IS A NORM OF LIABILITY REQUIRED FOR A MULTINATIONAL CORPORATION TO BE LIABLE UNDER CUSTOMARY INTERNATIONAL LAW?

An Analysis in Light of *Nevsun Resources Ltd. v Araya*.

REBECCA MEIKLE

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Introduction

Due to globalisation, a multinational corporation (MNC) can maintain operations in a multitude of countries around the world. The economies of developing countries have become especially attractive for MNCs searching for resources, cheap workforce and new market niches with a view to reducing costs.[1] Thus, many MNCs are setting up operations in developing countries. While MNCs can provide various benefits to developing countries such as employment and an inflow of capital, they are also capable of violating a *jus cogens* norm when operating within the territory of these countries. A *jus cogens* norm is a fundamental principle of international law that is accepted and recognised by the international community as a whole, from which no derogation is permitted.[2] Examples include genocide, slavery and crimes against humanity.[3]

While it is accepted as a matter of fact that an MNC is capable of committing a *jus cogens* violation, it is unclear whether this act gives rise to liability under Customary International Law (CIL). Liability of MNCs under CIL is controversial because it is unclear *how* liability under CIL arises. In particular, it is unclear whether liability under CIL arises due to a 'norm of liability'. A norm of liability refers to a CIL norm whereby state practice and opinio juris establish a particular entity as liable under CIL. For example, a norm of *corporate* liability would arise if there was state practice and opinio juris establishing a corporation as bound by CIL.

Nevsun Resources Ltd. v Araya is a recent landmark decision by the Supreme Court of Canada that emphasises this point.[4] Nevsun is a Canadian corporation that owns and operates the Bisha mine in Eritrea. The claimants, three workers at the Bisha mine, brought proceedings against Nevsun in the Canadian Court for breach of *jus cogens* prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity.[5] In response, Nevsun brought a motion to strike out this claim based on the *British Columbia Supreme Court*

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[1] Robert Reich *The World of Nations* (Oxford University Press, Oxford, 1983).

[2] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 53.

[3] Legal Information Institute "Jus Cogens" Cornell Law School <https://www.law.cornell.edu/wex/jus_cogens>

[4] *Nevsun Resources Ltd. v Araya* 2020 SCC 5.

[5] At [4].

Civil Rules which permits pleadings to be struck out if they disclose no reasonable chance of success.[6] For this cause of action to disclose a reasonable chance of success, an MNC would need to be liable under CIL directly.[7] This required the Court to determine whether a *jus cogens* violation by an MNC gave rise to liability under CIL.[8]

In determining whether an MNC was liable under CIL, the Court was split. According to the majority, whether an MNC was liable under CIL depended on whether the prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; or crimes against humanity excluded corporations from its scope.[9] The majority held: "it is not 'plain and obvious' that corporations enjoy a blanket exclusion under CIL from *direct* violations of obligatory, definable, and universal norms of international law."[10] In contrast, the minority held that for an MNC to be liable under CIL, there needed to be a norm of corporate liability.[11] As there was no evidence of a domestic court holding an MNC civilly liable for a breach of CIL, state practice and opinio juris did not support the existence of a norm of liability.[12] Thus, according to the minority, Nevsun was not liable under CIL. Here we can see that the liability of MNCs under CIL was controversial as it was unclear *how* liability under CIL arose. The crucial point of uncertainty was whether liability under CIL arose due to a norm of liability. Without clarification on this, the liability of MNCs under CIL is likely to remain controversial.

This dissertation seeks to clarify the role of a norm of liability and contribute to the broader discussion of closing the governance gap. The governance gap, put simply, is the umbrella term for the lack of accountability over MNCs when they operate within the borders of states in weak governance zones. As international law is state-centric, it relies on states to protect rights within the confines of its territory. But if a *jus cogens* violation is committed by an MNC within the territory of the host state, the host state may be unable or unwilling to take any

[6] At [5] per Abella J.

[7] At [104]–[114] per Abella J.

[8] At [104]–[114] per Abella J.

[9] At [113] per Abella J.

[10] At [113] per Abella J.

[11] At [190] per Brown and Rowe JJ.

[12] At [191] per Brown and Rowe JJ.

action against the MNC.[13] Thus, international law falls short when the host state fails to take action. This has led to an extensive debate regarding whether this creates a governance gap.[14] Assuming that there is a governance gap, holding MNCs liable under CIL directly could help to close this gap. This is because if MNCs were liable under CIL, then a claim could be brought against an MNC directly for breach of a *jus cogens* violation. This would open the door to judicial remedies for victims of an MNC's *jus cogens* violation and send a strong message to MNCs around the world.

However, as the minority in *Nevsun Resources Ltd. v Araya* demonstrate, a norm of liability may be a stumbling block to holding corporations liable under CIL and therefore, closing the governance gap.[15] This is because state practice and opinio juris do not support the existence of this norm.[16] Thus, clarifying whether a norm of liability is needed will help determine whether corporate liability in CIL is a feasible way to close the governance gap.

In short, the purpose of this dissertation is to analyse the viability of corporate liability under CIL as a means to close the governance gap. It will do so by resolving the questionf: *Does corporate liability under CIL depend on a norm of liability?*

This dissertation will be structured in two main parts. Part One will introduce the concept of corporate liability in CIL as a means to close the governance gap. Chapter One will discuss how the state-centric framework of international law does not adequately prevent MNCs from committing a *jus cogens* violation. It will then illustrate that there is a debate over whether this leads to a governance gap, and position this dissertation within that debate. Chapter Two will discuss the arguments for and against corporate liability in international law and argue that there

[13] Sarah Lauwo and O.J. Otusanya "Corporate accountability and human rights disclosures: a case study of Barrich Gold Mine in Tanzania" (2014) 36 Accounting Forum 91.

[14] See generally Seunghyun Nam "Reducing the Governance Gap for Corporate Complicity in International Crimes" (2019) 45 Brook. J. Int'l L. 193; Surya Deva "Human Rights Violations by Multinational Corporations and International Law: Where from here" (2003) 19 Conn. J Inti'l L. 1; Gabrielle Holly "Transnational Tort and Access to Remedy under the UN Guiding Principles on Business and Human Rights: Kamasaee v Commonwealth" (2018) 19 Melb. J. Int'l L. 52; Steven R. Ratner "Corporations and human rights: A theory of responsibility" (2001) 111 Yale Law J. 443.

[15] *Nevsun Resources Ltd. v Araya*, above n 4, at [191].

[16] At [190] per Brown and Rowe JJ.

is little scholarship analysing *how* liability in CIL arises. It will discuss the case of *Nevsun Resources Ltd.* v *Araya* and demonstrate that if a norm of liability is required, it may be a stumbling block to holding corporations liable under CIL and therefore, closing the governance gap.

Part Two will analyse whether corporate liability under CIL depends on a norm of liability. Chapter Three will reveal that this requirement did not originate from international law but from American jurisprudence in the context of the Alien Tort Statute.[17] Chapter Four will argue that corporate liability under CIL does not depend on a norm of liability. This is for three main reasons. First, there is criticism of the requirement for a norm of liability in the context of the Alien Tort Statute.[18] Thus, the requirement for a norm of liability does not rest on strong foundations. Second, this requirement has developed from a misconception of CIL. A norm of liability is based on the traditional definition of CIL, requiring a Judge to identify state practice and opinio juris. However, various scholars have argued that the traditional CIL definition misconceives how CIL is created.[19] This line of scholarship is very compelling given that various International Court of Justice (ICJ) decisions do not establish a CIL norm through the identification of both state practice and opinio juris.[20] Thus, the traditional definition is unlikely to be representative of what CIL is. As the norm of liability requirement has developed from this traditional definition, it has developed from a misconception of CIL. Finally, there is no international law authority for a norm of liability. Liability under CIL is one of many contexts in which the issue of international subjectivity may arise. The simple reason for this

[17]See *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2d Cir 2010).

[18] See Tyler Giannini and Susan Farbsten "Corporate Accountability in Conflict Zones: *How Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights" (2010) 52 Harv Int. Law J. 119; William S. Dodge "Corporate Liability Under Customary International Law" (2012) 43 Geo. J. Int'l L. 1045.

[19] See Roozbeh (Rudy) B. Baker "Customary International Law in the 21st Century: Old Challenges and New Debates" (2010) 21 EJIL 173 at 182; Bin Cheng "United Nations Resolutions on Outer Space" (1965) 5 J Int'l L. 23 at 532; Christian Tomuschat *International Law: Ensuring the Survival of Mankind on the Eve of a New Century* (Martinus Nijhoff Publishers, Belgium, 2001); Brian D. Lepard *A New Theory With Practical Applications* (Cambridge University Press, Cambridge, 2010); Frederic L. Kirgis Jr "Custom of a Sliding Scale" (1987) 81 AJIL 146; John Tasioulas "In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case" (1996) 16 Oxford J. Legal Stud. 85.

[20] See Mark Weisburd "Customary International Law: The Problem of Treaties" (1988) 21 Vanderbilt J Transnat'l L. 1; Niels Peterson "*The International Court of Justice and the Judicial Politics of Identifying Customary International Law"* (2017) 28 EJIL 357.

is that if MNCs have liability under CIL, they will gain international subjectivity.[21] A norm of liability was not a requisite in other contexts where the issue of international subjectivity arose.[22] Rather, the Court analysed whether the particular entity possessed rights and functions in international law that could only be explained on the basis of international personality.[23] Thus, the proper inquiry should be whether an MNC possesses rights and functions in international law that can only be explained on the basis of international personality. Thus, a norm of liability is masking the proper inquiry.

[21] Jose E. Alvarez "Are Corporations "Subjects" of International Law?" (2011) 9 Santa Clara J. Int'l L. 1.

[22] See *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174; *Trial Of The Major War Criminals Before The International Military Tribunal* (vol 22, Nuremberg, Germany, 1948) at 466.

[23] *Reparation for Injuries Suffered in the Service of the United Nations,* above n 22, at 179; *Trial Of The Major War Criminals,* above n 23, at 466.

Part One - Corporate Liability Under Customary International Law as a Means to Close the Governance Gap.

I The Multinational Corporation and the Host State.

A The Problem.

Globalisation is a worldwide trend through which the economies in the world transcend their borders and connect with each other.[24] Due to globalisation, corporations are no longer imprisoned in their borders and can implement a wide range of business activities around the world.[25] This has led many corporations to maintain operations in a multitude of countries. These companies are known as multinational corporations (MNC). An MNC is defined as an economic entity, in whatever legal form, that owns, controls or manages operations, either alone or in conjunction with other entities, in two or more countries.[26] According to Robert Reich, MNCs tend to move to countries that provide the most attractive advantages, in both the production and the marketing area, without considering the nationality of the country in question.[27] The economies of developing countries have become especially attractive for MNCs searching for resources, cheap workforce and new market niches with a view to reducing costs.[28] Thus, multiple MNCs are setting up operations in developing countries.

