

Nevsun: A Ray of Hope in a Darkening Landscape?

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Abstract

*This article explores some aspects of the Canadian Supreme Court's decision in *Nevsun Resources v Araya* in the light of its exposition on the act of state doctrine and application of core human rights as an integral aspect of international customary law and common law. It examines the *Nevsun* decision in the context of recent statutory developments in France and the Netherlands, the promised law reform in the European Union, and the proposed business and human rights treaty. I argue that it is high time to abandon the doctrinal fossil that human rights obligations do not apply to corporate governance and operations. It is hoped that COVID-19 contexts, and a post-pandemic world, will expeditiously result in the willing adoption of a treaty on business and human rights.*

Keywords: act of state, business and human rights treaty, corporate liability, international customary law, *jus cogens*

I. INTRODUCTION

In these desperate days of combat against a global pandemic, the 28 February 2020 decision of the Supreme Court of Canada in *Nevsun Resources v Araya*¹ brings us some good news, in contrast to the twin decisions of the United States Supreme Court in *Kiobel*²

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¹ *Nevsun Resources Ltd v Araya*, 2020 SCC 5. The-International Human Rights Program, University of Toronto Faculty of Law, Earth Rights International, Global Justice Clinic at New York University School of Law, Amnesty International Canada, International Commission of Jurists, Mining Association of Canada and Mining Watch Canada were the Interveners. The well-recognized technique of intervention embodies, and creatively modifies, the spirit of Article 38(1)(d) of the Statute of the International Court of Justice, which recognises 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

² *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013). Ingrid Wuerth discusses this decision in an excellent analysis: Ingrid Wuerth, 'The Supreme Court and the Alien Tort Statute: *Kiobel v Royal Dutch Petroleum Co.*', Vanderbilt University Law School Public Law and Legal Theory Working Paper No 13–26, http://ssrn.com/abstract_id=2264323 (accessed 2 August 2015). See also Anna Grear and Burns H Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Landscape' (2015) 15 *Human Rights Law Review* 21; and Upendra Baxi, 'Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?' (2016) 1 *Business and Human Rights Journal* 21. See also, for a different genealogy of human rights, Anna Grear, "'Framing the Project" of International Human Rights Law: Reflections on a Dysfunctional "Family" of the Universal Declaration', in Adam Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge: Cambridge University Press, 2012) 17.

and *Jesner*³ which brought down the curtain on suing multinational corporations (MNCs) for violations of core human rights in doing business.⁴

Notwithstanding *Nevsun*, the darkening landscape still persists given the overall state–business nexus. Apart from recent support from some corporations for mandatory human rights due diligence laws,⁵ corporate lobbying against binding international law obligations persists,⁶ even in the face of substantial evidence of wrongdoing and aggravation of inequality in COVID-19 times.⁷ Attacks on human rights defenders opposing business projects continue to occur.⁸ The barrier to access to remedy posed by Bhopal has still to be overcome despite all the efforts to displace the notions *forum non conveniens* and choice of law dictating the place of doing business as the ‘proper law’ governing mass toxic disasters.⁹

Given the fact that the United Nations (UN) Human Rights Council is now seized with looking at the ways of taking human rights seriously, as stressed by the 2003 Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights¹⁰ and the 2011 UN Guiding Principles on Business and Human Rights (UNGPs),¹¹ one hopes that the nightmares of *Kiobel* and *Jesner* will yield to the dreams of *Nevsun*.

In *Nevsun*, the indictment of the violation of international customary law (ICL) was made in 2014 by a group of three refugee Eritrean nationals against British Columbia. They argued that by engaging the Eritrean military and state-owned construction companies to construct the Bisha Mine in Eritrea, *Nevsun* – which owned 60 per cent

³ *Jesner v Arab Bank* 138 S Ct 1386 (2018).

⁴ Beth Stephens, ‘The Rise and Fall of the Alien Tort Statute’ in Surya Deva and David Birchall (eds), *Research Handbook on Human Rights and Business* (Cheltenham: Edward Elgar, 2020) 46.

⁵ BHRRC, ‘Companies & Investors in Support of Mandatory Human Rights Due Diligence’, <https://www.business-humanrights.org/en/mandatory-due-diligence/companies-investors-in-support-of-mandatory-human-rights-due-diligence> (accessed 5 June 2020).

