate criminal liability: what purpose does it serve?* (p. 27-28), Harvard Law Review, 109(7). [http://www.law.harvard.edu/programs/olin\\_center/papers/pdf/Khanna\\_169.pdf](http://www.law.harvard.edu/programs/olin_center/papers/pdf/Khanna_169.pdf).

a distinction between natural and legal persons. Therefore, under article 51 of the Dutch Criminal Code, it is possible to prosecute a legal entity for international crimes<sup>65</sup>.

A *sine qua non* condition across the board for holding a corporation criminally liable, and similarly to the requirements of corporate criminal liability in the United States, the offence must have been committed with the intention of benefiting the corporation or with the knowledge and consent of the corporation.

Notwithstanding, in Switzerland, even if the managers of a company are not aware of the criminal acts committed, the absence of due diligence and measures taken to prevent the crimes are an offence in themselves<sup>66</sup>.

Given the discussed above, in many countries of the Western part of the globe, a corporation can be found guilty of a crime and punished in the same manner an individual would. However, considering that we cannot put corporations in prison, they are typically punished by imposing economic sanctions, such as fines, forfeiture of profits and penalties in public procurement.

Opting for the criminal punishment of a corporation can send a strong message to the communities of the disapproval of the corporate wrongdoing, and it can also serve as a form of punishing the harm, which was not only caused to the victims but equally to society at large<sup>67</sup>.

However, as Justice Leval mentioned in the *Kiobel* case, criminal punishment does not achieve its main objectives when it is imposed on an abstract entity that exists as a purely legal construct<sup>68</sup>. Criminal punishment seeks to inflict meaningful suffering upon the ones who violate the law. It has several different objectives, which include

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<sup>65</sup> SKINNER, Gwynne et al. (2013). *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (p. 33). The International Corporate Accountability Roundtable, CORE, the European Coalition for Corporate Justice.

<sup>66</sup> Id at p. 35.

<sup>67</sup> ROUAS, Virgine (2022). *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (p. 197), University of London Press.

<sup>68</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F3d 34 (Concurring opinion), (2nd Cir. 2010). Available at: [https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv\\_opn-2011-03-27.pdf?ts=1410917507](https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv_opn-2011-03-27.pdf?ts=1410917507).

giving society the satisfaction of seeing the ones who have broken its rules and have caused suffering are effectively “paying for it”. It also aims to prevent further criminal misconduct by the offenders during imprisonment; change the criminal’s conduct by bringing about repentance or, at least, the realisation that further criminal conduct will result in more severe punishment. It further aims to dissuade others similarly situated from criminal conduct. Therefore, when imposed upon a corporation, criminal punishment realises none of these objectives.

Additionally, criminal punishment is not the effective way of punishing corporations for human rights violations because while imposing a fine as a punishment may be sufficient for some violations of the law, violations of human rights are much more serious and require more severe punishment. In such cases, a fine may not adequately address the harm caused by the crime and may not serve as a sufficient deterrent to prevent future violations. Not only that but when a fine is imposed upon the corporation, the burden of paying the sum falls on the corporation’s owner, creditors and can even, sometimes, fall on the customers of the corporation when it successfully reflects payment of the fine on increasing the prices of its products or services.

Furthermore, the people responsible, within the corporation, for the violations of human rights may no longer work at the corporation, its directors and owners may have changed, thus failing to effectively punish those responsible for the misconduct. The economic sanctions imposed on corporations for criminal misconduct resemble civil liability. Still, the sums paid by the businesses for violations of human rights, in these cases, do not serve the purpose of reimbursing the suffering of the victims.

#### **2.4. Analysing corporate civil liability and its different forms**

The legal bases for corporate civil liability for violations of human rights imperatives may include international and domestic mechanisms. To start with, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law dictate that States have the duty to punish those who violate human

rights and that the victims of said violations have the right to adequate, effective and prompt reparation<sup>69</sup>. Moreover, under human rights law, States are responsible for the violations committed by private entities, including corporations, in their territory and/or under their jurisdiction.

In light of the above, instruments can establish norms that govern corporations' scope of activity. However, considering that States have the primary responsibility to "promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights<sup>70</sup>", the duty of taking legislative measures to enforce companies' civil liability lies with the States<sup>71</sup>. Consequently, victims can seek reparations through domestic mechanisms in the courts of law.

Generally speaking, under tort law, liability for damages depends on the existence of a wrong, a damage and a causal relationship between the wrong and the damage caused. Causation can involve commission (doing an act) or omission (not doing an act). Thus, taking into account that corporations can be duty bearers of CIL obligations, in the breach of those obligations, it may be possible to hold them accountable<sup>72</sup>.

Most importantly, legal persons, namely parent companies, can be held responsible for their own acts but also, in certain cases, for acts of their subsidiaries or third parties in their supply chains.

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<sup>69</sup> United Nations (n.d.). *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. Office of the High Commissioner. Available at: <https://www.ohchr.org/sites/default/files/2021-08/N0549642.pdf>.

<sup>70</sup> UN Sub-Commission on the Promotion and Protection of Human Rights. (2003). *Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* (p 4). United Nations. Available at: <https://digitallibrary.un.org/record/501576>.

<sup>71</sup> MONGELARD, Eric (2006). *Corporate civil liability for violations of international humanitarian law* (p. 673). International Review of the Red Cross. 88(863).

<sup>72</sup> *Id.* at p. 677.

Before going into detail about the requirements that need to be met in order to hold a company liable at the civil level, it is necessary to understand the relationship between the parent company and its subsidiaries and the question of the corporate veil.

#### **2.4.1. Separate corporate liability and the corporate veil**

Transnational corporations establish themselves in various parts of the world and under different corporate entities. They can assume many legal and structural forms and are governed by the principle of ‘separate legal personality’, which created a permissive environment that allowed for increased investment opportunities<sup>73</sup>. Under this principle, a company, even when part of a corporate group, is considered a separate legal entity from its shareholders or affiliates. The ‘corporate veil’, as it is commonly known, translates this exact corporate law principle, where each company has a separate legal entity from other legal entities or its managers and shareholders.

Separate legal personality results in limited liability coined as a “fundamental principle of corporate law” and historically deemed as one of the necessary drivers for the creation of incentives for investment<sup>74</sup>. Limited liability ensures that owners or investors in a company are only liable in proportion to the amount of their investment in the company<sup>75</sup>. This means that if the company incurs in debts or faces legal action, its shareholders are not personally responsible for paying off those debts or damages beyond the amount of their investment.

Limited liability is a concept that evidently also applies to groups of companies because a company is only liable for its own debts and not for the debts of affiliated corporations<sup>76</sup>. This is truly relevant when we talk about the possibility of holding a parent

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<sup>73</sup> UN High Commissioner for Human Rights (2016). *Improving accountability and access to remedy for victims of business-related human rights abuse HRC/32/19* (p. 9), United Nations. Available at: <https://digitallibrary.un.org/record/841635>.

<sup>74</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 211. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>75</sup> ENNEKING, Lisbeth et al. (2020), *Accountability, International Business Operations, and the Law Providing Justice for Corporate Human Rights Violations in Global Value Chains* (p. 220), Routledge.

<sup>76</sup> ZERK, Jennifer (2014). *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner*

company liable for the misconduct of its subsidiaries. In many cases, where the plaintiffs try to hold the parent company accountable for acts of its subsidiary, the subsidiary serves as a shield that prevents liability of the parent company and as a vehicle to operate in the jurisdiction of the host country without being considered a foreign corporation<sup>77</sup>.

Shareholders may be jointly and severally liable - with all their assets - for the debts of a company if they are guilty of misconduct or fraud that causes the company to suffer loss or to fail to make payments or if they abuse the company's limited liability for their own enrichment. More importantly, the parent company could also be held accountable for the actions or omissions of its subsidiary on the basis of its own negligence in the way the subsidiary was managed<sup>78</sup>.

In order to overcome parent company limited liability, there are a few approaches that can be analysed, the most commonly known being piercing the corporate veil and direct liability of the parent company.

Piercing the corporate veil is the doctrine where a shareholder is held liable for the corporation's debts, in spite of the rules of limited liability and/or separate personality<sup>79</sup>. In this specific scenario, it would mean attributing the harmful act of a company (subsidiary) to its shareholders (the parent company) because it was proved that the subsidiary was only an instrument in the hands of the parent company<sup>80</sup>. Common law courts have, for example, pierced the corporate veil in cases of fraud, from which the Common Law doctrine of alter ego developed<sup>81</sup>.

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for *Human Rights* (p. 45). OHCHR. Available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>77</sup> Id. at p. 224.

<sup>78</sup> MARX, Axel et al. (2019). *Access to legal remedies for victims of corporate human rights abuses in third countries* (p. 15), European Parliament.