Many of these developing countries are located in weak governance zones that have a relaxed regulatory environment (hereinafter referred to as the 'host state'). Many of these host states

[24] Katerina Ristovska and Aneta Ristovska "The Impact of Globalization on the Business" (2014) 47 EA 83 at 85.

[25] Alina-Petronela Haller "Globalisation, Multinational Companies and Emerging Markets" (2016) 5 EFJ 9.

[26] Deva, above n 14, at 18.

[27] Reich, above n 1.

[28] Haller, above n 25.

have poor working conditions, few trade unions and a cause to deny the existence of many human rights abuses that may occur.[29] This lays the groundwork for an MNC to commit *jus cogens* violations when operating within the territory of the host state.

1 The regulatory landscape of the host state.

The regulatory landscape of the host state enables an MNC to commit a *jus cogens* violation. This is for various reasons. Firstly, there is a repression of trade unions.[30] For example, the Bangladesh Independent Garments Workers Union was refused registration as a national union due to the objections raised by owners of ready-made garment industries.[31] Secondly, workers' rights are not respected; many researchers have reported long working hours, low wages, unsafe working conditions and poor workers' rights.[32] This is in conjunction with highly informal recruitment policies and very few formal contracts.[33] Lastly, the violation of international labour standards and codes of conduct are common.[34] Thus, the relaxed regulatory environment enables an MNC to give little consideration to human rights when conducting its business operations within the territory of the host state. This has increased the frequency of *jus cogens* violations.

2 International law and the host state.

A subject of international law is an entity that is capable of possessing international rights and duties and can maintain its rights by bringing international claims.[35] Historically, states have

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[29] Javed Siddiqui "Human rights disasters, corporate accountability and the state" (2016) 29 Account. Audit. Account. J. 679 at 693; A. E. Louzine "Improving Working Conditions in Small Enterprises in Developing Countries" (1982) 121 Int'l Lab. Rev 443; Sukti Dasgupta "Attitudes towards Trade Unions in Bangladesh, Brazil, Hungary and Tanzania" (2002) 14 ILR 413 at 435.

[30] Siddiqui, above n 29, at 693.

[31] Human Rights Watch "Bangladesh: Garment Workers' Union Rights Bleak" (21 April 2016) Human Rights Watch <https://www.hrw.org/news/2016/04/21/bangladesh-garment-workers-union-rights-bleak>

[32] Louzine, above n 29.

[33] Siddiqui, above n 29, at 693.

[34] Sukti Dasgupta "Attitudes towards Trade Unions in Bangladesh, Brazil, Hungary and Tanzania" (2002) 14 ILR 413 at 435.

[35] James Crawford *Brownlie's Principles of Public International Law* (9th ed, Oxford University Press, Oxford, 2019) at 105.

been the primary subjects of international law.[36] While this has expanded to include international organisations and individuals, international law is still very state-centric. [37]

As international law is state-centric, it calls upon states to respect human rights and protect against abuses by private actors.[38] For example, instruments such as the International Covenant for Civil and Political Rights and the International Covenant for Economic Social and Cultural Rights create binding obligations on states to respect the rights embodied within.[39] This means that it is the responsibility of the host state to protect rights within the confines of its territory. However, if a human rights violation is committed by an MNC within the territory of the host state, the host state may be unable or unwilling to take any action against the MNC.[40] This means that international law does not act as a backstop to curbing a *jus cogens* violation.

The host state may be unable or unwilling to take action against the MNC for various reasons. Firstly, many host states lack the institutional capacity to provide redress. Frankental points out that host states may sometimes find it difficult to strengthen domestic social, environmental and human rights standards for fear of challenge by foreign investors.[41] This is particularly prevalent in poorer countries where the lack of institutional capacity to enforce national standards makes it difficult to take action against an MNC. Secondly, foreign direct investment (FDI) has been the main driver for economic growth in developing countries.[42] Due to their reliance on FDI, the host state may be reluctant to tighten regulations for fear of the MNC withdrawing much-needed investment. Thirdly, measures to protect labour (and other) rights

[36] J. H. Burns and H.L.A. Hart (eds) *The Collected Works of Jeremy Bentham: An Introduction to the Principles Of Morals and Legislation* (Clarendon Press, Oxford, 1970) at 293-96.

[37] Carlos M. Vazquez "Direct vs. Indirect Obligations of Corporations Under International Law" (2005) 43 Colum. J. Transat'l L. 927 at 932. See *Reparation for Injuries Suffered,* above n 22; *Trial Of The Major War Criminals Before,* above n 22.

[38] M. Cherif Bassiouni "International Crimes: Jus Cogens And Obligation Erga Omnes" (1997) 59 Law Contempt Probl 63.

[39] International Covenant on Civil and Political Rights 999 UNTS 171 (signed 16 December 1966, entered into force 23 March 1976) [ICCPR] art 2; and International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976) [ICESCR], art 2.

[40] Lauwo and Otusanya, above n 13.

[41] Peter Frankental "No accounting for human rights" (2011) 22 Crit. Perspect. Account. 762 at 762.

[42] Sally Wu "Catching Corporate Human Rights Abuse Abroad: A Wider Net of Extraterritorial Laws" (2017) 4 PILJNZ 174 at 178.

are costly and beyond the resources of host state governments.[43] Gallhofer acknowledges that some states are reluctant to regulate corporate human rights conduct due to the cost of such actions and the potential foreign policy repercussions.[44]

Sociologist Stanley Cohen argues that a culture of denial explains a host state's unwillingness to take action against an MNC. Cohen examines the discourse of official denial used by states involved in human rights abuses.[45] Cohen provides a comprehensive classification of three strategies of denial; denial of the past, interpretative denial (what happened is something else), and implicatory denial (what happened is justifiable).[46] Cohen argues that certain states will deny human rights abuses committed against its own citizens.[47] For example, when referring to the Rana Plaza incident,[48] the senior minister in cabinet attempted to blame the opposition party for the building collapse.[49] Despite having to acknowledge that something wrong had occurred, it was more effective for the government to try to neutralise the impact of the event by denying responsibility and blaming somebody else. If a state denies human rights abuses committed against its citizens, it is difficult to see how it can be proactive against preventing human rights abuses by MNCs operating in its territory. Eritrea, Bangladesh, Angola, Myanmar, Nigeria and Sudan are among the host states that have been referred to in this context.

The issue of human rights violations by MNCs has been emerging on the international governance agenda for some time. During the 1970s, the United Nations (U.N.) attempted to

[43] Wu, above n 42, at 177.

[44] Gallhofer, S., Haslam, J. and Walt, S. "Accountability and transparency in relation to human rights: a critical perspective reflecting upon accounting, corporate responsibility and ways forward in the context of globalisation" (2011) Crit. Perspect. Account 765 at 776.

[45] Stanley Cohen "Human rights and the crimes of the State: the culture of denial" (1993) 26 Aust N Z J Criminol 97.

[46] At 108-110.

[47] At 102.

[48] The Rana Plaza Incident involved the collapse of the Rana Plaza building in Dhaka, Bangladesh on 24 April 2013. The building housed five garment factories, killed at least 1,132 people and injured more than 2,500. Further details can be found at International Labour Organisation "The Rana Plaza Accident and its aftermath" International Labour Organisation <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm>

[49] Siddiqui, above n 29, at 689.

establish mandatory international laws governing the activities of MNCs.[50] This was initiated by developing countries as part of a broader regulatory program with redistributive aims known as the New International Economic Order.[51] However, this initiative was blocked by several member states.[52] Since then, 'soft law' initiatives have been created such as the U.N. Guiding Principles.[53] These non-binding principles were developed by John Ruggie in 2011 and have been unanimously approved by the U.N. Human Rights Council.[54] The Guiding Principles incorporate the 'Protect, Respect and Remedy' framework, which rests on three pillars: the duty of states to protect against human rights abuses by businesses; the corporate responsibility to respect human rights; and giving victims greater access to effective remedies.[55] However, the U.N. Guiding Principles do not explicitly mention whether the country where the MNC was incorporated (the home state), has a legal duty to exercise its jurisdiction extraterritorially. Due to such ambiguity, there is a strong reluctance among home states to exercise any form of extraterritorial jurisdiction.[56] Moreover, these principles are voluntary and home states are not obliged to regulate the extraterritorial activities of businesses domiciled in their territory.[57]

To conclude, the relaxed regulatory landscape of the host state enables an MNC to give little consideration to human rights when conducting its business operations within the territory of the host state. Furthermore, international law falls short when the host state is unable or unwilling to take steps to hold the MNC accountable for its human rights violations. Soft law instruments including the U.N. Guiding Principles have proven to be even less effective. In light of this, who will hold the MNC accountable for its actions? This has led to an extensive debate over whether alternative mechanisms of accountability are adequate. If an MNC is not being held accountable for its actions, this will lead to a governance gap. The 'governance gap'

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[50] *UN Intergovernmental Working Group on a Code of Conduct, Draft UN Code of Conduct of Transnational Corporations* UN Doc E/1990/94 (12 June 1990).

[51] See Branislav Gosovic & John Gerard Ruggie "On the Creation of a New International Economic Order" (1976) 30 Int'l Org. 309.

[52] Siddiqui, above n 29, at 681.

[53] *Guiding Principles of Business and Human Rights:* Implementing the United Nations 'Protect, Respect and Remedy' Framework UN Doc HR/PUB/11/04 (16 June 2011).

[54] GA Res 17/4 (2011), art 1.

[55] *Guiding Principles of Business and Human Rights*, above n 53, at [6].

[56] Nam, above n 14, at 223.

[57] Nam above n 14, at 219.

is the term used to describe the lack of regulation over MNCs. Some academics argue that there is no governance gap as there are other mechanisms whereby the MNC will be held accountable.[58] Other academics who believe that there is a governance gap argue that alternative mechanisms of accountability are inadequate.[59] Thus, while there is consensus over the fact that not all host states will take action against the MNC, scholars disagree on whether this leads to a governance gap. The second part of this chapter will discuss this debate.

B The Governance Gap Debate.

The home state could hold the MNC accountable by exercising jurisdiction over corporate officials and the MNC for extraterritorial activities.[60] However, certain scholars have pointed out issues with this. For example, business communities have demonstrated strong opposition to the increased regulation of private investment activities due to the detriment that this may have on their competitiveness.[61] As a result, home states are reluctant to regulate the extraterritorial activities of MNCs. Surya Deva argues that an approach which exclusively relies on the home state to enforce human rights obligations is bound to fail as state governments suffer from trans-border limitations and therefore cannot exercise effective control over MNCs.[62] If states are in connivance with MNCs they may benefit from failing to enforce human rights obligations.[63] Therefore, the efficacy of an approach which solely relies on home states to enforce human rights obligations against the MNC is bound to fluctuate as per the attitude of each state. Furthermore, Deva argues that the concept of one home state is a "fictitious assumption" which evolved at a time when corporations confined their operations to one country. Since the area of an MNC's activities defies any notion of boundaries, and since

[58] Holly, above n 14.