⁶ See, for example, ‘Joint Business Response to the Revised Draft UN Treaty’ (October 2019), <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145680&token=9dbcc1f8414128d575cd6bef9f36b84ec106a386> (accessed 5 June 2020).

⁷ See Lawrence O Gostin et al, ‘Harnessing the Power of Law for Global Health and Sustainable Development’ (2019) 393:10183 *Lancet* 1857; António Guterres, ‘We Are All in This Together: Human Rights and COVID-19 Response and Recovery’ (23 April 2020), <https://www.un.org/en/un-coronavirus-communications-team/we-are-all-together-human-rights-and-covid-19-response-and> (accessed 5 June 2020).

⁸ See, for example, Coalition for Human Rights in Development, *Uncalculated Risks: Threat Against Human Rights Defenders and the Role of Development Financiers* (May 2019), <https://www.ciel.org/wp-content/uploads/2019/06/Uncalculated-Risks.pdf> (accessed 5 June 2020). The UN Working Group on Business and Human Rights is developing guidance for states and businesses to protect human rights defenders: ‘Human Rights Defenders and Civic Space – The Business and Human Rights Dimension’, <https://www.ohchr.org/EN/Issues/Business/Pages/HRDefendersCivicSpace.aspx> (accessed 5 June 2020).

⁹ See Baxi, note 2.

¹⁰ Human Rights Commission, ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003).

¹¹ Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, A/HRC/17/31 (21 March 2011). The expression ‘business and human rights’ has now become a term of art. Surya Deva has recently proposed that it ‘can be analysed in terms of three broad eras each with a distinct thrust: the “business or human rights” era, the “business and human rights” (BHR) era and the “business of human rights” era.’ Surya Deva, ‘From “Business or Human Rights” to “Business and Human Rights”: What Next?’ in Deva and Birchall (eds), note 4, 1.

shares in Bisha Mining Share Company – facilitated, aided, abetted, contributed to, and became an accomplice in, the use of forced labour, crimes against humanity and other core human rights abuses.¹²

Nevsun raised several typical procedural grounds to dismiss the case: from the doctrine of *forum non conveniens* to objections against representative action, the act of state doctrine and the CIL claims having no reasonable prospect of success.¹³ The Chambers Judge and the Court of Appeal dismissed Nevsun's motions to strike the case,¹⁴ and the Supreme Court upheld the lower courts' rulings on this.

Surely, corporate complicity in what would amount to crimes against humanity by state officials is not precluded by all the corporate social responsibility, whether at international or national level. However, efficient corporate governance is still in 2020 equated with forms of denialism of human rights by MNCs, with the result that while business may claim all the benefits of human rights entitlements, it may as a non-state actor not be bound by any obligations under international customary or treaty law.¹⁵

In this article, I analyse, in part II, the act of state doctrine which entails both the comparative international law aspects as well as distinctive Canadian modes of adjudication in this sphere. In Part III, I then turn to the argumentative strategy that maintains that human rights obligations extend only to states and not corporations and note the significant differences between the majority decision and the dissent on this issue in *Nevsun*. The mere fact that there could be a judicial dissent on this aspect in the second decade of the twenty-first century is indeed striking and precisely for that reason the dissenting opinions are worthy of close analysis. In part IV, I argue that the *Nevsun* majority opinion makes a distinctive restart in rethinking the roots of corporate governance (at both domestic and international levels) for corporate complicity for violation of core or basic human rights. The new ferment such as the striking French Duty of Vigilance Law, impending mandatory human rights due diligence legislation in the European Union (EU), and the Human Rights Council's ongoing engagement with the business and human rights treaty process continue to provide a context in which *Nevsun* needs to be situated.

At the outset it is indeed noteworthy that the wafer-thin majority opinion¹⁶ begins with a resounding message concerning the meaning of contemporary human rights: describing 'modern international human rights law' as 'the phoenix that rose from the ashes of World War II and declared global war on human rights abuses', the majority affirmed, preciously, that these 'norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities'.¹⁷

¹² *Nevsun*, note 1, paras 3–4.

¹³ *Ibid*, para 16.

¹⁴ *Ibid*, paras 17–25.

¹⁵ See Upendra Baxi, *The Future of Human Rights*, 3rd edn (Delhi: Oxford University Press, 2013). The 4th edition is due in 2020.

¹⁶ The majority judgement of CJ Wagner and Abella, Karakatsanis, Gascon and Martin was delivered by J Abella.

¹⁷ *Nevsun*, note 1, para 1.

