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ARTICLES

TRANSNATIONAL TORTS AGAINST PRIVATE CORPORATIONS: A FUNCTIONAL THEORY FOR THE APPLICATION OF CUSTOMARY INTERNATIONAL LAW POST-NEVSUN

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INTRODUCTION

About international law, Hans Morgenthau once remarked, “[t]here can be no more primitive and no weaker system of law enforcement than this; for it delivers the enforcement of the law to the vicissitudes of the distribution of power between the violator of the law and the victim of the violation.”¹ For political realists such as Morgenthau, judicial mechanisms to remedy international law violations—and more accurately the lack thereof—are epiphenomenal to state power. However, what happens when power and functions once within the exclusive purview of governments diffuse to

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non-state actors? Does international law apply beyond the state? And, if so, how?

This article considers one facet of international law’s application to non-state actors. It concerns the diffusion of certain functions traditionally undertaken by the state to private corporations, meaning those that are not substantially owned, managed, or controlled by the state apparatus. After the Supreme Court of Canada’s (SCC’s) 2020 decision in Nevsun Resources Ltd v Araya, Canadian courts can, in theory, apply customary international law (CIL) to these private corporate actors for the purposes of a transnational tort claim.

In a globalized economic order, companies routinely conduct business operations such as extractive or manufacturing activities outside of the state where they are headquartered—either directly or through foreign contractors or subsidiaries. At times, these multinational corporations

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3 Although I broadly refer to CIL throughout this article, it focuses on non-derogable *jus cogens* peremptory norms such as the human rights violations listed on the next page. These were the norms the Nevsun majority found were applicable to private corporate actors. As such, it makes sense for the functional approach to embark from that starting point rather than consider all potential CIL obligations. See Nevsun, supra note 2 at para 99:

Here the inquiry is less complicated and taking judicial notice is appropriate since the workers claim breaches not simply of established norms of customary international law, but of norms accepted to be of such fundamental importance as to be characterized as *jus cogens*, or peremptory norms.


4 See Nevsun, supra note 2 at paras 60–133 (for the majority’s commentary on the application of CIL in the case).

(MNCs)\(^6\) have been implicated in fundamental civil and political human rights violations against host state inhabitants.\(^7\) Violations include murder,
torture, cruel, inhuman, or degrading treatment, forced labor, arbitrary detention, injury to health and personal well-being, and harm to a clean and health environment. As victims are often barred from commencing claims in their own courts, they have increasingly decided to commence transnational claims in MNC home states, Nevsun being one such example.

Although the Nevsun Court acknowledged an overlap between CIL and domestic torts, it concluded the former is “of a more public nature”, more heinous, and symbolically different than existing negligent or intentional torts such that it garners a discrete cause or causes of action.


For commentary on the interaction of existing torts under Canadian law and human rights violations, see generally Francois Larocque, “The Tort of Torture (Le Délit De Torture)” (2009) 17 Tort L Rev 158.
The Court did not explain the consequential effects of a symbolically distinct CIL tort. Compared with existing torts, a successful CIL claim presumably warrants a higher punitive damages award and bears greater reputational costs to a corporate actor since the cause of action would relate to a public wrong that “shock[s] the conscience of humanity.”

To respect CIL’s distinctive nature that the Nevsun Court identified, I argue that subsequent Canadian courts should not universally adopt a CIL cause of action each and every time an MNC is alleged to have committed harm in the course of extraterritorial business operations. Rather, I advocate for a functional approach to CIL tort liability that would require courts to assess the manner in which a corporate defendant engaged with a host state’s population. In short, a CIL cause of action would only be available when a corporate defendant has behaved abroad like a state actor by discharging public functions. Approaching transnational corporate tort claims in this fashion demarcates a bright line between CIL and related torts such as assault, battery, unlawful confinement, and negligence. Leaving personal jurisdiction issues aside, under a functional approach the latter set of claims would remain available to foreign plaintiffs even when a corporate defendant has not ostensibly imbibed a public persona to attract a CIL claim.