[59] See Alice De Jonge "Human Rights and Corporate Wrongs: Closing the Governance Gap: Corporations, Globalisation and the Law" (2017) 2 BHRJ 383; Galit A Sarfaty "Managing the Governance Gap" (2017) 67 U. Toronto L.J. 655; Nam, above n 14; Anita Ramasastry "Closing the Governance Gap in the Business and Human Rights Arena: Lessons from the Anti Corruption Movement" in Surya Deva and David Bilchitz *Human Rights Obligations of Business* (Cambridge University Press, Cambridge, 2013).

[60] Nam, above n 14, at 213.

[61] Nam, above n 14, at 223.

[62] Deva, above n 14, at 48.

[63] Deva, above n 14, at 49.

they expect uniform rules governing international trade, Deva argues that it is a necessary corollary that the home state is no longer limited to the country of incorporation.[64]

Certain scholars argue that the existing avenue in tort is sufficient and the victims of the abuse by an MNC may pursue a claim in the form of a domestic tort claim.[65] Thus, tort litigation can provide an avenue for private parties to bring a claim against an MNC. However, as the victims are usually citizens of the host country, whose court and legal system are likely to be compromised, they would usually bring the claim in the court of the home state. Assuming that the home state does not decline jurisdiction, it may be complicated applying *lex loci delicti* to the claim, plus the public policy exception if needed.[66] The public policy exception is likely to have a high threshold. For example, in New Zealand, the public policy exception will only be applied if the application of the law would shock the conscience of the reasonable New Zealander.[67] Moreover, it is unlikely that an action in tort will equate to the severity of the wrongdoing. For example, the severity of the wrongdoing would not be properly marked if an MNC committed a crime against humanity but was only held liable in battery.[68] Other scholars have argued that any effective legal mechanism must include an international element as there is currently no consensus on the applicable human rights standards to be followed by MNCs operating in different countries.[69] Steven Ratner takes a similar stance and argues: "decision-makers considering these claims…will respond in an ad hoc manner, driven by domestic priorities or by legal frameworks that are likely to differ significantly across the planet."[70]

Certain scholars have argued that if the host state fails to act, an independent country could claim universal jurisdiction over a foreign corporation for alleged international crimes

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[64] At 40.

[65] Holly, above n 14.

[66] The *lex loci delicti* is the Latin term for "law of the place where the delict [tort] was committed" in the conflict of laws. See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at 450-452. The public policy exception refers to the principle that if the foreign law is to be given effect, that foreign law will not apply to the extent that its rules are contrary to public policy. See Maria Hook and Jack Wass *The Conflict of Laws in New Zealand* (LexisNexis, Wellington, 2020) at 284.

[67] *New Zealand Basing Ltd v Brown* [2016] NZCA 525, [2017] 2 NZLR 93 at [62].

[68] See also *Nevsun Resources Ltd. v Araya,* above n 4, at [129].

[69] Deva, above n 14, at 4.

[70] Ratner, above n 14, at 448.

perpetrated in a foreign territory.[71] In 2002, such an attempt was made. Four Myanmar refugees filed suit in Belgium against Total Ltd. in the Brussels Magistrates' Tribunal.[72] The refugees alleged that the company was complicit in crimes against humanity under Belgium's Universal Jurisdiction Act which allows universal jurisdiction to hear cases for certain serious crimes.[73] The Court dismissed the case in 2005 after the Belgian law providing for universal jurisdiction was repealed.[74] Thus, with the retreat of universal jurisdiction, states are generally not incentivised to exercise universal jurisdiction over foreign corporations.[75] Furthermore, if an independent state were to claim universal jurisdiction over a foreign corporation, this would raise the very issue that will be discussed in part two: is a norm of liability required in order for an MNC to be liable under CIL?

The International Criminal Court (ICC) may be able to act as a last resort for investigating alleged international crimes that were authorised or directed by a corporate official.[76] However, there are limitations to this. Firstly, the ICC only exercises jurisdiction over cases that are the most serious crimes of concern to the international community as a whole.[77] Furthermore, the case must have sufficient gravity for the ICC to justify further action by the Court.[78] Therefore, there are significant hurdles that must first be overcome, contributing to the difficulty in holding MNCs accountable.

To conclude, there is extensive debate regarding whether there is a governance gap, with various scholars disagreeing over whether other mechanisms are adequate. Resolving this debate is beyond the scope of this dissertation. Rather, this dissertation is situated on one side of the debate; aligning with scholars who argue that there is a governance gap. This leads us to the next question of what is the *best* way to close this gap? The next chapter will deal with this in more detail.

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[71] Nam, above n 14.

[72] Nam, above n 14, at 224.

[73] Nam, above n 14, at 225.

[74] Nam, above n 14, at 225.

[75] See also Maximo Langer "The Diplomacy of Universal Jurisdiction" (2011) 105 AM. J. INT'L L. 1.

[76] Rome Statute of the International Criminal Court 2187 U.N.T.S 90 (opened for signature July 17 1998, entered into force 1 July 2002), art 17.

[77] Rome Statute of the International Criminal Court, Article 5.

[78] Rome Statute of the International Criminal Court, Article 17.

II Closing the Governance Gap: Direct Liability in Customary International Law.

Various scholars have proposed different solutions to closing the governance gap. For example, Sally Wu argues that domestic human rights laws should be given extraterritorial effect in order to police the activities of MNCs.[79] Alan Franklin argues that tort law should encompass the concepts of the U.N. Guiding Principles because the development of tort law over the centuries has been based on the needs of society and has consistently transformed to accommodate the changes and needs of society.[80] Maya Steinitz takes a different approach and argues that there should be an International Civil Court of Justice.[81]

A novel solution to closing the governance gap is that an MNC should be liable under CIL. This would mean that MNCs would have international obligations and may be held liable for breach of CIL directly. The first part of this chapter will define CIL. The second part of this chapter will demonstrate that if this is to be a solution, it must be acknowledged that the liability of MNCs under CIL is very controversial. This controversy is due in large part to the fact that there is little guidance regarding *how* liability under CIL arises. In particular, the role of a norm of liability is unclear.

A What is Customary International Law?

CIL is a recognised source of international law. It is referred to as evidence of a general practice accepted as law.[82] In other words, it is the set of international law rules that presumptively apply to all sovereign states because enough states, through their practice, have indicated that they believe they are legally required to follow these rules.

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[79] Wu, above n 42.

[80] Alan Franklin "Corporate Liability Under Customary International Law: Is The Tail Wagging The Dog?" (2019) 25 ILSA J. Int'l & Comp. L. 301.

[81] Maya Steinitz "The Case For An International Court of Civil Justice" (2014) 67 Stan. L. Rev Online 75.

[82] Statute of the International Court of Justice, art 38.

A CIL obligation is formed through state practice and opinio juris.[83] State practice is evaluated by reference to how much practice exists; how many states, and what kinds of states are involved in the practice; and whether the practice has been sufficiently uniform.[84] Practice must occur in such a way as to show a general recognition that a legal obligation is involved.[85] On the other hand, opinio juris is the belief by states that they have a legal obligation to conform with the widespread and consistent state practice.[86]

Jus cogens norms are CIL norms that are considered to be so fundamental to the functioning of the international community that any treaties that conflict with them are considered void.[87] For treaty law, a *jus cogens* norm is described as a norm accepted and recognised by the international community of states as a whole, from which no derogation is permitted and which can only be modified by a subsequent norm of general international law having the same character.[88] Thus, a *jus cogens* norm is binding on nations even if they do not agree to them.

The common law approach to CIL is that of incorporation under which customary rules are to be considered part of the law of the land, provided they are not inconsistent with Acts of Parliament.[89] Many jurisdictions incorporate *jus cogens* obligations into their domestic law.[90] For example, in Canada, CIL is automatically adopted into domestic law via the doctrine of adoption, making it part of the law of Canada.[91] Moreover, CIL is generally considered to

[83] *North Sea Continental Shelf (Federal Republic of Germany v Netherlands; Federal Republic of Germany v Denmark)* [1969] ICJ Rep 3 at 74.

[84] *Draft conclusions on the identification of customary international law with commentaries* [2018] vol 2, pt 2 YILC.

[85] *North Sea Continental Shelf*, above n 83, at 74.

[86] *Draft conclusions on the identification of customary international law with commentaries* [2018] vol 2, pt 2 YILC.

[87] E. Samuel Farkas "*Araya v Nevsun* And The Case For Adopting International Human Rights Prohibitions Into Domestic Tort Law" (2018) 76 UT Fac L Rev 130.

[88] Vienna Convention on the Law of Treaties, art 53.

[89] Crawford, above n 35, at 63.

[90] Pierre-Hugues Verdier and Mila Versteeg, "International Law in National Legal Systems: An Empirical Investigation" (2015) 109 *Am. J. Intl L.* 514, at 528.

[91] *Nevsun Resources Ltd. v Araya,* above n 4, at [95]-[103].

automatically form part of New Zealand law.[92] Therefore, CIL is automatically adopted into the domestic law of New Zealand without any need for legislative action.

B Corporate Liability Under Customary International Law.

A novel solution to the governance gap is that an MNC should be liable under CIL. This would mean that international law obligations would apply directly to MNCs so that they may be held liable for breach of CIL directly. This is based on the premise that it would be an anomaly if MNCs, unlike other non-state actors, did not have obligations under CIL. There is a long tradition of MNCs having rights under international law.[93] However, there was little discussion surrounding what their international obligations were until WWII in the *Nuremberg Trials*.[94] However, as the International Military Tribunal was not given jurisdiction over corporations, they did not make a determination on this point. The issue was not brought to full attention until suits started being brought under the Alien Tort Statute against MNCs in the mid-1990s.[95] Today, the liability of MNCs under CIL remains controversial.

The traditional, positivist view holds that MNCs have no CIL obligations and therefore, cannot be liable for breach of CIL.[96] This is because, according to traditionalist scholars, MNCs are objects of international law. This means that they have no direct rights and duties and no means of invoking any rights.[97] The traditional, positivist view holds that MNCs are bound by

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[92] Alice Louise Maie Osman "The Effects Of Unincorporated International Instruments On Judicial Reasoning In New Zealand" (LLB (Hons) Dissertation, University of Otago, 2012).