II. THE ACT OF STATE DOCTRINE

The majority generally holds that the so-called ‘act of state’ doctrine is not a part of Canadian law, a viewpoint that provokes dissent by four justices. In effect, the dissent maintains that: (i) that it was obvious that corporations are excluded from direct liability under ICL, (ii) ICL itself does not create a remedy, and the creation of such a remedy should best be left to parliaments, and only the concerned state may create the applicable remedies; and (iii) new nominate torts should not be created if there are alternative and adequate remedies to deal with the harm caused and the existing torts of battery, unlawful confinement or intentional infliction of emotional distress were held to adequately deal with the alleged harms.

Nevsun does not as a matter of law hold that the doctrine is outlawed by ICL. However, its reasoning does provide a model opportunity for a funeral move for the act of state doctrine. Put another way, *Nevsun* offers a critical move which is not universal in scope now, but offers the potential for universalizability in the not-too-distant future.

From its vague origins,¹⁸ and uncertain itineraries¹⁹ and amidst its modernization,²⁰ the act of state doctrine remained merely like a ‘silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed’.²¹ Moreover, in the luminous words of Lord Justice Rix, it ‘also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law’;²² the idea ‘that the rights of a state might be curtailed by its obligations in the field of human rights would have seemed somewhat strange in that era. That is perhaps why our courts have sometimes struggled, albeit ultimately successfully, to give effective support to their abhorrence of the persecutions of the Nazi era’.²³

The *Nevsun* majority proceeded to hold that: ‘Our courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference’, but allow ‘for judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law’.²⁴ But what may this judicial emancipation from the act of state doctrine betoken? On the one hand, it does not entail that ‘... courts determine questions dealing with the enforcement of foreign laws according to ordinary private international law principles which generally call for deference’ but means merely ‘judicial discretion to decline to enforce foreign laws where such laws are contrary to public policy, including respect for public international law’.²⁵ On the other hand, quoting a string of extradition cases, the Court firmly chooses the view that this

¹⁸ For the examination of this judicial doctrine (primarily in the UK and Australia), see *Nevsun*, note 1, paras 29– 44.

¹⁹ *Ibid*, especially para 42 invoking the gentle admonition of J Jabot (in *Habib v Commonwealth of Australia* [2010] FCAFC 12) that the doctrine of act of state is ‘a common law principle of uncertain application’.

²⁰ *Ibid*, para 38 (italics removed).

²¹ *Ibid*.

²² *Ibid* (italics removed).

²³ *Ibid*.

²⁴ *Ibid*, para 45.

²⁵ *Ibid*.

‘deference accorded by comity to foreign legal systems ends “where clear violations of international law and fundamental human rights begin”²⁶ and “[a]n extradition that violates the principles of fundamental justice will always shock the conscience”.²⁷

If the court is deemed to have been shocked into negation of the doctrine in extradition cases, is it unreasonable for us to think that it might not be similarly shocked by other horrendous denials of core human rights doctrines, standards and norms? In all such situations, as held by the Australian High Court in *Moti v Queen*, ‘the phrase “act of State”... must not be permitted to distract attention from the need to identify the issues that arise in each case at a more particular level than is achieved by applying a single, all-embracing formula’.²⁸ In other words, the court should never be haunted by the spectral presence of the doctrine of act of state in performance of complex tasks of interpreting law and doing justice.

The predictable justifications defending the act of state doctrine are offered by J Côté (speaking also for J Moldaver) in their dissent. What is striking, however, is the defence of the doctrine by reference to a standard which distinguishes between the model of choice of law principles and rules which apply in a national justiciability situation and the act of state doctrine ‘which renders certain claims non-justiciable’.²⁹ This is because ‘adjudicating them would impermissibly interfere with the conduct by the executive of Canada’s international relations’.³⁰

Also, as a ‘practical matter’ if ‘Canadian courts claimed the power to pass judgment on violations of public international law by states, that could well have unforeseeable and grave impacts on the conduct of Canada’s international relations, expose Canadian companies to litigation abroad, endanger Canadian nationals abroad and undermine Canada’s reputation as an attractive place for international trade and investment. Sensitive diplomatic matters which do not raise domestic public law questions should be kept out of the hands of the courts’.³¹

The not so implicit postulate is that violation of core human rights protection in ‘trade and investment’ matters should be tabooed in courts, lest it should hurt national development. The minority does not wish to pose the question: what kind of trade and industry, or more generally economic development, is envisaged thus? Is not the very function of highest courts of the land to ensure that only that ought to count as ‘development’ which does not negate or threaten the core human rights of vulnerable

²⁶ Ibid, para 50.