<sup>79</sup> VANDEKERCKHOVE, Karen (2007). *Piercing the Corporate Veil: A Transnational Approach* (p. 9). Katholieke Universiteit Leuven, Rechtsfaculteit.

<sup>80</sup> SKINNER, Gwynne (2015). *Parent Company Accountability Ensuring, Justice for Human Rights Violations* (p. 15). The International Corporate Accountability Roundtable. <http://www.bhrinlaw.org/documents/pcap-report-2015.pdf>

<sup>81</sup> Alter ego doctrine is a legal theory in common law countries where the separation between the shareholder and the corporate structure is deemed as nonexistent, being therefore disregarded. However, this doctrine is usually applied to fraud or indebtedness situations, and not to violations of human rights.

Although possible, lifting the corporate veil is a very intricate undertaking. In practice, in order to lift the corporate veil, courts consider the effective degree of control exercised on the operations of the subsidiary by the parent company, namely by assessing if the board of directors is the same and if the corporation's policies are similar<sup>82</sup>.

Piercing the corporate veil is different from direct liability of the parent company, which is a liability that arises when the parent company failed to properly control the subsidiary's conduct to avoid the damage. Regardless of the liability of the subsidiary, the direct liability of the parent company implies an independent duty of care on their end. In such a situation, there is no need to pierce the corporate veil<sup>83</sup>.

The duty of care thus creates the obligation of conducting due diligence, meaning that when a breach occurred, the parent company knew or should have known that the subsidiary was engaged in human rights abuses and failed to take action to prevent or remedy the situation. To illustrate, in the case *Vedanta Resources PLC v. Lungowe*<sup>84</sup> that reached the Supreme Court of the United Kingdom, direct liability of Vedanta for the acts of Konkola Copper Mines plc (Vedanta's subsidiary in Zambia) was recognised based on the doubtful solvency of the subsidiary and on the genuine desire of the plaintiffs to obtain damages from the company.

To sum up, holding a parent company liable for acts of their subsidiaries is still very restricted, and it might be difficult to be carried out by courts in practice. The corporate veil may be lifted when the doctrine of separate legal personality was abused (taken advantage of by economic actors)<sup>85</sup> or when the subsidiary was involved in human rights abuses, the precondition is that the parent company must have had faulty conduct as well, such as the non-observance of the duty of care.

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<sup>82</sup> SKINNER, Gwynne (2015). *Parent Company Accountability Ensuring, Justice for Human Rights Violations* (p. 15). The International Corporate Accountability Roundtable. <http://www.bhrinlaw.org/documents/pcap-report-2015.pdf>

<sup>83</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 213. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>84</sup> *Vedanta Resources, PLC v. Lungowe* (2019). UKSC 20. Available at: <https://www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf>.

<sup>85</sup> HOCTOR, Leah et al. (2006). *Corporate Complicity & Legal Accountability, Volume 3: Civil Remedies* (p. 48). International Commission of Jurists.

### 2.4.2. Supply chain liability for human rights abuses

Principle 19 from the UNGPs declares that "parent companies and their subsidiaries should respect human rights throughout their operations". In particular, as mentioned earlier, a company could cause direct human rights impacts, could contribute to them or could be directly linked with them. In this regard, if a company was merely complicit in human rights abuses in its supply chain, a different approach is necessary because the harm was perpetrated by a third party. In order to assure accountability of corporations for aiding and abetting human rights violations, theories of supply chain liability emerged and allowed a diversifying of the options for the victims of the harm.

The International Chamber of Commerce refers to "responsible sourcing", a synonym for supply chain responsibility and defines it as "a voluntary commitment by companies to take into account social and environmental considerations when managing their relationships with suppliers<sup>86</sup>". When companies are not sourcing responsibly, and human rights violations happen, it may be considered a violation of their duty of care.

In this regard, supply chain responsibility is a corollary of supply chain liability. Thus, it means that the corporation is responsible for the negative impact of its operations on society, the environment, and the local economy across its entire supply chain.

Supply chain liability is the legal theory that affirms that a company can be held liable for human rights violations by commercial partners that occur within their supply chain. A company's supply chain often includes many contractual relationships, for example, with suppliers, as well as non-contractual relationships, such as the impact of a company's business on the local community or on the environment. This type of liability may arise when it is proven that a corporation failed to prevent the violations and thus breached the duty to refrain from causing or preventing harm.

To illustrate, companies all over the world have been accused of failing to prevent human rights abuses from suppliers in underdeveloped countries which typically have

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<sup>86</sup> ICC Commission on Business in Society. (2008). *ICC guide to responsible sourcing* (p. 1), International Chamber of Commerce. Available at: <https://cdn.iccwbo.org/content/uploads/sites/3/2008/10/ICC-guide-to-responsible-sourcing.pdf>.

more lax regulations and standards. Plaintiffs seeking damages do not pursue claims against local businesses because they are often severely undercapitalised; thus, plaintiffs generally prefer to bring claims against other business partners located in countries where human rights violations can be better taken into account, especially in the light of the theory of supply chain liability<sup>87</sup>.

The most widely publicised case concerning supply chain liability is, undoubtedly, the collapse of the Rana Plaza building. The Rana Plaza was a factory that, in 2013, collapsed in Bangladesh. This factory housed five garment factories, and the collapse caused the killing of at least 1,132 people and the injuring of more than 2,500<sup>88</sup>. In *Rahaman v JC Penney*<sup>89</sup>, the Plaintiffs argued that the US retailers breached their duty of care to ensure the Rana Plaza was a safe place to work. However, plaintiffs did not argue the existence of a special relationship, which was necessary in order to establish that one party owes a general duty of care to another<sup>90</sup>. The case was ultimately dismissed as the claim was time barred due to the fact that under the applicable law - the Bangladeshi law - plaintiffs had only a one year time limit to claim damages.

Despite the liability that may arise from statutory norms and/or contractual dispositions and accounting for situations where prevention of harm was not foreseen in any way, the crucial question is in what situations can the victims enforce tort liability before the courts<sup>91</sup>. Extracontractual liability or tort liability can be invoked on the basis of negligence or the breach of a duty of care towards the victims. In these cases, the duty of care is often construed by courts based on general legal norms and suffers variations depending on the law that is applied to the specific case. In civil law countries, the court may compare the conduct of the company that is being sued for supply chain liability to

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<sup>87</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 168. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>88</sup> (n.d.). *The Rana Plaza Accident and its aftermath*. International Labour Organization. Retrieved March 31, 2023, from [https://www.ilo.org/global/topics/geip/WCMS\\_614394/lang--en/index.htm](https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm).

<sup>89</sup> *Rahaman v. J.C. Penney Corp.*, C.A. No. N15C-07-174 MMJ (Del. Super. Ct. May. 4, 2016). Available at: <https://courts.delaware.gov/Opinions/Download.aspx?id=240380>.

<sup>90</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 200-201. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>91</sup> *Id.* at p. 170.

the standard of care of a reasonable company, in the light of the *bonus pater familias*<sup>92</sup> concept, given the specific situation of the company and its special knowledge of the matter. For example, if the corporation knew or should have known that its business partner was committing human rights violations<sup>93</sup>.

The duty of care can involve various specific duties, such as the duty to seek information, investigate, monitor, or control. The duty of care, however, is likely to constitute a “best efforts” obligation (as opposed to an obligation of results), which means that even if the due diligence is conducted, the harm to victims may still happen<sup>94</sup>.

Notwithstanding, better than relying on doctrinal theories, States have started to legislate in this matter. In order to establish the breach of the duty of care, there are already legislative diplomas that specify mandatory due diligence activities that must be conducted by corporations in order to prevent adverse impacts on human rights in their supply chain. In the Netherlands, the Dutch child labour Due Diligence act<sup>95</sup> was enacted precisely to prevent the commercialisation of goods in the country that have used the labour of children at any point in the supply chain. In France, the duty of vigilance law requires mapping of risks in the supply chain and sets out due diligence obligations (“vigilance obligations”) to both: other companies controlled by the parent company and commercial partners. In Germany, the German supply chain due diligence act<sup>96</sup> came into force in January 2023 and established mandatory compliance with human rights standards for businesses that conduct any kind of activities in the territory of Germany.

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<sup>92</sup> Id. at p. 182.

<sup>93</sup> ZERK, Jennifer (2014). *Corporate liability for gross human rights abuses. Towards a fairer and more effective system of domestic law remedies. A report prepared for the Office of the UN High Commissioner for Human Rights* (p. 24). OHCHR. Available at: <https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

<sup>94</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 180. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>95</sup> Ropes & Gray (2019). *Legislative proposal from member Van Laar on the introduction of a duty of care to prevent the supply of goods and services produced using child labor (Child Labor Due Diligence Act)*, Unofficial translations of Child Labour Due Diligence Act.