[93] For example, in the investor-state context, MNCs have rights under bilateral investment treaties and free trade agreements. See also Nicola Jägers *Corporate Human Rights Obligations: in Search of Accountability* (Intersentia, Cambridge, 2002) at 71 stating that civil, political, economic and social rights are directly applicable to private parties, including MNC's

[94] *Trial Of The Major War Criminals,* above n 22.

[95] Alien Tort Statute 28 USC § 1350. The ATS grants federal United States district courts jurisdiction over claims by an alien for a tort claim committed in violation of CIL. See *Filartiga v Pena-Irala* 630 F 2d 876 (2d Cir 1980). The first case to allege violations of international human rights against U.S. corporations was in *Doe v Unocal Corp* 248 F.3d 915 (9th Cir 2001).

[96] See Crawford, above n 35, at 111-113.

[97] Jägers, above n 23, at 20.

international law indirectly.[98] In other words, international law imposes obligations on states to regulate MNCs.

The cosmopolitan approach to international law argues that the traditional position no longer reflects modern reality and as a result, MNCs should be liable in international law. Steven R. Ratner started this discussion in 2001. Ratner argues that private corporations have become increasingly powerful in recent decades, and this increasing power must be met with increasing responsibilities under international law.[99] Surya Deva builds on this and argues that unless a change is seen, international law runs the risk of becoming obsolete.[100] Other scholars have supplemented this argument by stating that there is no conceptual barrier to concluding that MNCs have direct obligations in international law as they are already subject to various international regulations.[101] These arguments are based on the doctrine of Command Responsibility; a principle of liability found in international law that extends the liability of a military commander for acts of subordinates.[102] NGOs have made claims against MNCs based on the MNCs' failure to inform themselves of certain conduct by the government.[103] Inherent in such a claim is the belief that the MNC is the superior and the state is the agent. As MNCs exceed certain host states in economic power and might, command responsibility may be a justifiable basis for corporate duties in situations where corporations are superiors to government actors.

Other scholars have discussed the dangers of holding MNCs liable under CIL.[104] The rationale for this is that if MNCs have direct liability under international law, then they will be seen as subjects of international law and therefore become international actors with rights akin to states

[98] Vazquez, above n 37, at 930.

[99] Ratner, above n 14.

[100] Deva, above n 14, at 51.

[101] See Eric Mongelard "Corporate Civil Liability For Violations of International Humanitarian Law" (2006) 88 Int'l Rev Red Cross 665; Ratner, above n 14.

[102] Ratner, above n 14, at 505.

[103] Ratner, above n 14, at 505.

[104] Peter T Muchlinski *Multinational Enterprises And The Law* (2nd ed, Oxford University Press, Oxford, 2007); Alvarez, above, n 21; Jay Butler "The Corporate Keepers of International Law" (2020) 114 Am. J. Int'l L. 189.

and international organisations.[105] This may give them uncontrollable power. Moreover, if MNCs rather than states are going to be held accountable, states may begin to offload certain matters to corporate actors and exercise less control and oversight which may make matters worse.

Against this background, the argument for corporate liability under CIL has recently made its way to the Supreme Court of Canada in *Nevsun Resources v Araya.* [106] In this case, the Court was required to determine whether MNCs may be liable under CIL. What becomes apparent from *Nevsun Resources v Araya* is that while there are numerous arguments for and against corporate liability, there is little authority explaining *how* liability under CIL arises. This led the Court in *Nevsun Resources Ltd. v Araya* to disagree on how liability under CIL arose. Thus, without clarification on this, the liability of MNCs under CIL is likely to remain controversial.

C Nevsun Resources Ltd. v Araya

Nevsun is a publicly held Canadian mining company that contracted with the Eritrean government to develop the Bisha Gold Mine. In Eritrea, the use of forced labour has become an integral part of Eritrean citizenship and all Eritrean's between the ages of 18 and 40 are required to serve six months of military training followed by a year of military service.[107] However, after the 1998 border war with Ethiopia, the government made military service an indefinite endeavor. Service limits for new conscripts were abolished, and citizens can be reactivated into national service at any time.[108] This environment laid the groundwork for Nevsun to take advantage of Eritrea's normalised use of forced labour.

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[105] Franklin, above n 80 at 311. Contrast Gregory T. Euteneier "Towards a Corporate "Law of Nations" Multinational Enterprises' Contributions to Customary International Law" (2007) 82 Tul. L. 757; Jordan J. Paust "Human Rights Responsibilities of Private Corporations" 2001 35 VandJTransnatlL 801 arguing that multinational corporations already contribute to the formation of customary international law.

[106] *Nevsun Resources Ltd. v Araya*, above n 4.

[107] Eliza Guyol-Meinrath Echeverry "Violence, Development, and Canada's New Transnational Jurisprudence" in Erella Grassiani (ed) *Conflict and Society* (Berghahn Books, New York, 2018) vol 4 at 168.

[108] Echeverry above n 107, at 168.

The claimants, three workers at the Bisha mine owned by Nevsun, brought a class action on behalf of over 1000 workers who allege that they were conscripted by the Eritrean government to work at Nevsun's mine, where they were subject to violent, cruel, inhuman and degrading treatment.[109] They argued that this benefited Nevsun whose board and management were aware of the situation. The claimants sought damages for breach of CIL prohibitions against forced labour; slavery; cruel, inhuman or degrading treatment; and crimes against humanity in the Canadian Court.[110] This was based on the proposition that because the acts that Nevsun committed were breaches of CIL, then Nevsun should be liable for breach of CIL directly. In response, Nevsun brought a motion to strike out the claim based on the *British Columbia Supreme Court Civil Rules* which permits pleadings to be struck out if they disclose no reasonable chance of success.[111]

Against this background, the Supreme Court's initial task was to determine whether the respondents' claims made under the prohibitions of forced labour slavery, cruel, inhumane and degrading treatment; and crimes against humanity were part of Canadian law. This involved a two-step process: (1) Whether those prohibitions were part of CIL; and (2) Whether CIL was part of Canadian law?[112] The majority accepted that these prohibitions formed part of CIL and viewed CIL as automatically adopted into Canadian domestic law without any need for legislative action.[113] Building on the traditional, positivist account of international law, Nevsun contended that even if CIL was part of Canadian law, it was immune from its application because it was a corporation.[114] This required the Court to determine whether a *jus cogens* violation by an MNC gave rise to liability under CIL.[115] Thus, the success of this cause of action was contingent on the application of CIL to MNCs. This would effectively give CIL norms horizontal application between individuals and corporations. However, when determining whether MNCs were liable under CIL, the Court disagreed on *how* liability under CIL arose. A crucial point of disagreement was whether the application of CIL to an MNC depended on a norm of liability.

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[109] *Nevsun Resources Ltd. v Araya*, above n 4, at [4].

[110] At [20].

[111] At [16].

[112] At [73] per Abella J.

[113] At [95]-[103] per Abella J.

[114] At [104] per Abella J.

[115] At [104]–[114] per Abella J.

1 A substantive norm vs. a norm of liability.

(a) A substantive norm.

The majority approached the issue of corporate liability under CIL in a two-step manner. First, they analysed whether the prohibited action committed by the MNC was an action that was a CIL norm.[116] When referring to a norm, the majority were referring to a substantive norm. A 'substantive norm of CIL' is a prohibited action e.g. the prohibited act of forced labour. Second, the majority analysed whether this substantive CIL prohibition excluded corporations from its scope.[117] In other words, was the substantive norm of a type that could only be violated by a State? In answering this second question, the majority held: "it is not 'plain and obvious' that corporations enjoy a blanket exclusion under CIL from *direct* violations of obligatory, definable, and universal norms of international law."[118] Thus, as the act committed by Nevsun was a substantive prohibition of CIL and because it was not plain and obvious that corporations were excluded from the norm's scope, the majority concluded that it is not plain and obvious that a civil remedy for breach of customary international law could not succeed and dismissed the motion to strike.[119]

(b) A norm of liability.

In determining whether CIL could bind MNCs directly, Brown and Rowe JJ (dissenting in part) criticised the majority decision: [120]

> The position taken by the majority relies upon it being possible for a norm of CIL to exist when state practice is not general and not uniform…the majority did not cite any cases where a corporation has been held civilly liable for a breach of CIL anywhere in the world.

[116] At [95]-[103] per Abella J.

[117] At [113] per Abella J.

[118] At [113] per Abella J.

[119] At [132] per Abella J.

[120] At [187] per Brown and Rowe JJ.

The minority held that the representative and consistent state practice and opinio juris required to establish a customary rule did not exist to support the proposition that CIL could apply to corporations directly.[121] When referring to a 'norm', the minority was referring to a norm of corporate liability as opposed to as substantive norm.[122] A norm of liability refers to a CIL norm whereby state practice and opinio juris establish a particular entity as liable under CIL. Evidence of a domestic court holding an MNC civilly liable for a breach of CIL would constitute state practice. Thus, according to the minority, as there was no evidence of a domestic court holding an MNC civilly liable for a breach of CIL, there was no state practice evidencing a norm of corporate liability.[123] Thus, as there was no norm of corporate liability, Nevsun was not liable under CIL.

Therefore, it is unclear how liability in CIL arises. In particular, it is unclear whether corporate liability in CIL depends on a norm of liability.

2 Implications.

The Nevsun decision breaks new ground by concluding that CIL obligations may apply to MNCs and that a common law cause of action to enforce CIL obligations against MNCs may exist in Canadian law. This is a huge step in international law as this is the first time that a common-law Court has acknowledged that MNCs may be directly liable under CIL. This supports the cosmopolitan approach to CIL. While the Court have not endorsed the view (given that a motion to strike is a low threshold), the Court have upheld the claim and referred it back to the trial judge make a determinative finding. This case is a huge step in the direction of corporate liability under CIL. If the claim is successful, this could open the door to judicial remedies for victims of an MNC's *jus cogens* violation.

This new potential cause of action may proceed based on the recognition of new nominate torts or alternatively, since CIL is part of Canadian law, then a breach by a Canadian corporation could be directly remedied based on a breach of CIL. Thus, instead of bringing a claim in tort, individuals could bring a claim in CIL. This approach avoids the choice of law question

[121] At [190] per Brown and Rowe JJ.

[122] At [190]–[191] per Brown and Rowe JJ.

[123] At [191] per Brown and Rowe JJ.

because international human rights law is equally applicable to conduct in every nation.[124] This would provide a simpler route for claimants and send a strong message to MNCs around the world.

As CIL is generally considered to form part of New Zealand law and a decision by the Canadian Supreme Court would be treated as persuasive authority, *Nevsun Resources Ltd. v Araya* may impact the decision of a New Zealand Court considering the same legal question. For example, it may be argued in New Zealand, that a corporation domiciled in New Zealand but operating overseas should be liable in common law for breach of customary international law. As it is a predicate to this claim that CIL binds MNCs directly, the success of this cause of action in New Zealand depends on the court stating that MNCs are liable under CIL directly (i.e. it depends on the New Zealand court agreeing with the majority in *Nevsun*.)