²⁷ Ibid, para 52 (underlining in original).

²⁸ Ibid, para 43.

²⁹ Ibid, para 273.

³⁰ Ibid, para 276.

³¹ Ibid, para 300. Similar concerns were voiced in *Sosa*, where the Court said the separation of powers and conduct of foreign policy entail ‘vigilant doorkeeping’. *Sosa v Alvarez-Machain* 542 U.S. 692 (2004) at 729 and generally 730–731. The Court in *Kiobel* said that judicial caution ‘guards’ against ‘our courts triggering ... serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches’, *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) at 124 and added that the ‘Congress, not the Judiciary’ is the branch with ‘the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain’. Ibid at 116. In *Jesner*, the Court was most explicit: ‘If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate’, *Jesner v Arab Bank* 138 S Ct 1386 (2018) at 1407.

persons and collectivises? And is that not the core of the very idea of the right to development, which is now recognized itself as a human right?

III. APPLICABILITY OF INTERNATIONAL CUSTOMARY LAW TO CORPORATIONS

The US Court of Appeals for the Second Circuit in *Kiobel* made two astonishing propositions. It observed, first, that '[f]rom the beginning ... the principle of individual liability for violations of international law has been limited to natural persons – not “juridical” persons such as corporations’³² and second, that ‘no corporation has ever been subject to any form of liability under the customary international law of human rights, and thus the ATS, the remedy Congress has chosen, simply does not confer jurisdiction over suits against corporations’.³³ Both these propositions are egregiously and deeply misleading.

The first proposition has been totally discredited, in a magisterial analysis by Professor Jordan Paust who demonstrates how even ‘today, invidious consequences occur when judges cling to clearly ahistorical assumptions about international law’.³⁴ He notes how crucial it is:

to explode a false and inhibiting myth regarding nonstate actors and a related pretense of exclusion by identifying a large number of such actors from each inhabited region of the globe and a number of specific forms of formal participation from the 1700s through the early twentieth century when, according to mendacious myth, state-oriented positivism achieved complete and universal acceptance and denied the existence of any status, role, right, or duty of any nonstate actor.³⁵

The *Nevsun* contentions expressly address this very question. It may be helpful to distinguish three, related but distinct, questions: (i) what may constitute ICL obligations on the state in general, (ii) the specific question of what obligations automatically become binding on Canadian non-state actors, and (iii) whether the Canadian Supreme Court or the legislature is best equipped to create additional new civil remedies. I focus here only on the first question.

The majority in *Nevsun* responds to the first question largely by reiterating the commonly accepted criteria. In order to become recognized as a rule of ICL, two ingredients should be satisfied: there must be widespread, representative and consistent

³² *Kiobel v Royal Dutch Petroleum Company*, 642 F 3d 111 (2nd Cir. 2010) at 119.

³³ *Ibid* at 131.

³⁴ Jordan J Paust, ‘Nonstate Actor Participation in International Law and the Pretense of Exclusion’ (2011) 51 *Virginia Journal of International Law* 977 at 978.

³⁵ *Ibid*. He also alerts us to the question:

Did individuals and other groups from such areas play little or no role in the formation of customary international law, treaties, and normative content more generally? I suspect that our research into roles played by actual participants in international agreement processes and customary international law during the seventeenth, eighteenth, and nineteenth centuries has been remarkably incomplete, and that our awareness of the history of international law is growing but is still imperfect.

Ibid at 997. See also on the same page the interesting reference to the work by Professor Christiana Ochoa recalling the theme of Marten’s Clause and for the further references to ‘laws of humanity’.

state practice, and *opinio juris*. The majority rules that when ‘an international practice develops from being intermittent and voluntary into being widely accepted and believed to be obligatory, it becomes a norm of customary international law’.³⁶ The learned dissenting opinion by Brown and Rowe calls this a ‘high bar’, reflecting ‘the extraordinary nature of customary international law’ because ‘it leads courts to adopt a role otherwise left to legislatures’ and ‘unless a state persistently objects, its recognition binds states to rules to which they have not affirmatively consented’.³⁷ Moreover, ‘if a rule becomes recognized as peremptory (i.e., as *jus cogens*) then even persistent objection will not relieve a state of the rule’s constraints’.³⁸