<sup>96</sup> In German: Lieferkettensorgfalts-pflichtengesetz. Available at: [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl121s2959.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl121s2959.pdf%27%5D\\_1686155457105](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl121s2959.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl121s2959.pdf%27%5D_1686155457105).

All of these will certainly increase a company's liability in the supply chain. For one, the companies will be aware of the risks and threats in operations of the business partner because they are required to conduct investigations. Knowledge of human rights abuses can trigger courts to recognise the existence of a duty of care that was breached under which the victims must be redressed for the harm suffered. Moreover, if such events occur due to breaches of due diligence obligations, the company concerned is increasingly vulnerable to liability<sup>97</sup>.

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<sup>97</sup> BERGKAMP, P. A. (2017). Models of Corporate Supply Chain Liability. *Jura Falconis*, 55(2), 178. <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

## Chapter III - Comparative legal analysis

### 3.1. Corporate civil liability in Civil Law systems

In the absence of a contractual relationship and availing oneself of the Portuguese jurisdiction as the model for the analysis, extracontractual civil liability in Civil Law systems can exist on three occasions: liability based on fault, based on risk (commonly known as strict liability), or based on sacrifice<sup>98</sup>. The only kind that would accept redress for human rights abuses would be the liability based on fault.

Civil liability concerns the financial reparation of damage suffered by a person. The aim is to restore the injured party to the enjoyment of their offended interests<sup>99</sup>. In addition, it may also serve a punitive or preventive function.

The cumulative legal criteria for the monetary compensation of victims are (i) a voluntary action by the agent; (ii) a violation of a norm; (iii) fault of the agent; (iv) a damage; and (v) a relationship between the action of the agent and the damage created<sup>100</sup>.

A voluntary action by the agent has implied that it could amount to an action or an omission of an action. In the latter, there needs to exist a specific duty to act, and contrary to what the law prescribed, the agent did not, thus potentially incurring in liability<sup>101</sup>.

Civil liability for omission may serve as the base for aiding and abetting claims against corporations. In the discussion of omissions to act, there is a school of thought which dictates that when a party exercises an activity that could potentially cause prejudice to another, it must stop damages from occurring, being civilly liable in case it does not<sup>102</sup>.

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<sup>98</sup> MENEZES LEITÃO, Luís (2013). *Direito das obrigações, Volume I - Introdução. Da constituição das obrigações* (p. 255). Almedina, 10<sup>a</sup> edição.

<sup>99</sup> GALVÃO TELLES, Inocência (2014). *Direito das obrigações* (p. 209). Coimbra Editora, 7.<sup>a</sup> edição.

<sup>100</sup> MENEZES LEITÃO, Luís (2013). *Direito das obrigações, Volume I - Introdução. Da constituição das obrigações* (p. 258). Almedina, 10<sup>a</sup> edição.

<sup>101</sup> Id. at p. 259.

<sup>102</sup> Id. at p. 260.

The illegality criteria means that the conduct of the agent needs to violate a law norm. Considering that international law is incorporated by the Portuguese jurisdiction by article 8 of the Portuguese Constitution, a violation of a human rights norm, especially if it is deemed a *jus cogens* norm, fits this requirement.

Fault of the agent is measured in accordance with the standard of conduct imposed by the law or the reasonable care that an agent in its position should have had. The agent is deemed as guilty by the legal system, and its conduct is seen as axiologically reproachable<sup>103</sup>. The law distinguishes those who act with purpose from those who act negligently.

To be considered civilly liable, the damage caused must have resulted in the suppression of an advantage from which the victim benefited. In the Portuguese jurisdiction, the damage may be calculated in accordance with losses, what the victim did not earn in consequence of the harm or damages, *stricto sensu*, the material and the moral damage suffered as result of the harm carried out by the agent<sup>104</sup>.

Finally, there needs to exist a connection between the damage and the conduct of the agent. This causal link is inferred by the *conditio sine qua non* theory. This theory considers that for a damage to be attributable to a certain conduct, it must have occurred in consequence of said conduct, that being equivalent to stating that if not for the conduct, the damage would have not taken place<sup>105</sup>.

For a claim based on violations of human rights to succeed in Civil Law systems (in this case, specifically in Portugal), the victim would have to provide proof of all of the above-mentioned points, which might prove to be difficult, given the fact that typically there exists an asymmetry of means between victims and transnational corporations (perpetrators).

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<sup>103</sup> MENEZES LEITÃO, Luís (2013). *Direito das obrigações, Volume I - Introdução. Da constituição das obrigações* (p. 282). Almedina, 10ª edição.

<sup>104</sup> Id. at p. 300-301.

<sup>105</sup> Id. at p. 312.

### 3.2. Corporate civil liability in Common Law systems

In this section, civil liability of corporations will be analysed in the light of the Common law system, with a particular focus on the legal systems of the US and Canada.

#### 3.2.1. The United States of America

Tort liability is part of American Common Law, and it is distinct from other kinds of civil liability, such as liability for breach of contractual obligations. Tort law is primarily judge-made law, and no American jurisdiction has yet adopted a tort “code”<sup>106</sup>. Torts are also State law as opposed to federal, therefore changing from one State to another<sup>107</sup>.

In Common Law systems, tort liability refers to different civil causes of action where a victim of an injurious action seeks a private remedy for the suffering endured following a damaging action perpetrated by another person or entity. It consists of a private civil lawsuit which is based on a claim brought by the victim upon the injurer. Contrasting with liability arising from breach of contract, where the victim seeks to hold the injurer to a privately agreed promise between them<sup>108</sup>.

Tort actions empower victims of injury to receive justice from those who brought about suffering or harm. This system is based on the idea that individuals should be held responsible for their actions and should be required to pay for any harm caused to others. The main purpose of tort law is to achieve corrective justice by seeking to redress wrongs through the placing of the injured person back in the situation he/she was in before he/she was injured<sup>109</sup>.

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<sup>106</sup> KIONKA, Eduard J. (1993). *Torts* (p. 1). West Publishing Co, 5th edition. Available at: <https://lscontent.westlaw.com/images/content/Torts5th.pdf>.

<sup>107</sup> LEWIS, Kevin M. (2019). *Introduction to Tort Law*. Congressional Research Service. Version 1. Available at: <https://sgp.fas.org/crs/misc/IF11291.pdf>.

<sup>108</sup> SUGARMAN, Stephen D. (N/A). *Torts in law* (p. 2). Available at: [https://www.law.berkeley.edu/files/Sugarman\\_on\\_Torts\\_International\\_Encyclopedia\\_Social\\_and\\_Behavioral\\_Sciences\\_Reformatted.pdf](https://www.law.berkeley.edu/files/Sugarman_on_Torts_International_Encyclopedia_Social_and_Behavioral_Sciences_Reformatted.pdf).

<sup>109</sup> LEWIS, Kevin M. (2019). *Introduction to Tort Law*. Congressional Research Service. Version 1. Available at: <https://sgp.fas.org/crs/misc/IF11291.pdf>.

Each tort entails different criteria. There are three main categories of tort liability: (i) injuries stemming from intentional acts; (ii) injuries stemming from negligent acts; (iii) injuries stemming from dangerous activities or defective consumer products.

To bring a tort claim based on a negligent act, a plaintiff (the injured party) must show that the defendant (the injury-causing party) owed the plaintiff a duty of care, that the defendant breached this duty, and that the plaintiff suffered damages as a result of the breach<sup>110</sup>.

Damages can also be sought based on injuries stemming from intentional acts. The most common torts in this category are (i) battery, which translates into intentionally causing physical harm to another person; (ii) intentional infliction of emotional distress or (iii) false imprisonment. In these allegations, the plaintiff must offer proof of the intent of the defendant to cause the injury.

The tort system allows, in some cases, for individuals to seek compensation for violations of their human rights. For example, suppose an individual's human rights have been violated as a result of the actions of another person or entity. In that case, they may be able to bring a tort claim against the person or entity responsible for the violation. This could include claims for damages for physical or emotional harm and other types of damages such as loss of income or reputation.

However, the existing torts system may not always effectively compensate victims of human rights violations. As an example, proving liability may be difficult to accomplish because, in order to have a successful tort claim, a plaintiff must be able to show that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the plaintiff suffered damages as a result of the breach<sup>111</sup>. This is often difficult to achieve in human rights violation cases, especially if the violations were perpetrated by a transnational corporation.

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<sup>110</sup> Id.

<sup>111</sup> MICHALOWSKI, Sabine (2013). *Corporate Accountability in the context of Transitional Justice* (p. 42-43). Routledge.