As demonstrated by the divergence in the Supreme Court's reasoning, it is unclear how liability under CIL arises. In particular, it is unclear whether the application of CIL to MNCs requires a norm of liability. After personal discussions with Hassan M. Ahmad and Alan Franklin, both believe that the minority had the stronger argument. This places doubt on the soundness of the majority's approach to corporate liability under CIL, and the likely success of this potential cause of action. If a norm of corporate liability was required, it would unlikely be met given that no domestic court has ever held a corporation civilly liable for breach of CIL before. As a result, an MNC would not be liable under CIL. Thus, the requirement for a norm of liability may be a stumbling block to holding MNCs liable in CIL and therefore, potentially closing the governance gap. In order to determine whether corporate liability under CIL is a viable means to close the governance gap, it is necessary to determine whether the application of CIL to MNCs depends on a norm of liability.

[124] William S. Dodge "Supreme Court of Canada Recognizes Corporate Liability for Human Rights Violations" (26 March 2020) Just Security <https://www.justsecurity.org/69349/supreme-court-of-canada-recognizes-corporate-liability-for-human-rights-violations>

Part Two - Does Corporate Liability Under Customary International Law Depend on a Norm of Liability?

III The Origins of a Norm of Liability.

In order to determine the importance of the norm of liability requirement, is useful to understand where the requirement originated from. The requirement for a norm of liability first arose in the case of *Kiobel v Royal Dutch Petroleum.*[125] *Kiobel v Royal Dutch Petroleum* forms part of the American jurisprudence regarding the Alien Tort Statute (ATS). The ATS grants federal United States district courts jurisdiction over claims by an alien for a tort claim committed in violation of CIL.[126] The statute states that district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of CIL or a treaty of the US.[127] Thus, the statute enables foreign persons to bring a claim against another in a United States Court in tort for a breach of CIL. International law is the substantive law that governs the jurisdiction under the ATS. Thus, courts can only take the statute as far as international law permits. For example, as CIL imposes individual liability for a limited number of international crimes, the Court has held that the ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes.[128] Attempts have recently been made to bring an ATS suit against an MNC.[129] This gave rise to the issue of whether the jurisdiction granted by the ATS extended to civil actions brought against MNCs under CIL. As the scope of the ATS is governed by international law, for an MNC to be liable under the ATS, it would need to be subject to liability under CIL. Therefore, analogous to the *Nevsun*

[125] *Kiobel v Royal Dutch Petroleum Co* 621 F 3d 111 (2d Cir 2010).

[126] *Filartiga v Pena-Irala* 630 F 2d 876 (2d Cir 1980).

[127] Alien Tort Statute 28 USC § 1350.

[128] *Kiobel v Royal Dutch Petroleum Co ,* above n 25, at [15].

[129] See *Kiobel v Royal Dutch Petroleum Co,* above n 125; *Jesner v Arab Bank PLC* 138 US 1386 (2018).

Resources Ltd. v Araya, the United States Court was required to look to international law to determine whether an MNC could be subject to liability for a violation of CIL.

Kiobel v Royal Dutch Petroleum[130] involved an attempt to bring an ATS suit against an MNC. In *Kiobel v Royal Dutch Petroleum,* the plaintiffs who were residents of Nigeria claimed that Dutch, British and Nigerian corporations that were engaged in oil exploration aided the Nigerian government in committing violations of CIL. Thus, the Second Circuit had to resolve whether corporations may be subject to tort liability for violations of CIL. To determine this, the majority looked to footnote 20 in *Sosa.* This footnote stated: "…whether international law extended 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."[131] The Second Circuit interpreted this footnote as a requirement for there to be a CIL norm of liability.[132] This is apparent when the Second Circuit stated: *"*We are required to look to international law to determine whether corporate liability for a violation of the law of nations is a norm accepted by the civilised world*."*[133] And again: "We next consider what sources of international law reveal with respect to the existence of a norm of corporate liability under CIL*."*[134] The majority justified this interpretation based on its ATS precedent. According to the majority, in *Filartiga v Peña-Irala*, the Court looked to international law to determine jurisdiction.[135] Moreover, *Presbyterian Church v Hull Church* declared that footnote 20 in *Sosa* supported the broader principle that the scope of liability for ATS violations should be derived from international law. The majority concluded that its interpretation of *Sosa* was consistent with *Presbyterian Church v Hull Church* where the Court looked to international law to determine the identity of persons to whom that conduct was attributable.[136] Thus, in determining whether corporations were subject to liability under CIL, the majority held that under international law, *Sosa* and their three decades of precedent,

[130] *Kiobel v Royal Dutch Petroleum Co*, above n 125.

[131] *Sosa v Alvarez-Machain*, 542 U.S. 692 (U.S. 2004) at 732.

[132] *Kiobel v Royal Dutch Petroleum Co*, above n 125, at [43].

[133] At [50] per Judge Cabranes.

[134] At [52] per Judge Cabranes.

[135] At [52] per Judge Cabranes.

[136] At [44] per Judge Cabranes.

they were required to look to international law to determine whether corporate liability was a norm of CIL.[137]

The majority in *Kiobel v Royal Dutch Petroleum Co* then asserted that no norm of corporate liability existed.[138] The majority substantiated this proposition by pointing to the charters of certain international criminal tribunals and noted that no international tribunal had ever held a corporation liable for the violation of CIL.[139] Thus, as CIL of human rights did not impose *any* form of liability on corporations (criminal or civil), corporate liability was not a norm of CIL.[140] In coming to this conclusion, the majority did not draw any distinction between civil and criminal liability.

The Supreme Court in *Jesner v Arab Bank* adopted the Second Circuit's interpretation of the footnote in *Sosa* giving it "considerable weight and force".[141] In this case, the petitioners alleged that the persons on whose behalf they asserted claims were injured or killed by terrorist acts committed abroad, and those acts were in part facilitated by Arab Bank, a Jordanian financial institution with a branch in New York. The plaintiffs brought a claim against the Arab Bank under the ATS. The Supreme Court had to consider whether common-law liability under the ATS extended to a foreign corporate defendant.[142]

The majority held that whether corporations were permissible defendants under the ATS turned on the first step of the two-part inquiry, set out in *Sosa,* for recognising a common-law action.[143] This requirement stated that the plaintiff must demonstrate that the alleged violation is a norm that is specific, universal and obligatory.[144] The Supreme Court interpreted this first step as a requirement for there to be a *CIL norm of liability* that is "specific, universal and obligatory".[145]

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[137] At [50] per Judge Cabranes.

[138] At [52] per Judge Cabranes.

[139] At [68] per Judge Cabranes.

[140] At [104] per Judge Cabranes.

[141] *Jesner v Arab Bank PLC,* above n 129, at 1400.

[142] At 1398 per Justice Kennedy.

[143] At 1400 per Justice Kennedy.

[144] *Sosa v Alvarez-Machain*, above n 131, at 732.

[145] *Jesner v Arab Bank PLC,* above n 129, at 1398.

Thus, the Supreme Court adopted the Second Circuit's interpretation of the footnote 20 and merged this with the first step of *Sosa*.

Analogous to the Second Circuit in *Kiobel v Royal Dutch Petroleum*, the Supreme Court held that no norm of liability existed: [146]

> It does not follow that current principles of international law extend liability – civil or criminal – for human rights violations to corporations…this is confirmed by the fact that charters of respective international criminal tribunals often exclude corporations.

According to the Supreme Court, jurisdictional reach had been limited to natural persons. The international community's conscious decision to limit the authority of these international tribunals to natural persons counselled against a broad holding that there was a specific, universal and obligatory norm of corporate liability under prevailing international law.[147] Thus, as jurisdictional reach had been limited to natural persons, CIL did not impose any form of liability on corporations. Thus, corporate liability was not a norm of CIL.

In summary, *Kiobel v Royal Dutch Petroleum* and *Jesner v Arab Bank* reveal that the requirement for a norm of liability, adopted by the minority in *Nevsun,* was not derived from international law but from an interpretation of footnote 20 in *Sosa,* a United States Supreme Court decision. This footnote was interpreted as a requirement that there be evidence of enforcement establishing the existence of a particular norm of liability. Following this analysis, a CIL norm of corporate liability will only crystallise – and be enforceable at the domestic level – after there as been an instance of enforcement of that particular norm against an MNC.

This approach rejects the global legal pluralism; an international law theory that does not dictate what types of actors create, implement and enforce international law or are bound by its rules.[148]

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[146] At 1400 per Justice Kennedy.

[147] At 1401 per Justice Kennedy.

[148] International Law Association *Johannesburg Conference: Non State Actors* (International Law Association, Final Report, 2016) at 19. See also Austen L. Parrish "*Kiobel's Broader Significance: Implications For International Legal Theory* (2014) 107 AGIL Unbound 19.

Under this theory, actors are inseparable from their normative practice.[149] Therefore, the substantive actions of an entity determine its status in international law. However, according to the United States Courts, the production of (substantive) rules is not the decisive element which determines which actors matter under international law. Rather a norm of liability determines this.

Having established that the requirement for a norm of liability originated from American jurisprudence, the next chapter will analyse whether it is a requirement of international law.

IV Does International Law Require a Norm of Liability?

A Existing Scholarship.

There is little scholarship analysing whether a norm of liability is required in the context of *Nevsun Resources Ltd. v Araya.* However, the cases of *Kiobel v Royal Dutch Petroleum* and *Jesner v Arab Bank* involved a compelling, partial dissent, and a small number of academics have analysed the requirement for a norm of liability in the context of the ATS. As the requirement for a norm of liability, discussed in *Nevsun Resources Ltd. v Araya*, originated from United States case law, this criticism is relevant for our purposes.

1 The courts.

Judge Leval provided a concurrence in the case of *Kiobel v Royal Dutch Petroleum.* However, this concurrence was more of a dissent as it completely rejected the majority's reading of footnote 20 in *Sosa.*

[149] Paul Schiff Berman *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, Cambridge, 2012).

According to Judge Leval, international law *does* distinguish between criminal and civil liability: [150]

> International law not only recognises differences between criminal and civil liability but treats them differently. While international institutions have occasionally been established to impose criminal punishments for egregious violations of international law…the basic position of international law with respect to civil liability is that States may impose civil liability on offenders as they see fit.