There is no disagreement in the *Nevsun* court on the proposition that the core human rights to immunity from slavery and forced labour form a part of ICL called *jus cogens*.³⁹ However, the learned dissent vehemently disagrees with the majority on the applicability of ICL obligations. It cites, as high authority, the views of Professor Ruggie that ‘preliminary research has not identified the emergence of uniform and consistent state practice establishing corporate responsibilities under customary international law’.⁴⁰ It also re-cites the evaluation of Judge Professor Crawford: ‘At present, no international processes exist that require private persons or businesses to protect human rights. Decisions of international tribunals focus on states’ responsibility for preventing human rights abuses by those within their jurisdiction. Nor is corporate liability for human rights violations yet recognized under customary international law...’.⁴¹

Yet, the ever so circumspect Ruggie uses a qualifier that seems to have escaped the Court. He speaks only of ‘preliminary’ research; yet the Court cites this as an authoritative study. That leaves then one lone expert on each side: if the majority relies on Professor Koh, the minority invokes Professor Crawford. Perhaps this illustrates more a research shortfall than a truism that ICL does not recognize human rights responsibilities as applicable to corporations.

IV. RELEVANCE OF *NEVSUN* TO THE EVOLUTION OF BINDING OBLIGATIONS

The time for debate for a deference to the executive is long over, especially when businesses specialise in core human rights violations in foreign states and fail to practise minimal norms of due diligence. When corporations trade away core human rights, and national courts practise judicial abdication by deferring to executive and the legislature, impermissible violation of core human rights occurs, even though prohibited by customary, or conventional, international law.

³⁶ *Nevsun*, note 1, para 80.

³⁷ *Ibid*, para 164.

³⁸ *Ibid*.

³⁹ *Ibid*, para 269 (per Justice Côté, also on behalf of J Moldaver). On the complexities of these entailments, see Upendra Baxi, ‘Sources in the Anti-Formalist Tradition: “That Monster Custom, Who Doth All Sense Doth Eat”’ in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017) 228. I develop what I consider a vital distinction between ‘Empire-centric’ and UN-‘charter centric’ approaches.

⁴⁰ *Nevsun*, note 1, para 190.

⁴¹ James Crawford, *Brownlie’s Principles of Public International Law*, 9th edn (Oxford: Oxford University Press, 2019).

Rather, these are the times to further develop the UNGPs in such a way that fully meets obligations of the state to respect, protect and fulfil human rights and fundamental freedoms, for ‘business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights’ and the ‘need for rights and obligations to be matched to appropriate and effective remedies when breached’.⁴² Perhaps the most important principle in the UNGPs is that of human rights due diligence. Principle 17 enunciates that ‘business enterprises should carry out human rights due diligence’ and that this ‘process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed’.⁴³

In this context, we must take a brief note of further developments in the EU law and policy. The 2017 *Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre*, has been rightly hailed as a pioneering French law imposing a duty of vigilance. It creates a binding legal duty to prevent, mitigate and, when needed, remedy human rights violations by holding companies. The elaboration of *plan de vigilance* entails an obligation of means (*obligation de moyens*), and not an obligation of result (*obligation de resultat*), to follow up on the implementation and efficiency of measures.⁴⁴

While this law has been hailed both as progressive and workable, it does not provide for any criminal liability for large MNCs. Nor does it set out specific details of stakeholder consultations in preparing the corporate vigilance plan. However, it is worth noting that human rights groups, trade unions and social movements had proposed a more comprehensive law in 2013 which ‘initially tried to push for a criminal liability regime as well as a civil regime with a reversal of the burden of proof.... The weakening of the legislative proposal was due mainly to intensive business lobbying against the text...’.⁴⁵

On the other hand, the Dutch Child Labour Due Diligence Act, passed in May 2019, crystallizes a generic duty to exercise due diligence that extend to all companies that sell or supply goods and services to Dutch end-users, including companies registered outside the Netherlands (Article 4.1).⁴⁶ If a company determines that there is ‘a reasonable

⁴² General Principles to the UNGPs, note 10. See also Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (Cambridge: Cambridge University Press, 2013); Surya Deva, ‘Multi Nationals, Human Rights and International Law: Time to Move beyond the “State-Centric” Conception?’ in Jernej Letnar Černič and Tara Van Ho (eds), *Human Rights and Business: Direct Corporate Accountability for Human Rights* (The Hague: Wolf Legal Publishers, 2015) 27.