Victims can only seek redress when their claims fit into the legal criteria and when it checks all of the above-mentioned requirements<sup>112</sup>. Consequently, and similarly to what was already mentioned in the previous section, the existing torts may not be the most effective manner of obtaining compensation for victims of human rights violations.

### The US Alien Tort Statute

In the United States, there is a federal law, which dates to 1789, called the Alien Tort Statute, 28 U.S.C.S. § 1350. The ATS attributes authority to US federal courts to decide on lawsuits filed by non-US citizens ('aliens') for torts committed in violation of international law. At the time it was enacted, the Statute enabled foreign citizens to seek justice for injuries caused by acts of piracy, which by their nature often occurred outside the territory of the United States.

It is a jurisdictional statute, which implies that the list of justiciable torts is confined to those designated as forbidden norms under international law or treaties ratified by the United States.

While treaties explicitly define duties and constrain actors' behaviour, determining patterns of behaviour that are prohibited under the concept of the law of nations creates additional challenges. Historical sources, such as Blackstone's Treatises, shed light on what this concept meant during the period of the First Judicial Act.

BLACKSTONE defines the law of nations as "a system of rules established by universal consent among the civilized inhabitants of the world; in order to decide all disputes which must frequently occur between two or more independent nations, and the individuals belonging to each<sup>113</sup>". For BLACKSTONE, three specific offences were considered primary violations of the law of nations: violation of safe conduct, interference with ambassadors, and piracy on the high seas<sup>114</sup>.

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<sup>112</sup> Id. at p. 43.

<sup>113</sup> BLACKSTONE as cited in DANFORTH, Matthew E. (2011). *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations* (p. 663), Cornell International Law Journal, Vol. 44.

<sup>114</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 724 (2004).

For more than 200 years, the Statute remained relatively forgotten because, aside from piracy cases, plaintiffs rarely invoked the ATS. This changed in 1980 when the *Filártiga v. Peña-Irala*<sup>115</sup> case took place. The case concerned a torture and killing of a family member of the plaintiffs by a Paraguayan police official. The Court ruled that it had jurisdiction to decide on the claim as acts of torture were universally known to be contrary to customary international law. The court adopted Filártiga's statement regarding the international condemnation of torture, because "for the purposes of civil liability, the torturer has become - like the pirate and slave trader before him - *hostis humani generis*, an enemy of all humankind"<sup>116</sup>.

The Filártiga decision highlighted a debate about the scope of application of the ATS to modern human rights violations. After the decision, the American Congress recognised a need for supplemental human rights protections in this matter, thus enacting the Torture Victims Protection Act (TVPA).

The TVPA created a federal cause of action for torture and extrajudicial killings. It requires exhaustion of remedies in other international forums, and its scope of application is restricted to "individuals" as defendants, whether foreign citizens or nationals. It has served the role of a guiding hand for the interpretation of the ATS, namely in what concerns corporate liability and what violations may be actionable under the ATS. Some Justices have argued that because Congress decided to explicitly allow individuals, and not juridical persons, as defendants under TVPA, corporations cannot be defendants under the ATS either. Given the fact that the TVPA and the ATS are seen as closely interrelated, some have concluded that "Congress created the TVPA to limit the boundaries of causes of action under the ATS"<sup>117</sup>.

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<sup>115</sup> 630 F.2d 876 (2d Cir 1980).

<sup>116</sup> CHRISTENSEN, David D., *Corporate liability for overseas human rights abuses: the Alien Tort Statute after Sosa v. Alvarez-Machain*, 62 Wash. & Lee L. Rev. 1219 (2005), p. 1232. Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol62/iss3/8/>.

<sup>117</sup> MENDOZA, Emily (2019). *Jesner V. Arab Bank, Plc: Corporate Enemies And The Alien Tort Statute* (p. 704). Denver Law Review, Vol 96:3, 699. Available at: [https://irp.cdn-website.com/8c66f319/files/uploaded/Vol96\\_Issue3\\_Mendoza\\_FINAL.pdf](https://irp.cdn-website.com/8c66f319/files/uploaded/Vol96_Issue3_Mendoza_FINAL.pdf).

After *Filártiga*, claims against States and high officials were filed. Progressively, claims against corporations started to take place, the first one being *Doe v. Unocal*<sup>118</sup> in 1997. Even though *Doe v. Unocal* never reached a judicial verdict, as the claim was settled privately, it became a precedent for filing other claims of violations of human rights against transnational corporations in the US<sup>119</sup>.

It was not until 2004 that the Supreme Court felt the need to address the scope of the ATS through the *Sosa v. Alvarez-Machain*<sup>120</sup> case. The case began when Dr Humberto Alvarez-Machain, a Mexican citizen, was abducted by US agents in Mexico and brought to the United States to stand trial for his alleged involvement in the kidnapping and murder of a Drug Enforcement Administration agent. Alvarez-Machain argued that his abduction violated international law.

The Supreme Court eventually determined that the ATS did not offer a legal foundation for the case against the US government personnel who kidnapped him. The court ruled that the ATS can only recognise Common Law claims when the claims satisfy a few requirements. The Justices agreed that the Statute was not supposed to only accept claims for a narrow list of international law offences that already existed at the time of the enactment of the ATS, such as piracy or crimes against ambassadors<sup>121</sup>. On the contrary, infringement of well-established international law norms should be able to thrive. Therefore, the court set limits, known as ‘The Sosa Standard’.

The Supreme Court stated that federal courts should be cautious when determining new causes of action under the ATS. The court emphasised that the ATS was adopted in 1789 to allow federal courts to consider claims by aliens for torts accepted

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<sup>118</sup> 395 F.3d \_\_\_ (9th Cir. 2002).

<sup>119</sup> ROUAS, Virgine (2022). *Achieving Access to Justice in a Business and Human Rights Context: An Assessment of Litigation and Regulatory Responses in European Civil-Law Countries* (p. 84), University of London Press.

<sup>120</sup> 542 U.S. 692 (2004).

<sup>121</sup> MULLIGAN, Stephen P. (2018). *The Alien Tort Statute (ATS): A Primer* (p. 10). Congressional Research Service. Version 4. Available at: <https://crsreports.congress.gov/product/pdf/r/r44947/4>.

under international law at the time. As a result, the Court warned against broadening the scope of the ATS to include claims that are not solidly rooted in international law<sup>122</sup>.

The ‘Sosa Standard’ mandates that a plaintiff seeking remedy under the ATS identifies a particular and actionable infringement of a well-established and internationally accepted rule of international law. According to the Supreme Court, said norm must be sufficiently explicit to characterise the forbidden action and must be widely acknowledged amongst international actors<sup>123</sup>.

The ‘Sosa standard’ provides guidance for federal courts in determining whether a plaintiff could bring a lawsuit under the ATS and sets a high bar for recognising new causes of action, thus significantly limiting its scope of application. Despite establishing limits, the Standard also gave federal courts permission to use the ATS as a means of redress for severe human rights violations - a foundational group of international violations that are universally condemned.

Even though the case involved private persons and not corporations, the Supreme Court established a precedent for the decision of corporate civil liability cases for human rights violations, namely through footnote 20, which reads<sup>124</sup>:

A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued if the defendant is a private actor such as a corporation or individual<sup>125</sup>.

Over the years, decisions from the Supreme Court of the United States have changed the scope of action of the ATS, thus reducing its effectiveness in providing a path of civil compensatory nature to victims of human rights violations by corporations. In accordance, the following section will analyse three well known cases in which the

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<sup>122</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 732 (2004).

<sup>123</sup> *Id* at p. 725.

<sup>124</sup> Brief of International Law Scholars as Amici Curiae in Support of Petitioners, *Jesner v. Arab Bank, PLC* (p. 11). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2994127](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994127).

<sup>125</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 732 (2004).

main issue was corporate civil liability under the ATS, namely, *Kiobel v. Royal Dutch Petroleum Co.*; *Jesner v. Arab Bank, PLC*; and *Nestlé, USA, inc v. Doe*.

### 3.2.1.2. Case law analysis

#### A) *Kiobel v. Royal Dutch Petroleum Co.*

The *Kiobel v. Royal Dutch Petroleum Co.* case (from now on mentioned only as the *Kiobel* case) was filed in 2002 by twelve Nigerian nationals who had been granted political asylum in the United States. The lead plaintiff was Esther Kiobel, the wife of the late Dr Barinem Kiobel, one of the Ogoni Nine, a group of Nigerian environmental activists known as the “Movement for Survival of Ogoni People”. This group protested the impact of Royal Dutch Petroleum’s oil operations on the Ogoni people of the Niger Delta region of South Nigeria.