Pursuant to a functional approach, a CIL tort would be available against a private corporation in two discrete set of instances. The first would be when MNCs discharge public or quasi-state functions in the absence of a host state government. These functions can include the provision of food, shelter, infrastructure, healthcare, and public security. In the second

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17 I use private as an adjective here and elsewhere not to distinguish between public and private corporate functions, but rather as contra-distinction to state-owned or controlled corporations.

category of instances, a CIL tort would be available when an MNC’s investor-state arrangement specifically concerns the provision of public goods or services, generally defined among economists as being non-rivalrous and non-diminishable. This category of the functional approach can manifest when investor-state agreements pertain to public utilities, infrastructure, transportation, or previously state-run services such as immigration control. Although the result would be the same (the applicability of a CIL tort to a private corporation), I separate out the two categories that comprise the functional approach for completeness and because existing literature, discussed below, has parsed out underlying factual scenarios that, at times, can be quite distinct (for example, whether the provision of public goods/services takes place in a failed or fragile host state).

For some critical and feminist scholars, a distinction between public and private corporate functions may seem arbitrary. And to them it may already have or soon become non-existent as corporations encroach on activities once within the exclusive purview of the state. However, as seen later, the current status of CIL as it has evolved in international and domestic spheres militates in favour of maintaining the public/private divide when it comes to a related tort claim. Moreover, historians that

22 See e.g. Karen Knop, “Re/Statements: Feminism and State Sovereignty in International Law Symposium: Feminist Inquiries into International Law” (1993) 3:2 Transnat'l L & Contemp Probs 293 at 329 (“...many feminist scholars conclude either that this rigid [public/private] boundary should become permeable or that at least in certain cases, the boundary should be eliminated altogether.”).
23 Kennedy maps the sequence of decline of a historical legal divide into six stages: 1) Hard cases with large stakes; 2) The development of intermediate terms; 3) Collapse; 4) Continuumization; 5) Stereotypification; and 6) Loopification. See Kennedy, *supra* note 21 at 1350. After *Nevsun’s* 5-4 split, it is reasonable to argue that CIL tort liability placed upon corporate actors remains lodged in stage one.
focus on the corporate form acknowledge the existence of a public/private distinction in which the corporation over the past two centuries has increasingly become synonymous with private enterprise.24 Adopted from the Roman societias and commenda, the Anglo-American corporation (or rather its predecessor joint stock chartered company) initially required a public purpose and was thus restricted to churches, universities, and municipalities as opposed to any commercial activity that yielded profits.25

For CIL tort liability, a corporation’s stock being traded on a public exchange is not determinative of a public function. The bright-line (if that) I employ throughout this article to distinguish between a public and private function is a corporation’s engagement with the host state’s population. If a corporation is not widely supplying goods and/or services to that population—either in place of, or alongside, a host state government—it will not be subject to a CIL tort in a Canadian court. The assertion of a public/private division, even if it is dwindling, is not alien to existing Canadian law as it is entrenched within the realm of constitutional application and protections (albeit with different indicators and consequences).26

To delineate the functional approach to corporate CIL claims, I proceed as follows. Part I describes salient aspects of the pre–Nevsun debate in which there was an academic push forward to include non-state actors within CIL’s purview and a commensurate push back by United States (US) courts that, in many ways, bound themselves to a functional approach without saying as such. Part II lays out the Nevsun majority’s logic for extending CIL to private corporations. I argue in that part that the American academic and judicial sources upon which the majority relied actually employed a functional approach. Part III then


25 See ibid at 22–23.

26 See e.g. RWDSU v Dolphin Delivery Ltd, [1986] 2 SCR 573, 33 DLR (4th) 174.
focuses on this article’s functional theory. I describe the two categories when a CIL tort would apply to violations committed by a Canadian corporation in the course of foreign investment operations. In that part, I also surmise whether a CIL claim would have succeeded against Nevsun Resources pursuant to a functional approach. Part IV rebuts potential critiques.

Analysis on CIL’s applicability to corporate actors under Canadian tort law remains an area open for exploration. As such, this article makes a number of contributions. First, previous work on the use of international law in Canadian courts primarily focused on the doctrine of adoption. For CIL norms, authors grappled with whether Canada is a dualist state (as is the case with treaty integration) or if norms automatically become part of Canadian common law upon crystallization. Much of that literature preceded the SCC’s decisions in R v Hape and Kazemi Estate v Islamic Republic of Iran, which resolved that customary and peremptory norms are automatically incorporated into Canadian common law, absent legislation to the contrary. Even so, past literature relegated CIL to a traditional “statist” notion. As Nevsun appears to have solidified that CIL applies to private corporations in tortious claims, I tackle one aspect of how to craft such claims going forward.