Thus, while criminal liability is a matter for international law, civil liability is not. While CIL sets worldwide norms of conduct, prohibiting certain universally condemned heinous acts, that body of law takes no position on whether its norms may be enforced by civil actions for compensatory damages.[151] This means that civil liability is a matter of remedy that international law leaves to the independent determination of each state.[152] For example, the United States has chosen to recognise tort liability for violations of CIL via the ATS. Therefore, the footnote in *Sosa* does not demand that there be a sufficient international consensus with regard to the mechanisms of enforcing these norms, as international law does not determine the manner of civil enforcement.[153] While it is true that there is no norm of liability, making corporations civilly liable, that is merely the inevitable consequence of the fact that there is no rule of international law making any private person civilly liable.[154] Thus, the Second Circuit's reading of *Sosa* nullifies the intention of international law to leave the question of civil liability to be decided separately by each nation.[155]

According to Judge Leval, the reason why international tribunals have been established without jurisdiction to impose criminal liability on corporations is solely to do with the fact that the theory and objective of criminal punishment has no bearing on the question of civil liability.[156] This is because criminal punishment can only be justified where the defendant has acted with

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[150] *Kiobel v Royal Dutch Petroleum Co*, above n 125, at [185].

[151] At [124] per Judge Leval.

[152] At [48] per Judge Leval.

[153] At [121] per Judge Leval.

[154] At [201] per Judge Leval.

[155] At [122] per Judge Leval.

[156] At [119] per Judge Leval.

criminal intent – a condition that cannot exist when the defendant is a juridical entity which is incapable of having intent.[157] Thus, imposing a criminal punishment on a juridical entity would be counterproductive as this would fail to achieve the punitive objects of criminal punishment. Therefore, the fact that international tribunals do not impose criminal punishment on corporations does not support the inference that corporations are outside of the scope of international law and therefore incur no civil liability.[158]

In light of this, Judge Leval interpreted footnote 20 in *Sosa* as an indication that the distinction between conduct that does and conduct that does not violate CIL can turn on whether the conduct is done by or on behalf of a State or by a private actor independently of a state, as certain violations of CIL encompass non-state actors and others do not.[159]

Judge Leval observed: [160]

> If the violated norm is one that international law applies only against a State, then a private actor such as a corporation or individual who acts independently of a state, can have no liability for violation of CIL as there has been no violation of CIL. On the other hand, if the conduct is of the type classified as a violation of the norms of international law regardless of whether done by a State or private actor, then a private actor such as a corporation or an individual has violated the law of nations.

Thus, whether international law extends the scope of liability for a violation of a given norm to a non-state actor will depend on the type of CIL substantive norm. For example, in *Tel-Oren v Libyan Arab Republic,* Judge Edwards held that a non-state actor could not be liable for torture as this norm is one that international law only applies against a State.[161] Whereas in *Kadic v Karadzic*, a non-state actor could be held liable for genocide as this norm prohibited conduct regardless of whether or not it was done by a State.[162] Therefore, the Supreme Court in *Sosa* were referring to the fact that whether an MNC is liable under CIL depends on whether the

[157] At [120] per Judge Leval.

[158] At [168] per Judge Leval.

[159] At [205] per Judge Leval.

[160] At [165] per Judge Leval.

[161] *Tel-Oren v Libyan Arab Republic* 726 F 2d 774 (DC Cir 1984) at 794-795.

[162] *Kadic v Karadzic* 70 F 3d 232 (2d Cir 1995) at 241-242.

substantive norm is of a type that could be violated by a non-state actor. While international law determines *who* is liable for breach of CIL it does not follow that a norm of liability is required. The majority's partial quotation out of context, interpreting the Supreme Court in *Sosa* as distinguishing between individuals and corporations misunderstands the meaning of the passage.[163] Instead, the Supreme Court was implying that natural persons and corporations were to be treated identically.[164] Thus, if the violation is of a type that encompasses non-state actors, this includes MNCs.

Justice Sotomayor in *Jesner v Arab Bank* also rejects the Second Circuits interpretation of *Sosa*:[165]

> Although international law determines what substantive conduct violates the law of nations, it leaves the specific rules of how to enforce international law norms and remedy their violations to states, which may act to impose liability collectively through their domestic legal systems.

Thus, how a particular actor is held liable for a given norm is a question of enforcement left up to the individual states.[166] In keeping with the nature of international law, *Sosa* used the word 'norm' to refer to substantive conduct. That statement would make little sense if a norm encompassed enforcement mechanisms.[167] According to Justice Sotomayor, the relevant inquiry is whether there is any reason to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS.[168] For example, in *Jesner v Arab Bank,* assuming the prohibition against financing terrorism is sufficiently "specific, universal and obligatory" to satisfy the first step of *Sosa*, nothing in international law suggests a corporation may not violate it.[169]

In summary, Judge Leval and Justice Sotomayor completely reject the requirement for a norm of liability. Their principle objection is that this would nullify the intention of international law

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[163] *Kiobel v Royal Dutch Petroleum Co,* above n 125, at [165].

[164] At [163] per Judge Leval.

[165] *Jesner v Arab Bank PLC,* above n 129, at 1420.

[166] At 1423 per Justice Sotomayor.

[167] At 1420 per Justice Sotomayor.

[168] At 1425 per Justice Sotomayor.

[169] At 1422 per Justice Sotomayor.

to leave the question of civil liability to be decided separately by each nation. Rather, they hold that the proper inquiry is whether the conduct of the MNC is of the type classified as a violation of CIL regardless of whether it is done by a State or private actor. If so, the next question is whether there is any reason to distinguish between a corporation and a natural person who is alleged to have violated CIL under the ATS.

2 Academics.

According to Giannini and Farbstein, the scarcity of cases at international law imposing liability on corporations does not lead to the conclusion that such entities cannot be held to violate international law.[170] This is because enforcement should not be conflated with the application of the norm in question.[171] William Dodge makes a similar argument and contends that international law does not contain general norms of liability and non-liability applicable to categories of actors.[172] On the other hand, particular norms of CIL do sometimes apply to actors and not to others.[173] In the corporate context, unless there is a relevant difference between natural persons and juridical persons, if the substantive norm prohibits all conduct, then an MNC is bound by this norm.[174] Because each nation is free to decide for itself what remedies to provide, a lack of consensus about remedies for human rights violations says nothing about the content of the CIL norms.[175]

The above arguments closely follow another strand of scholarship referred to as "why not?" scholarship. This line of scholarship argues that if individuals have international law obligations, then why should these obligations not extend to MNCs? For example, Higgins argues that the distinction between subjects and objects serves no functional purpose and should be discarded. Thus, if international law binds individuals, why should it be constrained when

[170] Tyler Giannini and Susan Farbsten "Corporate Accountability in Conflict Zones: *How Kiobel* Undermines the Nuremberg Legacy and Modern Human Rights" (2010) 52 Harv Int. Law J. 119 at 123.

[171] At 125.

[172] Dodge, above n 18, at 1046.

[173] William S. Dodge "Corporate Liability Under Customary International Law" (2012) 43 Geo. J. Int'l L. 1045 at 1047.

[174] At 1049.

[175] At 1050.

it comes to MNCs?[176] Henkin argues that human rights norms are directly applicable to non-state actors.[177] He does so by relying on the language from the Preamble to the Universal Declaration of Human Rights.

The Preamble of the Universal Declaration of Human Rights states: [178]

> The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, 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.

Referring to this part of the preamble, Henkin argues that "every individual" includes juridical persons. Thus, there is no reason why non-state actors should exclude MNCs.[179] Moreover, Harold Koh argues that if states and individuals can be held liable under international law, then so too should corporations, for the simple reason that both states and individuals act through corporations.[180]

Andrew Clapham makes a similar argument:[181]

> If we legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone…international human rights obligations can fall on states, individuals, and non-state actors. Different jurisdictions may or may not be able to enforce these obligations, but the obligations exist just the same.

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[176] Rosalyn Higgins *Problems & Process: International Law & How We Use It* (Oxford University Press, Oxford, 1994) at 49-50.

[177] Louis Henkin "The Universal Declaration at 50 and the Challenge of Global Markets (1999) 25 Brook. J. Int'l L. 17.

[178] *Universal Declaration of Human Rights* GA Res 217A (1948).

[179] Henkin, above n 177, at 25.

[180] Harold Hongju Koh "Separating Myth From Reality about Corporate Responsibility Litigation" (2004) 7 J.I.E.L. 263 at 265.

[181] Andrew Clapham *Human Rights Obligations of Non-State Actors* (Oxford University Press, Oxford, 2006).

3 Analysis.

Judges and scholars have criticised the requirement for a norm of liability as it conflates the applicability of the norm and enforcement. They are essentially arguing that a norm of liability confuses the substance of international law with how it has been enforced in particular contexts. Whether CIL applies to an actor is a question of international law. However, it does not follow that a norm of liability is needed, as this would require evidence of civil enforcement, which is not a matter for international law, but for each state.[182]

The fact that enforcement has never been vital to the establishment of a CIL norm supports this argument. As stated by Higgins: "there are very few who believe that international law cannot exist in the absence of effective sanctions, or that sanctions predicate the existence of particular norms of international law."[183] As Ratner notes: "International actors have rights and obligations without either the possibility or probability that they might be called before an international court…the presence of a court holding states responsible has never been the linchpin of the obligation itself."[184] For example, the International Covenant on Civil and Political Rights contains no provisions granting either individuals or interested states the right to take a violating state to the ICJ or any other court.[185] This indicates that enforcement has no bearing on establishing the existence of a CIL norm as international actors have rights and obligations in international law without the possibility that these obligations may be enforced against them. Thus, enforcement is not the basis of obligation in CIL.[186] Since the creation of

[182] Although not overtly cited in all cases, these arguments owe an intellectual debt to an earlier wave of scholarship in international law which argues that multinational corporations contribute to the formation of customary international law. See Gregory T. Euteneier "Towards a Corporate "Law of Nations" Multinational Enterprises' Contributions to Customary International Law" (2007) 82 Tul. L. 757; Paust, above n 105.

[183] Higgins, above n 176, at 16.

[184] Ratner, above n 14, at 476.

[185] International Covenant on Civil and Political Rights.

[186] Just as obligations may exist without the possibility of enforcement, rights exist without the possibility of remedies. This already happens, for example under human rights treaties where the state has failed to allow for the international tribunal to have jurisdiction over claims coming from individuals under its jurisdiction. The right exists during this period even if there is no procedural remedy at international law. See Elihu Lauterpacht "International Law and Private Foreign Investment" (1998) 4 Indiana J. Glob 259; Clapham, above n 181, at 74.

a CIL norm has not been dependent on enforcement in the past, it is illogical for a CIL norm of liability to be a modern-day requirement.