The suit was brought against Royal Dutch Petroleum Co. - a Dutch oil company - Shell Transport and Trading Company PLC, - its British subsidiary - and Shell Petroleum Development Company of Nigeria, LTD - its wholly owned Nigerian subsidiary (from now on collectively referred to only as ‘Shell’).

The plaintiffs alleged that, through their Nigerian subsidiary, the companies had aided and abetted human rights abuses committed by the Nigerian military in the 1990s. The Ogoni Nine were detained by the Nigerian military on false charges, held *incommunicado*, tortured, and hanged following a sham trial in November 1995 in an attempt to suppress environmental protests against Shell’s oil operations. The defendants’ Nigerian subsidiary was specifically accused of providing transport to Nigerian forces, allowing its property to be used as a base for attacks on Ogoni villages, providing food to soldiers involved in these attacks, and paying compensation to those soldiers<sup>126</sup>.

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<sup>126</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F3d 13-14, (2nd Cir. 2010). Available at: [https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv\\_opn-2011-03-27.pdf?ts=1410917507](https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv_opn-2011-03-27.pdf?ts=1410917507).

■ District Court

The case was first decided in the District Court of New York<sup>127</sup> in September of 2006, where the lower court judge, Kimba M. Wood, ruled that Shell could be held liable for violations of international law, including crimes against humanity, torture, and arbitrary arrest and detention. The Court, however, dismissed the plaintiff's claims on Counts of aiding and abetting extrajudicial killings, property destruction, forced exile, and violations of the rights to life, liberty, security, and association, based on the Standard defined in the *Sosa v. Alvarez-Machain* case.

■ Court of Appeals

Both defendants and plaintiffs appealed the decision of the District Court to the US Court of Appeals for the Second Circuit. In September 2010, the majority of the judges of the appeal panel, composed of Judges Dennis Jacobs and José Cabranes, decided that the claim would be dismissed for lack of subject matter jurisdiction.

The Judges reasoned that a custom of holding corporations civilly liable does not exist in international law. Accordingly, corporations have never been subject to human rights liability under CIL, not even in the Nuremberg Tribunals, described by the Judges as the “single most important source of modern customary international law concerning liability for violations of fundamental human rights<sup>128</sup>”, which only recognised the liability of natural persons.

The aspects defined in the *Sosa v. Alvarez-Machain* case were helpful in showing the reasoning behind the majority's judgement. Under their interpretation of *Sosa*, the norm of international law must extend liability to the type of perpetrator the plaintiff seeks to sue. Therefore, the actor not only has to be able to violate a norm of conduct of

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<sup>127</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 456 F2d 457 (United States District Court, S.D. New York, 2006). Available at: [https://scholar.google.com/scholar\\_case?q=kiobel&hl=en&as\\_sdt=2006&case=9750031164443439262&scilh=0](https://scholar.google.com/scholar_case?q=kiobel&hl=en&as_sdt=2006&case=9750031164443439262&scilh=0).

<sup>128</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F3d 27, (2nd Cir. 2010). Available at: [https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv\\_opn-2011-03-27.pdf?ts=1410917507](https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv_opn-2011-03-27.pdf?ts=1410917507).

customary international law, but there also needs to be a custom for holding a certain type of actor liable for violations of the particular norm of conduct at issue.

The Second Circuit's majority decision alleged that:

No corporation has ever been subject to any form of liability (whether civil, criminal or otherwise) under the customary international law of human rights. Rather, sources of customary international law have, on several occasions, explicitly rejected the idea of corporate liability. Thus, corporate liability has not attained a discernible, much less universal, acceptance among nations of the world in their relations *inter se*, and it cannot not, as a result, form the basis of a suit under the ATS<sup>129</sup>.

Judge Pierre Leval issued a concurring opinion on the subject by arguing that the fact that international tribunals have not recognised corporate criminal liability does not mean that corporations fall outside of the scope of international law, being exempt from providing civil reparation to victims. Although Judge Leval agreed that the claim should be dismissed, he disagreed with the reasoning behind the decision.

In his opinion, the claim should have been dismissed on the grounds of the fact that the liability arising from aiding and abetting human rights violations could only be awarded if/when the “aider and abettor acts with *a purpose* to bring about the abuse of human rights<sup>130</sup>”, which the plaintiffs failed to state. The concrete facts showing that Shell intentionally contributed to the violations of the plaintiff's human rights were absent from the claim; thus, redress was not possible<sup>131</sup>.

The Kiobel decision in the Second Circuit created a conflict in the Circuits over whether ATS lawsuits could be brought against corporations or not. Several Circuit

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<sup>129</sup> Id. at p. 48.

<sup>130</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 9, (2nd Cir. 2010). Concurring Opinion of Circuit Judge Pierre Leval. Available at: [https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv\\_opn-2011-03-27.pdf?ts=1410917507](https://cases.justia.com/federal/appellate-courts/ca2/06-4800/06-4800-cv_opn-2011-03-27.pdf?ts=1410917507).

<sup>131</sup> Id.

Courts expressly disagreed with the Second Circuit's decision, which deepened the conflict.

Contrary to what had been a consensus in federal courts, the Second Circuit averted that corporations cannot be sued under the ATS because they are not recognised under customary international law as subjects. At the same time, the Ninth Circuit reaffirmed that corporations can indeed be sued when they violate an international law norm that applies to all actors<sup>132</sup>. The Supreme Court decided to review the case.

■ The Supreme Court

The Kiobel case was then discussed in the Supreme Court on the narrow question of whether a corporation may be sued under the ATS for violating international law.

However, in February 2012, during oral arguments before the Court, Shell's team of lawyers took the opportunity to challenge the geographical scope of the ATS. Afterwards, several Justices had questions about a separate issue of corporate liability: “whether and under what circumstances the Alien Tort Statute allows courts to recognise a cause of action for violations of the law of nations occurring within the territory of a sovereign country other than the United States”. The court then called for briefing and reargument on the novel issue of the extraterritorial application of the ATS, namely when human rights abuses are committed in the territory of a foreign country.

The Supreme Court affirmed the judgement of the Court of Appeals for the Second Circuit when it decided that considering all relevant conduct took place outside of the US territory, it implied an extraterritorial application of the ATS, which is not permitted<sup>133</sup>.

Justice Breyer authored a concurring opinion on behalf of Justices Ginsburg, Sotomayor and Kagan. There was a disagreement concerning the presumption of

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<sup>132</sup> BAUMANN-PAULY, D., & NOLAN, J. (2015). *Business and Human Rights: From principles to practice* (p. 249). Routledge.

<sup>133</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 US 14 (2013). Available at: <https://supreme.justia.com/cases/federal/us/569/10-1491/case.pdf>.

extraterritoriality established by the majority's ruling. Justice Breyer clarified the instances in which the ATS would apply to conduct occurring outside the US:

(1) The alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbour (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

In their opinion, the ATS is, in its essence, a Statute meant to apply to violations that occurred outside American soil, to not let the US become a safe harbour for human rights violators. Therefore, the 'touch and concern' test would be most appropriate to determine whether an extraterritorial claim should succeed or not.

■ Corporate civil liability under the ATS after the Kiobel ruling

In the end, the Court did not address the very important issue of whether corporations could be sued under the ATS. The Kiobel decision resulted in a significant reduction in international human rights litigation in US courts. Plaintiffs can wave off this presumption by demonstrating that the violations that occurred abroad were sufficiently linked to the US. This possibility is left open by the ambiguous paragraph at the end of the majority opinion issued by Chief Justice Roberts:

On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, *they must do so with sufficient force to displace the presumption against extraterritorial application*<sup>134</sup>.

The defendants in Kiobel were not held liable for any tort claims for aiding and abetting human rights violations. The majority's rule adversely affects the efforts of international law to protect human rights because it indirectly allows for commercial

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<sup>134</sup> Kiobel v. Royal Dutch Petroleum Co., 569 US 14 (2013). Available at: <https://supreme.justia.com/cases/federal/us/569/10-1491/case.pdf>.

exploitation of human rights by powerful corporations<sup>135</sup>. With this ruling the US ‘agreed’ to be a safe haven for corporations that ultimately make a profit out of human rights abuses.

B) Jesner v. Arab Bank, PLC

Joseph Jesner and 6.000 other petitioners were harmed or killed by terrorists during armed attacks in Israel, the West Bank, and the Gaza Strip between January 1995 and July 2005. The survivors and the families of those who died in the attacks accused Arab Bank, PLC, a bank based in Jordan, of knowingly and intentionally supporting the terrorist organisations that were involved in the attacks on Israeli people in that territory, which had the objective of eradicating them from the Middle East. Arab Bank allegedly facilitated the transactions that were able to fund terrorist attacks via enabling currency clearances and bank transactions. The funds were electronically approved by Arab Banks, PLC’s New York City offices.