Second, for non-state actors in international law, legal realists have focused on norm formation rather than obligations and enforcement. For


28 2007 SCC 26 [Hape].

29 2014 SCC 62 [Kazemi].

30 See ibid at para 149; Hape, supra note 28 at para 36.

Ochoa, one of CIL’s “legitimizing premises was that it was thought to originate in the actions and beliefs of those whom it later comes to bind—the subjects of the law.”\(^32\) As such, correlative to the ability of non-state actors to form CIL norms, there should be some consideration as to judicial mechanisms that can then enforce those norms. Previous work on CIL enforcement against corporate actors has centred around the parameters of the Alien Tort Statute (ATS) in the US.\(^33\) With this existing gap, I endeavour to contribute to Canadian-specific scholarship around the enforcement of CIL obligations.

Third and perhaps somewhat premature given Nevsun’s recency, there is little guidance as to the parameters of a CIL cause of action under Canadian tort law. The majority outlined two potential theories of how CIL can be invoked by foreign plaintiffs in a Canadian court. Under one theory, there would be a specific tort named “customary international law”\(^34\). Under a second theory, there would be four new nominate torts: slavery; forced labour; cruel, inhuman, or degrading treatment; and crimes


\(^34\) See Nevsun, supra note 2 at para 137.
against humanity.\textsuperscript{35} As the Court rendered its decision in the context of a
dismissal motion where the threshold was whether it was “plain and
obvious” the plaintiffs’ claims would fail, it was not well-placed to delineate
the elements of its proposed causes of action.\textsuperscript{36} For the herein purposes, the
Court did not explain the instances in which those causes of action would
apply to a private corporate defendant.

At this juncture, a point of clarification is required. Overall, I am
supportive of a move to encapsulate private MNCs within CIL’s ambit.
MNCs’ size and wealth has precipitated inordinate amounts of power and
authority over the persons and places with whom they interact at the
international level.\textsuperscript{37} However, there is a troublesome dissonance in \textit{Nevsun}
if CIL is to retain its symbolic nature of accounting for public and
exceedingly heinous conduct and yet be available on every occasion a
corporate actor invests and subsequently commits harm outside its home
state.

I. THE PRE-\textit{NEVSUN} SPECTRUM ON CIL’S APPLICATION
TO NON-STATE ACTORS

Widely considered a main source of international law alongside treaties,\textsuperscript{38}
CIL has typically been defined as “a general and consistent practice of states

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{35} See \textit{ibid.}
\item\textsuperscript{36} See \textit{ibid.} at para 64.
\item\textsuperscript{37} For explanations of MNC power and authority, see generally John Gerard Ruggie,
“Multinationals as Global Institution: Power, Authority and Relative Autonomy”
(2018) 12:3 Regulation & Governance 317; Doris Fuchs, \textit{Business Power in Global Governance}
(Boulder: Lynne Rienner Publishers, 2007); Susan Strange, \textit{The Retreat of the State: The Diffusion of Power}
in the World Economy (New York: Cambridge University Press, 1996); Florian Wettstein, \textit{Multinational Corporations and Global Justice: Human Rights Obligations of a Quasi-Governmental Institution}
(Stanford: Stanford University Press, 2009); Byers, supra note 1.
\item\textsuperscript{38} See Noora Arajärvi, \textit{The Changing Nature of Customary International Law: Methods of Interpreting the Concept of Custom in International Criminal Tribunals} (New York: Routledge, 2014) at 2 (“Treaty law and CIL are considered the main sources of international law imposing rights and obligations for the members of the international community”). In her recent critique of what she terms a “rulebook conception” of CIL,
\end{enumerate}
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followed by them from a sense of legal obligation”39 (opinio juris). However, opinions have diverged on whether CIL is formed by and thus enforceable only upon states. Its modern doctrine stems from the Statute of the International Court of Justice (ICJ).40 Article 38(1) provides a list of sources that the court can apply in resolving inter-state disputes. After international conventions (such as treaties), that provision lists “international custom, as evidence of a general practice accepted as law”41. That text resulted from the treaty of the Permanent Court of International Justice (PCIJ) drafted by the Council of the League of Nations' Advisory Committee of Jurists. In the draft treaty, custom was defined as “being practice between nations accepted by them as law.”42 However, in the final version, “nations” was omitted such that the final treaty read as reproduced above.43