Furthermore, this scholarship argues that it is not necessary to identify precedent explicitly affirming a principle of corporate liability, but rather the lack of explicit prohibition against corporate liability makes it permissible. A key tenet of international law – the *Lotus* principle, may indirectly support this contention. In *Lotus,* the Permanent Court of International Justice (PCIJ) held that Turkey could assert criminal jurisdiction over the French watch officer as a non-Turkish national for an offence occurring outside Turkish territory, even though international law did not explicitly authorise jurisdiction.[187]

The Permanent Court of International Justice held: [188]

> …the contention of the French Government to the effect that Turkey must in each case be able to cite a rule of international law authorising her to exercise jurisdiction, is opposed to the generally accepted international law.

Thus, the *Lotus* principle stands for the proposition that whatever is not explicitly forbidden is permitted. Following from this, it would not be necessary to identify an explicit authorisation in international law imposing corporate liability as the lack of explicit prohibition against it renders it permissible.[189]

In conclusion, there is compelling criticism of the requirement for a norm of liability in the context of the American Jurisprudence where this norm originated. Thus the requirement for a norm of liability does not rest on strong foundations.

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[187] *S.S. Lotus (France v Turkey)* [1927] PCIJ (series A) No 13.

[188] *S.S. Lotus*, above n 187, at 19.

[189] See also Ziad Haider "Corporate Liability For Human Rights Abuses: Analyzing *Kiobel* & Alternatives To The Alien Tort Statute" (2012) 43 Geo. J. Int'l L. 1361.

B A Norm of Liability Has Developed from a Misconception of Customary International Law

The traditional definition of CIL requires both state practice and opinio juris.[190] However, there is compelling evidence that the traditional definition is no longer representative of what CIL is. As the norm of liability requirement has developed from this traditional definition, requiring a Judge to explicitly identify state practice and opinio juris, a norm of liability is likely to have developed from a misconception of CIL.

Several ICJ decisions do not appear to establish a CIL norm through the identification of state practice. In his article 'ICJ and the Judicial Politics of Identifying CIL', Niels Petersen performed a qualitative analysis of all the judgments and advisory opinions of the ICJ since its establishment in 1949, in which the Court positively identified a rule of CIL.[191] In a summary of the results, Petersen noted that there is not one case in which the positive identification of a customary norm was based on a detailed analysis of individual state practice.[192] Mark Weisburd conducted a similar project, analysing the ICJ's treatment of state practice. Discussing twenty-seven cases decided by the ICJ between 1984-2007, Weisburd found that the ICJ relied on state practice to determine the content of customary rules surprisingly rarely.[193] The only judgments where the Court analysed state practice in detail were cases that concerned the bilateral practice of the parties.[194] For example, in *Right of Passage*, the Court determined that Portugal had a general right of passage over Indian territory, based on a long continued practice between the two states.[195]

Since the 1970s non-traditional scholarship has emerged in international law to challenge the importance of state practice. Various scholars have proposed new 'modern customary international law' theories. These academic theories have attempted to provide a more nuanced and accurate definition of CIL to explain the ICJ decisions. Various scholars stress that *opinio juris* alone, formulates the foundation of CIL and state practice is a secondary factor in CIL

[190] *North Sea Continental Shelf*, above n 83, at 74.

[191] Peterson, above n 20.

[192] At 369.

[193] Weisburd, above n 20.

[194] Peterson, above n 20, at 377.

[195] *Right of Passage over Indian Territory (Portugal v India)* [1960] ICJ Rep 6, at 39.

formation.[196] For example, Brian D. Lepard uses the weakening of the state practice requirement to infuse CIL with ethical values.[197] Lepard argues that a CIL norm arises when states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting or prohibiting certain conduct.[198] This belief constitutes *opinio juris*. According to Lepard, the role of state practice is to serve as one source of evidence of opinio juris.[199] Thus, it is not necessary in every case to satisfy a separate consistent state practice requirement. Lepard argues that his theory accounts for how ethical principles inform the identification and interpretation of CIL.[200] Furthermore, this theory resolves various paradoxes surrounding the traditional definition including its circular proposition that for a new customary rule to be recognised, states must already believe that they are legally bound to observe a rule that is not yet legally binding.[201] Other scholars have attempted to rationalise the divergence of traditional CIL with modern CIL. For example, Frederic Kirgis rationalises the divergence in custom by analysing the requirements of state practice and opinio juris on a sliding scale.[202] Thus, as the frequency of state practice declines, a stronger showing of opinio juris will be required. In this way, strong evidence of opinio juris will compensate for a weak evidence of state practice and vice versa. John Tasioulas builds on this theory and justifies it on the basis of Ronald Dworkin's interpretative theory of law, which balances a description of what the law is with normative considerations of what it should be.[203] These modern CIL theories may explain why the Court has been less exacting in requiring state practice and opinio juris.

Proponents of the traditional CIL definition have argued that if we adopt a theory of CIL that minimises the role of state practice, then anything labelled as a CIL norm will lack legitimacy.[204] This argument is likely to be derived from the fact that historically, state practice

[196] Baker, above n 19, at 182; Cheng, above n 19, at 532; Tomuschat, above n 19; Lepard, above n 19; Kirgis, above n 19; John Tasioulas, above n 19.

[197] Lepard, above n 19.

[198] At 8.

[199] At 8.

[200] At 11.

[201] At 9.

[202] Kirgis, above n 19.

[203] Tasioulas, above n 19.

[204] Weisburd, above n 20.

was connected to the idea of consent, which was thought to legitimise a customary rule.[205] The argument that consent was required to legitimise and bind a state to a customary rule is known as voluntarism.[206] This means that international legal rules only have legal authority over particular states insofar as those states have expressed their prior or current consent to those rules. The Permanent Court of Justice (PCIJ) appeared to endorse the voluntarist position in the *Lotus Case*, where the Court stated that "international law governs relations between independent states...the rules of law binding upon states therefore emanate from their own free will".[207] Thus, following from this, the state practice requirement is fundamental as it is a means of ensuring that states have voluntarily consented to the norm.

However, the voluntarist position has also been heavily criticised. For example, the fact that most state practice is not publicised makes it unlikely that states would be aware that a rule is being formed.[208] Moreover, weaker states may feel that they are unable to protest against the inception of a rule for fear of the consequences from powerful states.[209] Anthony D'Amato, for example, has pointed out that by its very character CIL binds even those states that do not consent to the rule, unless they qualify as persistent objectors to the rule.[210] Rosalyn Higgins has declared: "Custom is an obligation involuntarily undertaken – that is, not based on the consent of any given state. No state has a veto over the emergence of a customary norm."[211] From this, we can see that there is a declining emphasis on consent indicating that its role in international law is diminishing. Moreover, in the *North Sea* case, the Court held that all states

[205] See Francisco Vitoria *Escritos Politicos* (Ediciones Depalma, Palma De Mallorca, 1967); Christian Wolff *Jus gentium methodo scientifica petractatum* (Clarendon Press, Oxford, 1934; Matthew Lister "The Legitimating Role of Consent in International Law" (2011) 11 Chic. J. Int. Law 663.

[206] D. J. Harris *Cases and Materials in International Law* (6th ed, Sweet & Maxwell, London, 2004) at 41; Campbell MacDiarmid "Customary International Law: A Reassessment" (LLB (Hons) Dissertation, University of Otago, 2007).

[207] *S.S. Lotus,* above n 107, at 18; MacDiarmid, above n 206.

[208] J. Patrick Kelly "The Twilight of Customary International Law" 2000 40 **Va**. J. Int'l L. 449 at 513.

[209] Michael Byers "Introduction: Power, Obligation, and Customary International Law" 2001 11 Duke J.Comp.& Int'l L. 81 at 83.

[210] Anthony A. D'Amato *The Concept of Custom in International Law* (Cornell University Press, Cornell, 1971) at 187-199.

[211] Rosalyn Higgins *Problems & Process: International Law & How We Use It* (Oxford University Press, Oxford, 1994) at 34.

are bound to customs, irrespective of consent.[212] In light of this, the argument that state practice legitimises the creation of CIL by ensuring that states have voluntarily consented to the norm, loses much of its force.

To conclude, the norm of liability requirement has developed from the traditional definition of CIL, requiring a Judge to explicitly identify state practice and opinio juris. However, the ICJ rarely refers to the state practice requirement. Modern CIL theories have emerged that consider state practice as a secondary requirement in CIL formation. These theories are better able to explain how the ICJ decisions were decided and also resolve certain paradoxes of CIL such as its circularity. This is supported by the fact that state practice is not required to legitimise and bind a state to a customary rule. In light of this, it is likely that the traditional definition misconceives how CIL is formed. As it is unlikely that international law requires both state practice and opinio juris for the creation of a CIL norm, then a norm of liability has developed from a misconception of CIL.

C International Law Does Not Provide Authority for a Norm of Liability.

As previously demonstrated, a norm of liability arises when the court is tasked with determining whether MNCs are liable under CIL. If an MNC is liable under CIL, then MNCs will gain international law obligations. When an entity has international law obligations, it will be seen as a subject of international law.[213] Thus, if MNCs are liable under CIL, they will become subjects of international law. International subjectivity can arise in other various formal contexts including the capacity to make claims in respect of breaches of international law, the capacity to make treaties and the enjoyment of privileges and immunities from national jurisdiction.[214] For example, if a court held that an entity had the capacity to make claims in respect of breaches of international law, this would make that entity a subject of international law. Since holding MNCs liable under CIL would also make them subjects of international law, liability under CIL is one of many contexts in which the question of international subjectivity may arise. Therefore, it is useful to analyse how the court determined whether an

[212] *North Sea Continental Shelf*, above n 83, at 202.

[213] Alvarez, above n 21.

[214] Crawford, above n 35, at 105.

entity was a subject of international law in other contexts. This will help reveal whether there is any international law authority for a norm of liability.

1 International organisations.

A useful starting point is the *Reparation Advisory Opinion* where international organisations were first acknowledged as being subjects of international law.[215] In its Advisory Opinion, the International Court of Justice (ICJ) was asked whether the U.N. could bring a legal suit to recover damages for the death of the U.N. Chief negotiator for Palestine, Count Bernadotte. This required the ICJ to determine whether an organisation had the capacity to bring an international claim.[216] An organisation could only bring an international claim if it was a subject of international law.[217] Thus, if the court held that the U.N. had the capacity to bring an international claim, they would be stating that it was a subject of international law.

In determining whether an organisation had the capacity to bring an international claim, the ICJ referred to the Charter of the U.N. which specifies the purposes and principles of the U.N.[218] The Court considered the characteristics that the Charter was intended to give to the organisation. According to the ICJ, the Charter equipped the organisation with special tasks; the organisation was charged with political tasks of an important character, and covering a wide field namely the maintenance of international peace and security, the development of friendly relations among nations, and the achievement of international co-operation in the solution of problems of an economic, social, cultural or humanitarian character.[219] To achieve the purposes and principles in the Charter, attribution of international personality was indispensable.[220] The Court then looked to the Convention on the Privileges and Immunities.[221] This Convention created rights and duties between each of the signatories and the organisation. The Court held that it was difficult to see how such a convention could operate except upon the

[215] *Reparation for Injuries Suffered*, above n 22.