■ District Court

Given the connection to the United States, five separate lawsuits were filed against Arab Bank in the New York federal court under, *inter alia*, the Alien Tort Statute - namely, *Jesner v. Arab Bank, PLC*; *Almog v. Arab Bank, PLC*; *Afriat-Kurtzer v. Arab Bank, PLC, No.*; *Lev v. Arab Bank, PLC*; and *Agurenko v. Arab Bank, PLC*<sup>136</sup>. The plaintiffs accused Arab Bank of having directly and indirectly been a perpetrator of violations of the law of nations.

Arab Bank, PLC argued towards the dismissal of the claim based on the Second Circuit's *Kiobel* decision, which asserted that the Alien Tort Statute does not allow claims against foreign corporations. The District Court agreed with the defendants and dismissed the case.

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<sup>135</sup> DANFORTH, Matthew E. (2011). *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations* (p. 661), *Cornell International Law Journal*, Vol. 44.

<sup>136</sup> *Jesner v. Arab Bank, PLC*. (2016). *Petition for a Writ of Certiorari*. Available at: <https://www.scotusblog.com/wp-content/uploads/2016/10/16-499-cert-petition.pdf>.

■ Court of Appeals

On appeal<sup>137</sup>, the Court of Appeals for the Second Circuit affirmed the District Court's decision based on the court's precedent created by the Kiobel case, where it was ruled that corporations could not be proper defendants under the ATS<sup>138</sup>.

A Second Circuit's judgement can only be overruled "by the Court *en banc* or by the Supreme Court<sup>139</sup>". The Supreme Court ruling on Kiobel did not answer the question of corporate liability, which was originally the issue being discussed, meaning that it was still valid and binding.

■ The Supreme Court

Finally, the plaintiffs (of the five separate lawsuits against Ara bank, PLC) petitioned for a *writ of certiorari*, which was granted by the Supreme Court in October 2016, to answer whether the ATS allows suits against foreign corporations.

In *Jesner v. Arab Bank, PLC*<sup>140</sup>, the Supreme Court affirmed the appellate court's decision and ruled that the ATS does not permit lawsuits against foreign corporations. The majority, composed of five Justices, issued the decision of the court, which was authored by Justice Kennedy.

The Court stated that the original purpose of the ATS was to provide foreign nationals with a venue in federal courts to file actions about violations of international law and to prevent potential issues of international relations. It claimed that allowing this lawsuit to proceed would have the opposite effect, negatively affecting diplomatic relations<sup>141</sup> with Jordan. The majority agreed that if Congress wished to authorise ATS

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<sup>137</sup> *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018). Available at: <https://www.govinfo.gov/content/pkg/USCOURTS-ca2-13-03605/pdf/USCOURTS-ca2-13-03605-0.pdf>.

<sup>138</sup> *Id.* at p. 6.

<sup>139</sup> *Id.*

<sup>140</sup> *Jesner v. Arab Bank, PLC*, 584 US \_\_\_\_ (2018). Available at: [https://www.supremecourt.gov/opinions/17pdf/16-499\\_1a7d.pdf](https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf).

<sup>141</sup> *Id.* at p. 5.

lawsuits against foreign corporations, it should explicitly legislate accordingly, given that it holds that power.

Additionally, in the opinion of Justice Kennedy, which did not reach a majority, as it only had the agreement of Justice Roberts and Justice Thomas, the inexistence of a custom of holding corporations civilly liable for human rights violations arose again, given that it did not pass the *Sosa* test of being a specific, universal, and obligatory norm of CIL.

A dissenting opinion was issued by the remaining four Justices, authored by Justice Sotomayor. Justice Sotomayor argued that foreign corporations could be sued under the ATS, given its history, text, and purpose, and remarked that the decision exonerates corporations of responsibility for serious human rights violations<sup>142</sup>.

The plurality and the dissent disagreed on how to frame the question at issue. While the plurality insisted on the absence of an international customary norm of corporate liability, Justice Sotomayor's dissent presented a different articulation of the problem, according to which international law determines 'what substantive conduct violates the law' but leaves the concrete enforcement mechanisms for the States to decide<sup>143</sup>.

■ Corporate civil liability under the ATS after the *Jesner* ruling:

In the roots of this decision was the respect of separation of powers, but notoriously a diplomatic/political affairs issue. Future suits under the ATS had to start complying with multiple requirements, one of them being the fact that the defendants must directly implicate a national US corporation, which from the outset will empty the useful effect of this statute for liability for violations of human rights norms. Corporations tend to set up subsidiaries in other countries precisely for the purpose of avoiding the strict regulations (and general enforcement of laws) of their home countries.

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<sup>142</sup> Id. at p. 1 (Dissenting opinion of Justice Sotomayor).

<sup>143</sup> Id. at p. 32.

Additionally, plaintiffs will have to demonstrate that the defendant aided and abetted the human rights violations, as well as satisfy the “touch and concern” test created and imposed by the Kiobel ruling.

In the end, the Jesner Court did not directly solve the question of whether legal entities could be held accountable for violations of international norms of human rights. Therefore, it implicitly left open the question of domestic corporate liability. Nonetheless, it imposed great difficulty and limitations to the applicability of the ATS for human rights violations. As the options for foreigners to sue under the ATS became scarcer, the business and human rights movement must explore different paths to solve the question of impunity of corporations<sup>144</sup>.

In its *amici curiae* brief for the Jesner case, WILLIAM S. DODGE reinforced that the question at issue should not be whether corporate civil liability exists under CIL but if the norms at stake can only be infringed by natural persons, or if legal persons can also violate them<sup>145</sup>. Based on the various scope and effects of specific human rights norms, different norms may apply to some actors and not to others<sup>146</sup>.

C) Nestlé, USA, inc v. Doe

The plaintiffs of this case are six individuals from Mali, identified as John Doe I through VI, who were trafficked into Côte d’Ivoire as children. Under threat of violence, they worked for up to fourteen hours every day without getting any pay and were kept in harsh living conditions at the cocoa plantations. The defendants are US companies that partnered with cocoa plantations in Côte d’Ivoire. Even though the defendants did not directly own the plantations, they bought cocoa from them while also providing “tools, equipment, and technical support to farmers, including training in farming techniques and

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<sup>144</sup> BERGKAMP, P. A. (2017). *Models of Corporate Supply Chain Liability*. Jura Falconis, 55(2), 200. Available at: <https://www.law.kuleuven.be/apps/jura/public/art/55n2/bergkampsupplychainliability.pdf>.

<sup>145</sup> Brief of International Law Scholars as Amici Curiae in Support of Petitioners, *Jesner v. Arab Bank, PLC* (p. 11). Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2994127](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994127).

<sup>146</sup> *Id.* at p. 12.

farm maintenance<sup>147</sup>” and visiting their supplier farms several times yearly. In light of the previous considerations, plaintiffs accused the defendants of aiding and abetting their slavery by supporting the farms financially while knowing or, at the very least, suspecting that the plantations constituted a site of violations of internationally recognised norms, namely the prohibition of using child labour and the prohibition of slavery.

■ District Court

The US District Court for the Central District of California<sup>148</sup> dismissed the case as it was found that corporations, being juridical entities, cannot be sued under the ATS and that the plaintiffs failed to allege the elements of an aiding and abetting claim.

■ Court of Appeals

The US Court of Appeals for the Ninth Circuit<sup>149</sup> reversed the decision. Judge Dorothy Wright Nelson held that the defendants could seek corporate liability for aiding and abetting slavery since norms against slavery are "universal and absolute", thus providing a basis for an ATS claim against corporations.

As remarked in the judgement, even though the harm was conducted overseas by a foreign company in the defendants’ supply chain, it was proven that they took “major operational decisions” within US soil. The defendants had exclusive buyer-seller relationships, thus exercising effective control over the production of cocoa.

● The Supreme Court

In 2020, a *writ of certiorari* was granted by the Supreme Court to answer *if mere corporate presence suffices to establish the domestic application of the ATS*. In an almost unanimous opinion of 8–1, authored by Justice Thomas, the judgement of the Ninth

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<sup>147</sup> Doe v Nestle USA, 766 F3d 5, (9th Cir. 2015). Available at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/23/17-55435.pdf>.

<sup>148</sup> Doe v Nestle USA, 748 F2d \_\_\_ (United States District Court, C.D. California, 2010). Available at: <https://www.leagle.com/decision/inadvfdco110610000442>.

<sup>149</sup> Doe v Nestle USA, 766 F3d \_\_\_, (9th Cir. 2015). Available at: <https://cdn.ca9.uscourts.gov/datastore/opinions/2018/10/23/17-55435.pdf>.

circuit was reversed by ruling that respondents improperly sought extraterritorial application of the ATS.