Despite Article 38(1)(b) excluding reference to state practice as a basis for identifying a CIL norm, the Statute of the International Law Commission (ILC), a body of experts responsible for developing and codifying international law, reads, “[t]he Commission shall consider ways and means for making the evidence of customary international law more


39 Restatement (Third) of Foreign Relations Law § 102(2) (1987). The first requirement of a general and consistent practice is typically characterized as an “objective” element with opinio juris being the “subjective” element. Cf Ochoa, supra note 32 at 133 (citing viewpoints that opinio juris is not required (or cognizable) for a CIL norm to crystallize). I do not take a position on whether CIL requires both objective and subjective elements. Rather, taking Nevsun as a starting point that CIL applies to corporate actors, I focus on what practices make corporations akin to states such that CIL, as a distinct cause of action with a “public” and “heinous” nature, ought to apply in transnational tort claims.

40 International Court of Justice, Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993, online: <icj-cij.org/en/statute>.

41 Ibid, art 38(1)(b).

42 Arajärvi, supra note 38 at 10.

43 Ibid.
readily available, such as the collection and publication of documents concerning State practice.\textsuperscript{44} The ILC Statute departed from Article 38(1)(b) and began to solidify custom as contingent upon state practice, correlative meaning it was meant to exclusively bind states.

More recently, the ILC’s Conclusions on the Identification of Customary International Law (Conclusions) corroborated the position of the ILC Statute that CIL is created by a general practice of states.\textsuperscript{45} The Conclusions state that “conduct of other actors [non-state actors] is not practice that contributes to the formation, or expression, of rules of customary international law.” The commentary to that text explicates, “the conduct of entities other than States and international organisations—for example, non-governmental organisations (NGOs) and private individuals, but also transnational corporations and non-State armed groups—is neither creative nor expressive of customary international law.”\textsuperscript{46}

Like the ILC Statute and Conclusions, international tribunals have agreed that custom is evidenced by state practice. In both \textit{SS Lotus (France v Turkey)}\textsuperscript{48} and \textit{Asylum (Colombia v Peru)},\textsuperscript{49} international courts premised a


\textsuperscript{45} See Report of the International Law Commission, UNGAOR, 73rd Sess, Supp No 10, UN Doc A/73/49 (2018) at 130 (Conclusion 4, para 1, and related commentary).

\textsuperscript{46} Ibid, Conclusion 4, para 3 [clarification added].

\textsuperscript{47} Ibid at 132 (related commentary on Conclusion 4, para 3) [emphasis added].

\textsuperscript{48} (1927), PCIJ (Ser A) No 10 at para 87.

\textsuperscript{49} [1950] ICJ Rep 266, online: <icj-cij.org/public/case-related/7/007-19501120-JUD-01-00-EN.pdf> [Asylum].
customary norm on the existence of state practice. That view though began to shift with the ICJ’s advisory opinion in *Reparation for Injuries Suffered in the Service of the United Nations*. In that case, the Court found the United Nations (UN)—while not a state—is subject to international law, meaning it is capable of possessing rights and duties as well as the “capacity to bring international claims.” In its subsequent opinion in *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the ICJ applied the principles from the *Reparations Opinion* to characterize the World Health Organization (WHO) as a subject of international law.