[216] At 177.

[217] At 177.

[218] At 178.

[219] At 178.

[220] At 180.

[221] Convention on the Privileges and Immunities of the United Nations 1 UNTS 15 (signed 13 February 1946, entered into force 17 September 1946).

international plane and as between parties possessing international personality.[222] In the opinion of the Court, the organisation was intended to exercise and enjoy, and is exercising and enjoying functions and rights which can only be explained on the basis of the possession of a large measure of international personality. As the organisation had international personality, it had the capacity to bring an international claim. [223]

This demonstrates that the ICJ held that the U.N. had the capacity to bring a claim as it was a subject of international law. International subjectivity was determined through an analysis of the rights and functions that the U.N. possessed in its charter and other international treaties and conventions. Thus, the capacity to bring a claim was derived from the existence of international subjectivity in international law, which flowed from the existence of rights and duties. It was not derived from any norm of liability. Therefore, the *Reparation Advisory Opinion* does not provide authority for a norm of liability.

2 Individuals.

In the *Nuremberg Trials,* the Nuremberg Tribunal, composed of four principal judges and four alternates, were required to determine whether international law imposed duties and liabilities on individuals.[224] If an entity is capable of possessing international rights and obligations, it is a subject of international law.[225] Thus, if the Tribunal held that individuals had duties and liabilities in international law, they would be conferring it with international subjectivity.

In determining whether international law imposed duties and liabilities on individuals, the Tribunal held that the fact that "international law imposes duties and liabilities upon individuals as well as upon states has long been recognized".[226] According to the tribunal this can be seen in the case of *Ex Parte Quirin.*

In *Ex Parte Quirin*, Chief Justice Stone observed:[227]

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[222] *Reparation for Injuries Suffered,* above n 22, at 179.

[223] *Reparation for Injuries Suffered,* above n 22, at 185.

[224] *Trial Of The Major War Criminals,* above n 22, at 466.

[225] *Reparation for Injuries* Suffered, above n 22, at 179.

[226] *Trial Of The Major War Criminals,* above n 22, at 465.

[227] *Ex Parte Quirin* 317 US 1 (1942).

> From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.

The Tribunal noted that there is a list of cases tried by the courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war.[228] The Tribunal concluded that: "crimes against international law are committed by men, not by abstract entities, and *only by punishing individuals who commit such crimes can the provisions of international law be enforced*."[229] Thus, individuals had duties and obligations under international law.

In coming to this conclusion, the Tribunal was not explicit in identifying state practice and opinio juris establishing a norm of liability. Rather, the individual had duties and obligations that could only be explained on the basis of the possession of international personality.[230] As the individual was a subject of international law, it had international duties and could be liable for breach of those duties.

3 The proper inquiry.

We have looked at two other contexts where international subjectivity has arisen: the capacity to make claims in respect of breaches of international law and the imposition of international duties and liabilities. In neither context did the Court engage in an inquiry of whether a norm of liability was required. Rather, the Court analysed whether the entity was a subject to international law by looking at the rights, functions and duties it already possessed. As liability under CIL is yet another context in which the issue of international subjectivity may arise, there is little reason to treat the issue any differently. Therefore, in determining whether an MNC is liable under CIL, the proper inquiry in international law is as follows: 'Is an MNC a subject of international law'? This can be determined by looking to the rights and functions than at MNC possesses.

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[228] *Trial Of The Major War Criminals,* above n 22, at 466.

[229] At 466.

[230] At 466.

Support for this can be derived from the fact that the liability of international organisations in international law is derived from their personality as subjects of international law.[231] This is echoed in the *WHO-Egypt* advisory opinion where the ICJ observed:[232]

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.

Thus, as international organisations were subjects of international law, they were bound by any obligations incumbent upon them and therefore, were liable under international law. Various scholars have affirmed that as international organisations are subjects of international law, international law binds international organisations.[233] As CIL is a source of international law, then as international organisations are bound by international obligations, they are bound by CIL. This is likely to be the case given that in its current work on CIL, the International Law Commission did not separate states and international organisations, but prepared general conclusions about CIL.[234] By extension, if MNCs were subjects of international law, they will be bound by international obligations incumbent upon them. As CIL is a source of international law, if MNCs have international obligations, then they will be liable under CIL.

Furthermore, the majority in *Nevsun Resources Ltd.* acknowledged that liability in CIL and international subjectivity are closely related concepts. In answering whether an MNC could be liable in CIL, the Court observed:[235]

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[231] Mahnoush H. Arsanjani "Claims Against International Organizations: *Quiscustodietisos custodies"* (1981) 7 131 at 132.

[232] *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt (Advisory Opinion)* [1980] ICJ Rep 73.

[233] See Olivier De Schutter *Transnational Corporations and Human Rights* (Hart Publishing, North America, 2006) at 73-73; August Reinisch "Securing the Accountability of International Organisations" (2001) 7 Glob. Gov. 131 at 136.

[234] *Draft conclusions on the identification of customary international law with commentaries* [2018] vol 2, pt 2 YILC. See also Niels Blokker "International Organisations and Customary International Law" (2017) 14 IOLR 1 at 3.

[235] *Nevsun Resources Ltd. v Araya,* above n 4, at [106]-[107].

> While states were classically the main subjects of international law since the Peace of Wesphalia in 1648, international law has long-since evolved from this state-centric template…in fact, international law has so fully expanded beyond its Grotian origins that there is no longer any tenable basis for restricting the application of customary international law to relations between states.

This supports the argument that in determining whether MNCs are liable under CIL, the proper question is whether an MNC is a subject of international law.

In conclusion, due to existing criticism, the fact that a norm of liability has developed from a misconception of CIL and the fact that there is no international authority for such a norm, a norm of liability is not required by international law. Therefore, liability of MNCs does not arise due to a norm of liability. Rather, the relevant inquiry should be whether an MNC is a subject of international law. The requirement for a norm of liability is simply masking the issue.

Concluding Remarks.

The new potential cause of action proposed in *Nevsun* whereby an MNC could be liable under CIL may help close the governance gap. It could open the door to judicial remedies for victims of an MNC's CIL violations. Instead of bringing a claim in tort, individuals could bring a claim in CIL. This would provide a simpler route for claimants and send a strong message to MNCs around the world.

A norm of liability is not an obstacle to holding MNCs liable under CIL. This is for three reasons. First, this requirement was not derived from international law but from a (controversial) interpretation of a footnote. There is extensive criticism over this interpretation with various dissenting judges and scholars arguing that *Sosa* did not intend a norm of liability to be a requisite for corporate liability. Thus, the requirement for a norm of liability does not rest on strong foundations. Second, this requirement has developed from a misconception of CIL. A norm of liability is based on the traditional definition of CIL, requiring a Judge to explicitly identify state practice and opinio juris. However, various scholars have argued that

the traditional CIL definition misconceives how CIL is created and that this definition is not representative of what CIL is.[236] This line of scholarship is very compelling given that almost every ICJ decision does not establish a CIL norm through the identification of both state practice and opinio juris.[237] Thus, the traditional definition is unlikely to be representative of what CIL is. As the norm of liability requirement has developed from this traditional definition, it has developed from a misconception of CIL. Finally, if MNCs are liable under CIL, they will gain international subjectivity.[238] Thus, liability under CIL is one of many contexts in which international subjectivity may arise. When looking at how international subjectivity arose in other contexts, the Court did not analyse whether a norm of liability existed.[239] Therefore, international law does not require that a norm of liability is needed in order for an entity to be liable under CIL. This means that a norm of liability is not a stumbling block to holding MNCs accountable in CIL, and therefore, potentially closing the governance gap.

In *Reparation* and *Nuremberg,* the Court analysed whether the particular entity possessed rights and functions in international law that could only be explained on the basis of international personality.[240] As liability under CIL is also a context in which international subjectivity of an entity (in this case, an MNC) may arise, the proper inquiry is whether an MNC is a subject of international law? This can be determined by looking to the rights and functions it possesses.

As stated in chapter two, scholars argue that we should be wary of giving MNCs more power.[241] However, personality is not an all or nothing concept. The Court in *Reparation* noted that the subjects in any legal system are not necessarily identical in their nature or in the extent of their rights, and the nature depends on the needs of the community.[242] Thus, the Court was careful to state that the possession of international personality did not imply that the organisation had the same rights and duties as those of a state.[243] Thus, holding MNCs liable under CIL may

[236] See Baker, above n 19, at 182; Bin Cheng "United Nations Resolutions on Outer Space" (1965) 5 J Int'l L. 23 at 532; Tomuschat, above n 19; Lepard, above n 19; Frederic L. Kirgis, above n 19; Tasioulas, above n 19.

[237] See Peterson, above n 20, at 369; Weisburd, above n 20.

[238] See Alvarez, above n 21.

[239] See *Reparation for Injuries Suffered,* above n 22; *Trial Of The Major War Criminals,* above n 22.

[240] *Reparation for Injuries Suffered,* above n 22, at 185; *Trial Of The Major War Criminals,* above n 22, at 466.

[241] Alvarez, above n 21; Muchlinski, above n 104; Butler, above n 104; Franklin, above n 80, at 311.

[242] *Reparation for Injuries Suffered,* above n 22, at 179.

[243] See also Clapham, above n 181, at 68.

not necessarily make them full subjects of international law but may acknowledge that they enjoy a more limited form of international subjectivity.[244]

As this dissertation contributes to a wider problem, I will briefly mention where further research is needed. Although corporate liability may be one way to close the governance gap, further research could be conducted determining whether this is the *best* way. For example, it could be useful to compare corporate liability in CIL with the possibility of domestic human rights being given extraterritorial effect. Moreover, if MNCs are held liable under CIL, a future question may be to what extent must an MNC be involved in a *jus cogens* violation in order to be held liable? For example, would it be enough for an MNC to provide funds that facilitate a *jus cogens* breach? Ratner addresses this point and provides a useful framework that could be adopted to determine how proximate an MNC must be to the violation.[245] Furthermore, if a claimant argued in a New Zealand Court, that a corporation domiciled in New Zealand but operating overseas should be held liable in common law for breach of CIL, further research analysing whether our common law could develop an appropriate remedy for breach of adopted CIL norms may be useful. In conclusion, while there may be other potential obstacles that need to overcome, this dissertation has demonstrated that a norm of liability is not one of them.

[244] See also Jonathan I. Charney "Transnational Corporations And Developing Public International Law (1983) Duke L. J. 748 at 775-776 who examines four options – from no legal personality to full legal personality – and argues that something in between these two extremes would be a "realistic treatment" of MNCs.

[245] See Ratner, above n 14.

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