The Court deemed insufficient the allegations of the plaintiffs of operational decisions by the defendants within national territory, as they were considered “general corporate activity” of the company, thus not establishing a sufficient extraterritorial connection. Therefore, all relevant conduct was considered to have taken place in Côte d’Ivoire, rendering the application of the ATS impossible<sup>150</sup>.

Justice Thomas, with the agreement of Justices Gorsuch and Kavanaugh, in part III of their opinion, proposed that the scope of the ATS should be limited to the three original paradigms that the First Congress had in mind when the ATS was enacted.

Even though the question of corporate liability was not directly addressed in the Court’s opinion, five of the nine Justices perceived no justifiable motive for the distinction between corporations and natural persons for the application of the ATS. Justice Gorsuch gave a historical example:

Founding-era cases involving piracy seem to confirm the point too. Injured plaintiffs routinely brought *in rem* proceedings against ships involved in piracy regardless of the owner’s personal involvement or liability<sup>151</sup>.

Justice Sotomayor, along with Justices Breyer and Kagan, agreed with Justice Thomas about the argument of extraterritoriality. However, consistently with opinions expressed in past judgements, she disagreed about limiting the scope of the ATS and insisted on the bindingness of the *Sosa* decision.

In his dissenting opinion, Justice Alito expressed his agreement on corporate liability by stating that “corporate status does not justify special immunity<sup>152</sup>”.

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<sup>150</sup> Nestle USA, inc v. Doe, 593 US \_\_\_\_ (2021). Available at: [https://www.supremecourt.gov/opinions/20pdf/19-416\\_i4dj.pdf](https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf).

<sup>151</sup> Id. at p. 4 (Concurring opinion of Justice Gorsuch).

<sup>152</sup> Id. at p. 1 (Dissenting opinion of Justice Alito).

■ Corporate liability after the Nestle case

The aforementioned cases highlight the limitations of the ATS in holding transnational corporations accountable for human rights abuses committed in their supply chains. However, progress was made since the *Jesner* case because none of the opinions discussed the question of an international custom of corporate civil liability.

The damage of the Nestle decision was contained due to the opinion of Justice Sotomayor because without the precedent of the *Sosa* decision, the scope of the ATS would be even more limited, and in that case, it would have become pointless and inadequate for the challenges of the world nowadays.

The Nestle case established a precedent under which decision making in the US by a corporation is not sufficient for the waiver of the extraterritorial presumption. This is going to further hinder the efforts of human rights victims to hold corporations liable under the ATS because, in most cases, the only acts that take place in the US are decision making acts; all further acts are carried out abroad.

After this Supreme Court decision, the ATS did become ineffective in ensuring corporate liability for human rights violations.

### **3.2.2. Canada**

A) Araya v. Nevsun

*Araya v. Nevsun* was the first case of corporate civil liability in Canadian common law jurisprudence history. Nevsun Resources Ltd. is a Canadian mining company headquartered in Vancouver that entered into a joint venture with the State of Eritrea in October of 2007. The aim of the joint venture was to develop the Bisha gold-copper-zinc mine in the country. The plaintiffs were Eritrean nationals forced to work at the Bisha mine from September 2008 on. In 2014, three Eritreans brought a class action, on behalf of all the victims, for damages against Nevsun under customary international law.

Nevsun owns 60% of the company that operated the Bisha mine - the Bisha Mining Share Company - while the other 40% belonged to the Eritrean National Mining

Corporation, a company controlled by the Eritrean government. The Bisha Mining Share Company hired a subcontractor to build the mine, which then engaged other subcontractors that perpetrated the human rights violations.

The plaintiffs accused Nevsun of aiding and abetting their slavery, torture and forced labour in the construction of the mine. They alleged they were conscripted to the Eritrean military's national service program and held captive forcefully and indefinitely, contrary to human rights prohibitions. The victims claimed damages for forced labour, slavery, cruel, inhuman, or degrading treatment, and crimes against humanity, which are norms that have acquired the status of *jus cogens* under customary international law.

■ Court of first instance

Nevsun filed a motion to strike<sup>153</sup> the pleadings where it challenged, *inter alia*, the CIL application to the case. Firstly, based on whether CIL is part of the Common Law of Canada and British Columbia. Second, if the first question was deemed to be affirmative: to what extent CIL can form part of the basis for the plaintiffs' claims against Nevsun, including the right to private law remedies. And lastly, whether Nevsun's corporate status resulted in immunity to the CIL pleadings<sup>154</sup>.

The defendants argued that CIL does not apply to corporations because corporations are not considered subjects of international law; thus, they cannot bear any international legal obligations. They contended that no treaty imposed obligations on domestic corporations in Canada and that international obligations are not actionable against Nevsun under Canadian law because domestic law does not automatically supply a private law remedy for the violation of norms of CIL. Finally, it was also proclaimed that the recognition of new nominate torts, as petitioned by the plaintiffs, were not

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<sup>153</sup> A motion to strike the pleadings consist of a prejudicial judgement, where one party believes the opposing party's arguments lack legal or factual grounds. It must be 'plain and obvious' for the judges that the opposing side's allegations are deficient or disclose no reasonable cause of action.

<sup>154</sup> Araya v. Nevsun Resources Ltd., 2016 BCSC 1856. Available at: <https://www.canlii.org/en/bc/bcsc/doc/2016/2016bcsc1856/2016bcsc1856.html>.

satisfied. The defendants concluded that there was no reasonable prospect at trial for the claim to be successful<sup>155</sup>.

The plaintiffs advocated that corporations do not enjoy a blanket immunity under customary international law, as there had been judicial recognition that corporations may be subject to rights and obligations under international law while giving the ATS cases as examples. They also stated that Nevsun must have established an affirmative norm of corporate immunity, which they did not assert in their allegations. Finally, the plaintiffs alleged that the conditions for recognizing new nominate international torts were met<sup>156</sup>.

To reply to these allegations, the Court declared that CIL is automatically incorporated in the Canadian legal system by the doctrine of adoption. In what concerned the remaining arguments, the court found both parties' allegations valid, but considering that it was a motion to strike, it argued that the case should proceed to trial to decide the substantial legal matters in question and debate the factual allegations, rendering it neither plain, nor obvious that the claims were bound to fail.

■ Court of Appeals<sup>157</sup>

Nevsun challenged the decision on the motion to strike in the Court of Appeal for British Columbia. The defendant insisted on the lack of subjectivity, proclaiming that corporations face legal obligations only within the domestic law of the place of incorporation and that international law is conceptually distinct from the legal systems of states<sup>158</sup>. Considering the lack of human rights obligations for corporations under Canadian law, it argued that it was not possible to be subject to civil liability.

Although it was recognized that the plaintiffs *face significant legal obstacles*, the Court did not consider that the claims were “bound to fail”. The fact that other jurisdictions had previously accepted accountability of corporate actors for violations of

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<sup>155</sup> Id. at § 443.

<sup>156</sup> Id. at § 444.

<sup>157</sup> Nevsun Resources Ltd. v. Araya, British Columbia Court of Appeal, 2017 BCCA 401. Available at: <https://www.canlii.org/en/bc/bcca/doc/2017/2017bcc401/2017bcc401.html>.

<sup>158</sup> Id. at § 181.

*jus cogens* norms weighed heavily on the decision. The appeal was not successful, and the claims, including the ones based on CIL, could proceed to trial.

■ The Supreme Court<sup>159</sup>

Nevsun challenged the decision of the Court of Appeals once more on grounds of the CIL application to the case, namely on *whether corporations could be held responsible for violations of International Humanitarian Law*.

The Supreme Court of Canada decided that there was not a need for a legislative implementation of CIL for it to be binding in Canada because CIL is automatically incorporated in the Canadian legal system under the doctrine of adoption. Since Canada has a long-standing practice of automatically incorporating customary international law into its domestic law, the majority of the judges reasoned that it was not “plain and obvious” that Canadian law could not recognize a direct remedy for the breach of customary international law norms.

The striking of the pleadings failed in all its extent as it was ultimately dismissed by the majority of the Justices at the Supreme Court, based on the argument that it was not “plain and obvious” that a corporation should enjoy a blanket exclusion from liability for violations of “universal norms” of international law.

The Canadian Supreme Court upheld the lower court’s decisions in favour of the claimants, and the matter could finally proceed to trial.

■ Corporate liability after the Nevsun case

Given the fact that the present case was developed under a motion to strike the pleadings, the Canadian courts paved the way for, at least, a possibility of redressing victims of transnational human rights violations. The Justices expressed their expansive approach to the liability of enterprises for violations of human rights, even including those that were committed abroad.

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<sup>159</sup> Nevsun Resources Ltd. v. Araya, 2020 SCC 5, [2020] 1 S.C.R. 166. Available at: <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18169/index.do>.