Recall Ochoa’s statement about the symmetry between actors who can create and are subsequently bound by CIL. As such, a discussion about CIL obligations is intertwined with considerations about which parties can form and express it. The flux as to the “subjects” of international law, as that term was explained by the ICJ in *Reparations Opinion*, is illustrative of an ongoing debate on the merits of including non-state actors—and

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50 In *Asylum*, the ICJ held that to rely on an alleged CIL rule, a party must prove that “the rule invoked... is in accordance with a constant and uniform usage practised by the States in question”: *ibid* at 276 [emphasis added]. See also *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3 at paras 50–56, online: <icj-cij.org/public/files/case-related/52/052-19690220-JUD-01-00-EN.pdf> [*North Sea Continental Shelf*]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1984] ICJ Rep 392 at paras 69–75, online: <icj-cij.org/public/files/case-related/70/070-19841126-JUD-01-00-EN.pdf> [*Nicaragua*]. In both *North Sea Continental Shelf* and *Nicaragua*, the ICJ limited the identification of a customary norm to the practice of states.


52 See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, *Advisory Opinion*, [1966] ICJ Rep 66 at 82, online: <icj-cij.org/public/files/case-related/93/093-19960708-ADV-01-00-EN.pdf>:

> That the WHO, as a subject of international law, should be led to apply the rules of international law or concern itself with their development is in no way surprising; but it does not follow that it has received a mandate, beyond the terms of its Constitution, itself to address the legality or illegality of the use of weaponry in hostilities.
specifically corporate actors—within international law’s fold. In this part, I describe what I see as the two ends of that debate’s spectrum. On one end, there is a push forward from sustained scholarly critiques that argue CIL should or already has included private actors, such as corporations at arm’s-length from state ownership or management. On the other end, there is a push back most acutely manifested in decisions by US courts in ATS litigation—that underlines an absence of consensus to expand CIL obligations beyond exclusively governing states and state-derived international organizations.

The discourse on the inclusion of non-state actors in international law, both inside and outside of domestic courts, framed the SCC’s decision in *Nevsun*. The majority deemed the existence of an ongoing debate as sufficient to conclude that private corporate actors can be liable for CIL violations. However, in another light, that debate—inclusive of influential decisions from US courts that have fallen contrary to the *Nevsun* majority’s reasoning and conclusion on the issue—should equally direct Canadian courts to take a principled and measured approach to private CIL claims. Historical and continuing disagreements on CIL’s applicability to non-state actors ought to caution Canadian courts from opening the flood gates to allow for every potential CIL claim to garner subject matter jurisdiction.

A. THE ACADEMIC PUSH FORWARD ON THE SUBJECTS OF INTERNATIONAL LAW

Notwithstanding early positions that nation states are comprised of human beings who should form the base unit within the international legal order,

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See generally Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge: Cambridge University Press, 2011) at 10–16 (for an overview of early positions on the application of the law of nations to individuals versus the state as a separate and sovereign entity). Parlett notes at 10:

Hugo Grotius… in *De jure belli et pacis libri* referred to the ‘law of nations’ or *jus gentium*; he did not envisage a law exclusively concerned with relations between states, but rather a law between the rulers of nations—those exercising public power—and between groups of citizens or private individuals not in a domestic relation to each other. Grotius did not see the state as a separate juridical entity, but as a ‘body of free persons, associated together’ under the personal leadership of the ruler. Grotius’ law of nations was… an inter-individual law, applicable on a universal basis.
the dominant opinion in international law is summarized in Oppenheim’s statement that “[s]ince the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”\(^{54}\)

That does not negate the application of CIL to international organizations that arise out of the consent of states, as relayed in the ICJ cases noted above. However, it concocts a paradigm in which the sources of international law, as presented in Article 38(1), are relegated to state governments rather than the panoply of non-state actors that operate on the international plane.

Echoing the ICJ in *Reparations Opinion*, McCorquodale defines an international law subject as “one which has direct rights and responsibilities under that system, can bring international claims and . . . is able to participate in the creation, development, and enforcement of international law.”\(^{55}\) The traditional view, perpetuated in the Conclusions, that states and state-derived international organizations are the only subjects of international law means that all other actors are deemed as objects that neither have rights or duties nor can invoke its protection or violate its rules.\(^{56}\) To make a claim or be subject to a duty, objects are subsidiary to the states from which they derive nationality.\(^{57}\)

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\(^{56}\) See e.g. George Manner, “The Object Theory of the Individual in International Law” (1952) 46 Am J Intl L 428.