⁴³ UNGPs, note 10, Principle 17.

⁴⁴ This vigilance plan has to include ‘reasonable vigilance measures to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment’. Tiphaine Beau de Lomenie, Sandra Cossart and Paige Morrow, ‘From Human Rights Due Diligence to Duty of Vigilance: Taking the French Example to the EU Level’ in Angelica Bonafanti (ed), *Business and Human Rights in Europe: International Challenges* (New York: Routledge, 2019) 133 at 134. The plans shall contain: (i) a risk mapping that identifies, analyses and ranks risks; (ii) procedures to assess the situation of subsidiaries, subcontractors or suppliers with whom ‘established commercial relationships’ are maintained; (iii) actions to prevent and mitigate risks and serious harms; (iv) an alert mechanism; and (v) a monitoring scheme. See also Adriana Espinosa González and Marta Sosa Navarro, ‘Corporate Liability and Human Rights: Access to Criminal Judicial Remedies in Europe’ in Bonafanti (ed), *ibid* at 223.

⁴⁵ Beau de Lomenie et al, note 44, 138.

⁴⁶ See Anneloes Hoff, ‘Dutch Child Labour Due Diligence Law: A Step Towards Mandatory Human Rights Due Diligence’ (10 June 2019), <https://ohrh.law.ox.ac.uk/dutch-child-labour-due-diligence-law-a-step-towards-mandatory-human-rights-due-diligence/> (accessed 5 June 2020).

suspicion that a product or service involves child labour', it has to develop and implement an action plan and declare that the company has conducted due diligence.⁴⁷ Although victims, consumers or other stakeholders cannot use this law to sue a company, they can approach a regulator appointed under Article 3 of the Dutch Act, who is under a duty to publish the corporate human rights due diligence statements in an online public registry.⁴⁸ However, such a complaint to the regulator could only be lodged if 'the company has not responded to the complaint six months after filing it'.⁴⁹ The Dutch Act envisages criminal sanctions if 'a company fails to produce the statement, carry out the investigation, or set up an action plan or if the investigation or action plan are inadequate'.⁵⁰

The procedural limitation on filing a complaint for alleged break of the Dutch Act is perhaps considered necessary to produce a balanced result. Nevertheless, the period of six months to respond appears excessive because companies with robust human rights due diligence processes in place should be able to respond much sooner, especially for wrongs such as child labour. The limitation on affected stakeholders being able to directly sue companies is also far from clear. Even so, the imposition of criminal liability is welcome, particularly if seen as presaging a global regime of human rights obligations of business.

The introduction of mandatory human rights due diligence legislation in France and the Netherlands as well as the push for similar legislation in several other European countries⁵¹ have created momentum for an EU-wide legislation. Amidst continued business wrongdoings, on 29 April 2020 the European Justice Commissioner Didier Reynders announced that 'the Commission commits to introducing rules for mandatory corporate environmental and human rights due diligence'.⁵² Although the precise elements of the proposed EU regulations are yet to be seen,⁵³ this appears a step in the right direction in hardening human rights responsibilities of businesses.

At the international level, in July 2019, the Chair of the Open-Ended Intergovernmental Working Group (OEIGWG) released a Revised Draft of a Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ See BHRRC, 'National and Regional Developments on Mandatory Human Rights Due Diligence', <https://www.business-humanrights.org/en/mandatory-due-diligence/national-regional-developments-on-mandatory-human-rights-due-diligence> (accessed 5 June 2020); and essays in Part II of Deva and Birchall (eds), note 4.

⁵² Sharon Burrow and Phil Bloomer, 'Something for Europeans to Celebrate: A New Social Contract Begins to Emerge?', *Open Democracy* (4 May 2020), <https://www.opendemocracy.net/en/can-europe-make-it/something-for-europeans-to-celebrate-a-new-social-contract-begins-to-emerge/> (accessed 5 June 2020).