In *Nevsun*, the question of corporate liability revolved around whether the adopted international law norm could be applied to a non-state actor, leaving the concrete form of redress to domestic law. Such line of thinking could potentially imply that in the trial stage, the party invoking customary international law would not have to prove the existence of a custom in this regard.

In the end, the case did not undergo trial because the parties settled the lawsuit for an undisclosed amount. However, it was a good opportunity for Canadian Courts to take a stand in human rights litigation.

## Conclusion

Transnational corporations and globalisation have contributed to the transformation of economic development, industrialisation and labour relations worldwide. These types of corporations are characterised for being entities that operate all over the world, with a considerable amount of power and wealth and, therefore influence.

On the negative side, their power and influence have contributed to, directly and indirectly, some of the most horrific human rights abuses, especially in underdeveloped nations and the Global South. For many years, they enjoyed a 'blanket of impunity' from punishment due to the gaps of liability under international law.

However, governmental organisations started to take notice of publicly known occurrences and began to implement measures through soft law mechanisms to reduce their impact on human rights abuses. When cases of corporate liability started to emerge, many were the questions on what grounds should corporations be punished.

Transnational corporations are juridical entities that rely on individuals in order to carry on their business and bring about profits. The individuals, whether employees or occupants of important decision-making positions, are the ones who determine the acts of the corporation, and even though they can be effectively punished by criminal law, it was the corporation that benefited from the violations.

In this regard, the harm and violations perpetrated are, at times, so wicked and grave that the victims are left with great prejudice. Thus, the effectiveness of criminal punishment upon the corporation's employees is doubtful because it was the corporation, not its employees, that earned the profits from the human rights abuses carried out<sup>160</sup>.

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<sup>160</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F3d 38 (2nd Cir. 2010).

In the end, corporate criminal liability was thought to be the path to take, but it has also been proven to be insufficient to address human rights violations because it cannot, by its nature, effectively punish abstract entities such as corporations.

Some were against corporate civil liability as it was perceived as a way to monetise violations of human rights. However, it is deemed as only apparent the incompatibility of corporate civil liability with the principles and objectives of the law of nations.

Considering that corporate criminal liability is incapable of functionally compensating the victims who have seen their human rights infringed, corporate civil liability must act as the only proper form of accountability for corporations (not considering the additional potential criminal liability of individuals that acted on its behalf) for violation of the law of nations. Hence, corporate civil liability is the most adequate path to redress victims of corporate human rights abuses.

Corporate liability was also thought to be incompatible with CIL because corporations are not considered subjects of international law. However, subjectivity is not needed for them to have some legal rights and obligations to the extent that they, as non-state actors, are able to enjoy those rights and bear those obligations.

Additionally, there are human rights norms that have acquired the status of *jus cogens*. Thus, being part of a strict group of norms composed by the most fundamentally important international rules, rendering them maximum authority. These norms are binding for everyone, whether natural or juridical entities.

Notwithstanding, the evidence gathered was not consistent nor enough to support the affirmation that there exists an international custom of holding corporations civilly liable for human rights violations. Such a finding does not mean a custom cannot form over the next few years. Modern transnational corporations have existed for only approximately 60 years, and for that reason, it would be wrong to say that enough time has gone by for a custom of corporate civil liability for human rights violations to form.

Despite this, a specific norm of CIL that prescribes that a legal entity may be civilly liable for violations of human rights is unnecessary. The specific human rights norms have different contents. As WILLIAM DODGE advocates: “the question of corporate liability under customary international law does not depend on finding a norm of customary international law in the abstract, but rather on whether the particular norms at issue reach corporations<sup>161</sup>”. Therefore, one needs only to decipher if a certain subject (whether a State or a non-state actor) may infringe the norm. And if so, it can be held civilly liable. For example, “[t]orture by a corporation is still torture<sup>162</sup>”.

The present dissertation has thus led to the inevitable conclusion that perhaps searching for a custom of holding corporations liable is not the right path, to begin with. Perhaps the question should have been, instead, what human rights norms can be violated by a juridical entity. If a juridical entity can infringe said norms, then it can also be sued to enforce monetary compensation for the victims in domestic courts.

Although there is not yet an international competent court with the power to specifically address corporate civil liability for human rights violations, domestic courts are the ones competent to apply internationally recognized customary norms in order to make sure that their national corporations are penalised accordingly. Consequently, if an international norm is deemed to be applicable to conduct by a certain type of subject, it is up to each state to “determine for itself whether and how that norm should be enforced in its domestic law<sup>163</sup>” as the burden of protection of human rights falls upon the States.

In accordance with the foregoing, corporations can effectively be duty bearers of CIL obligations, and in the breach of those obligations, measures shall be taken in order to punish their behaviour.

The American and Canadian jurisprudence hereby analysed served the purpose of showcasing how domestic courts are enforcing violations of the law of nations. If, during

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<sup>161</sup> DODGE, William S. (2012). *Corporate Liability Under Customary International Law*, 43 Geo. J. Int'l L. 1050. Available at: [http://repository.uchastings.edu/faculty\\_scholarship/122](http://repository.uchastings.edu/faculty_scholarship/122).

<sup>162</sup> Id. at p. 1051.

<sup>163</sup> Id.

the 90s, the ATS appeared to be a potential basis for human rights lawsuits, especially against corporations, the same cannot be affirmed as of today.

The US Supreme Court has consistently reduced the extent and scope of the ATS, relying primarily on the presumption, which can be refuted by the unambiguous wording of the legislation, that US federal laws are not intended to govern conduct that was carried out overseas.

The different case law studied displayed the effects of the overly conservative approach of American courts to the application of the ATS. In *Kiobel v. Royal Dutch Petroleum Co.*, the court held that the ATS does not confer jurisdiction over violations that happened outside of the territory of the United States. In *Jesner v. Arab Bank, PLC*, the ATS was an object of further limitation when it was ruled that foreign corporations cannot be defendants under the Statute. Then, in *Nestlé USA, Inc. v. Doe*, the Court dictated that the violations were entirely committed abroad, even when faced with domestic corporations, as it deemed general corporate activity insufficiently connected to the US. In the absence of a legislative reform, the ATS will not be able to serve as vehicle for addressing international human-rights breaches by corporations<sup>164</sup>.

After all the mentioned court decisions, the Supreme Court left unresolved the question of corporate liability, namely if defendants of violations of human rights under international law could be corporations. Despite this, it was apparent in the concurring opinions issued in the Nestle case that corporate liability was accepted amongst the majority of the Justices.

The decision of the Canadian Supreme on the motion to strike the pleadings in *Nevsun v. Araya* reflects a pioneer perspective on corporate liability under CIL, under which the Canadian legal system incorporated international law automatically. This implied that obligations to respecting human rights were binding to all persons, natural

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<sup>164</sup> RYERSON, C. et al. (2022). *Seeking Justice: The State of Transnational Corporate Accountability* (p. 805), The Yale Law Journal Forum. Available at: [https://www.yalelawjournal.org/pdf/F7.CALFinalDraftWEB\\_puwuyish.pdf](https://www.yalelawjournal.org/pdf/F7.CALFinalDraftWEB_puwuyish.pdf).

and juridical alike, and in case of a breach of those obligations, there was a possibility for the emergence of a private cause of action to redress the victims.

In general, while US Courts were more cautious in determining corporate liability for human rights abuses, while Canadian courts were more open to accept this form of liability. Moreover, the fact that, in *Nevsun*, the violations occurred overseas did not prevent the plaintiffs from pursuing redress, as opposed to the US cases, where a presumption of extraterritoriality was established, whereby if all the conduct occurred outside the United States, even in case of a domestic company, the defendant could not be liable.

Nonetheless, the law is ever-changing; it is dynamic and must be able to adapt to the world's reality. Some actions are so universally immoral that no relevance should be given as to what kind of person perpetrated the harmful conduct, natural or juridical. Such heinous acts should not require a precedent to be punished.

The nature of human rights, which aims to protect the inherent dignity of each individual, and the legal personality of transnational companies do not pose any constraints to liability. In this sense, victims do not distinguish whether the harm has been caused by a State or non-State actor and thus must be repaired irrespectively of this. As Nicolás Carrillo-Santarelli mentions: “Theories must be critically evaluated instead of blindly accepted<sup>165</sup>”. Law is instrumental and must be used for the protection of human rights, not as a mechanism for the protection of juridical entities<sup>166</sup>.

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<sup>165</sup> CARRILLO-SANTARELLI, Nicolás (2017). *Direct International Human Rights Obligations of Non-state Actors: a legal and ethical necessity* (p. 399). Wolf Publishers.

<sup>166</sup> *Id.* at p. 400.

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