Critical of that dichotomy, McCorquodale broadly reads the *Reparations Opinion* as setting out “principles that could be applied to any non-State actor on the international plane.”58 Likewise, for Parlett, the ICJ’s proposed subject/object formality did not adequately describe how different entities interact with the international legal system.59 And Ochoa has recognized that parties with rights and duties under the international legal system can change and expand over time depending on what the ICJ characterized as “the needs of the [international] community” and “the requirements of international life.”60 To make her argument for including the individual in CIL norms, Ochoa relies upon a number of authors who have advocated for expanding international legal personality since the *Reparations Opinion*. As those arguments implicitly provided the progressive platform for the *Nevsun* majority to rule that corporate actors fall within CIL’s purview and also tangentially overlap with the functional theory I present below, I summarily review those authors’ critiques of the traditional subject/object framework.

Early theorists who pushed back on CIL’s statist scope came from the New Haven School comprised of Yale Law School professors Myres McDougal, Harold Lasswell, and Michael Reisman. Derived from the American legal realist movement of the early 20th century, the school centred upon a methodology that prioritized decision-making processes

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59 See Parlett, *supra* note 53 at 358:

The notions of functions, participation and capacities suggest that it is necessary to lift the ‘veil’ of formality surrounding the doctrine of subjects, but they do not assist in qualitatively distinguishing between entities in the international legal system, and in particular they do not distinguish between entities which have autonomy and independence and those which have a more passive role: entities which acquire rights, obligations and capacities by consent, and which control access to the international legal system, on the one hand; and entities which may only participate in the international legal system at the instigation of and with the consent of the more independent and autonomous entities. Entities which possess these two capacities enjoy qualitatively meaningful participation in the international legal system, whereas entities which possess neither have significantly less meaningful capacity to participate in that system.

60 *Reparations Opinion*, *supra* note 51 at 178 [clarification added].
rather than positive rules to determine what parties are subject to international law’s rights and duties. The New Haven theorists emphasized the growing interdependence between state and non-state actors in the “production and wider sharing of all the basic values associated with a free society or public order of human dignity.” For them, state and non-state actors were conjointly beginning to enter into new organizational formulations consisting of larger and more inclusive groups. This is reminiscent of contemporary joint ventures between government and corporate actors in host states, in the course of which human rights and environmental violations have been alleged.

Another member of the New Haven School, Lung-chu Chen, argued that “[u]nder the concept of ‘custom’, which creates law through widely congruent patterns of human behavior and other communications, individuals and their private associations have always participated in the prescribing function [of decision-making processes].” Like recent realists who contend that corporations play an active role in the formation and implementation of international law rules and norms, Chen argues that

61 See Ochoa, supra note 32 at 154. See also Harold Dwight Lasswell, The Decision Process: Seven Categories of Functional Analysis (College Park: Bureau of Governmental Research, College of Business and Public Administration, University of Maryland, 1956); Myres S McDougal, Harold D Lasswell & W Michael Reisman, “The World Constitutive Process of Authoritative Decision” (1967) 19:3 J Leg Educ 253 (describing the following categories of decision-making processes: intelligence, promotion, prescription, invocation, application, termination, and appraisal).


63 See ibid.


66 See e.g. Arato, supra note 20; Butler, “Semi-States”, supra note 18.
individuals “are the ultimate participants in every social process, whether as individuals per se or as part of private groups or states.”

More recent theorists have made arguments reminiscent of the New Haven School to advocate for the application of international law to a broad set of non-state actors. Paust takes the (albeit controversial) position that well before the ICJ statute, non-state actors were part of international law formation and thus subject to its duties. He cites a select group of US cases that indirectly indicate the existence of international law obligations for private corporations. However, as discussed in the next section, recent American cases that have tackled the issue head-on have decided otherwise. He also cites the SCC’s decision in Pushpanathan “that it is possible for a non-state actor to perpetuate human rights violations on a scale amounting to persecution” as the latter term is used in the Refugee Convention. Despite Paust’s insistence that international and domestic legal instruments have long accounted for the human rights obligations of non-state actors, prior to Nevsun there was no judicial authority indicating that corporations fall within the sphere of CIL obligations.