⁵³ The European Parliament's Responsible Business Conduct Working Group has issued a letter on what ought to be the shape of possible future due diligence legislation. The main principles are that the legislation: (i) applies to all business undertaking of all sizes across the EU; (ii) includes the obligation to respect human rights and the environment in their own domestic and international activities, and to ensure such respect throughout their global value chains, products, services and business relationships; (iii) ensures that business enterprises have an obligation to identify, prevent, mitigate, monitor and account for potential and actual human rights abuses and environmental harm in their entire global value chains; (iv) is supplemented by more specific standards and guidance that provide clarity and certainty to business and stakeholders about the processes and topics expected to be covered; (v) establishes civil liability for human rights abuses and environmental harm and provide access to remedy for victims; and (vi) provides authorities with effective instruments to monitor compliance and ensure enforcement, including through penalties and sanctions. Heidi Hautala, 'EU is Well Placed to Show Leadership with its Future Due Diligence Legislation' (27 May 2020), <https://heidihautala.fi/en/eu-is-well-placed-to-show-leadership-with-its-future-due-diligence-legislation/> (accessed 4 June 2020).

Transnational Corporations and other Business Enterprises (Draft Treaty).⁵⁴ At the outset, and given some rumblings in *Nevsun* dissent⁵⁵ about the conflation of analytical and descriptive aspects, it is worth recalling that the Draft Treaty is based on the very idea of the promotion and protection of human rights obligations and responsibilities of corporations, most of which are already recognised in the ICL.

Mandatory human rights due diligence, as a requirement of ICL, remains central to the responsibilities of prevention of human rights victimage in doing transnational business. Clauses (d) and (e) of Article 5(3) of the Draft Treaty provide for integrating ‘human rights due diligence requirements in contractual relationships which involve business activities of a transnational character, including through financial contributions where needed’ and ‘adopting and implementing enhanced human rights due diligence measures to prevent human rights violations or abuses in occupied or conflict-affected areas, arising from business activities, or from contractual relationships, including with respect to their products and services’.

Moreover, Article 6(7) provides that, subject to their domestic law, ‘State Parties shall ensure that their domestic legislation provides for criminal, civil, or administrative liability of legal persons for’ several listed offences.⁵⁶ Doubts may be expressed whether these are all violations of *jus cogens*, or appear in the list of crimes against humanity. *Nevsun*, for example, provides a more chiselled listing of such norms. Moreover, the issue of civil versus criminal liability of corporations still remains wide open. Yet, human rights crimes as developed by the Draft Treaty appear to settle this issue insofar as it proposes a treaty approach rather than the ICL approach.

⁵⁴ Human Rights Council, ‘OEIGWG Chairmanship Revised Draft 16.7.2019’, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf (accessed 5 June 2020).

⁵⁵ The dissenting justices perceive ‘the approach of treating international law as law and new norms of international law as fact as creating unwieldy hybridization of law and fact’, *Nevsun*, note 1, para 178.

⁵⁶ The following offences are listed:

- a. War crimes, crimes against humanity and genocide as defined in articles 6, 7 and 8 of the Rome Statute for the International Criminal Court;
- b. Torture, cruel, inhuman or degrading treatment, as defined in article 1 of the UN Convention against Torture and other cruel, inhuman or degrading treatment or punishment;
- c. Enforced disappearance, as defined in articles 7 and 25 of the International Convention for the Protection of All Persons from Enforced Disappearance;
- d. Extrajudicial execution, as defined in Principle 1 of the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions;
- e. Forced labour as defined in article 2.1 of the ILO Forced Labour Convention 1930 and article 1 of the Abolition of Forced Labour Convention 1957;
- f. The use of child soldiers, as defined in article 3 of the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999;
- g. Forced eviction, as defined in the Basic Principles and Guidelines on Development based evictions and displacement;
- h. Slavery and slavery-like offences;
- i. Forced displacement of people;
- j. Human trafficking, including sexual exploitation;
- k. Sexual and gender-based violence.

Note 54, art 6(7).

V. CONCLUSION

It is too late in the day to resurrect the idea that human rights doctrines, standards and norms do not apply to corporations as non-state actors or to revive the rather obsolete rationales (such as separation of powers, or institutional capacities and legitimacy of courts). At the end of the second decade of twenty-first century, MNC-developed forms of human rights nihilism ought to end, and the idea of doing business as a ‘moral free zone’,⁵⁷ generating forms of ‘corporate Neandtherlism’⁵⁸ should yield to a core human rights oriented, and friendly, corporate governance. To this end, and particularly in clear affirmation of ICL legal liability of business, *Nevsun* makes, and marks, a substantial contribution.

⁵⁷ David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986).

⁵⁸ See Thomas Donaldson and Thomas W Dunfee, *Ties that Bind: A Social Contract Approach to Business Ethics* (Cambridge, MA: Harvard University Press, 1999).