Higgins built upon the work of the New Haven School, but was not as bullish as Paust to forward that international law throughout the pre-modern and modern eras included non-state actors. Rather, she views the subject/object divide as confusing and argues that there is a gradient of “participants” that includes governments, individuals, international

67 Ochoa, supra note 32 at 144 (discussing Chen) [emphasis added].
69 See Paust, “Private Corporations”, supra note 8 at nn 5–23 (for US case law and commentary).
71 See also Kiobel v Royal Dutch Petroleum Co, 642 F (3d) 379 (2nd Cir 2011) [Kiobel] (finding no previous judicial decision where corporate actors found liable for international law obligations); Kiobel v Royal Dutch Petroleum Co, 621 F (3d) 111 (2nd Cir 2010) [Kiobel 2010] at 118–20.
institutions, private groups, and corporations. She contends the subject/object paradigm disaggregates actors on formalistic grounds even though in practice they participate in international processes in similar ways. That insight is relevant to the functional theory as, at times, corporate and state actors have been implicated in similar international human rights violations, but distinguished for liability purposes based on whether a court characterizes them as a public or private actor.

For Clapham, rather than the subject/object divide there should be “limited international personality” for actors other than states and international organizations. He relies on what Arato, discussed further below, asserts: corporations (like individuals) enjoy rights and privileges under international law and, as such, should bear its obligations. For Clapham and Arato, as corporations possess a semblance of international legal personality through their ability to contract with states or commence claims in investor-state tribunals, there is no reason to syphon off their commensurate obligations.

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74 Clapham, supra note 6 at 78 (specifically referring to the international legal personality of MNCs).

75 See ibid at ch 6; Arato, supra note 20. Cf George Abi-Saab, “The International Law of Multinational Corporations: A Critique of American Legal Doctrines” (1971) 2 Annales d'études internationales 97 (arguing that “internationalized” contracts and investor-state dispute resolution is insufficient to ground corporate international legal personality) at 102.
Alvarez endorses the arguments of most of the above-noted authors (he does not engage with Paust). Although he cautions that there are unintended consequences when deconstructing corporate legal personality to synonymize it with rights and obligations already held by states and individuals, he is unsupportive of the traditional subject/object characterizations. For him, the dichotomy “implies that these are hermetically sealed categories such that mere ‘objects’ are passive recipients of international rights and duties that are created by international law’s ‘subjects.’”\(^\text{76}\) He sees Higgins’s “participants” as “sensible and accurate” as that framework does not conflate corporate and natural persons—the latter’s international law protection is not contingent upon national recognition, whereas the former exists as a creature of national laws.\(^\text{77}\) Like Clapham and Arato, Alvarez asserts that corporations (alongside a number of non-state actors) are “now involved in the making of international law, including . . . the making of international investment law through investor-state adjudication.”\(^\text{78}\)

With a basic understanding of some arguments made by academics to push CIL forward, such that it encompasses non-state actors, the next section considers the opposite end of the spectrum in which US appellate courts have promulgated traditional notions of CIL’s statism to reject a tortious cause of action against private corporations.

B. THE JUDICIAL PUSH BACK: THE STATIST CLING IN ATS LITIGATION

Part of the US Judiciary Act of 1789, the ATS states that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort...
only, committed in violation of the law of nations or a treaty of the United States. As its text suggests, for a US federal court to assert jurisdiction, an ATS claim requires that i) an alien; ii) sue for a tort; iii) committed in violation of CIL or a treaty. Absent legislation to incorporate international human rights treaties into US law, to ground a tort claim foreign plaintiffs ("aliens") must argue that US entities committed CIL violations that are specific, universal, and obligatory.

Dormant for almost 200 years, the ATS was revived in Filártiga v Peña-Irala and Sosa v Alvarez-Machain, both claims against state officials or those acting under the colour of law where the respective courts were not required to consider the CIL obligations of non-state actors. Since then, most ATS suits have concerned US and foreign non-state actors implicated in extraterritorial human rights violations. A large subset of those cases has been brought against American corporations. That shift, referred to by Bradley as the second wave of ATS litigation, sparked both an academic and judicial debate as to whether corporations can be held civilly liable for violating recognized CIL wrongs.

Despite the benefit of the same set of authors and arguments to expand CIL’s scope as the Court in Nevsun, US appellate courts—most importantly, the Supreme Court of the United States (SCOTUS)—have

79 28 USC § 1350.
80 See e.g. Beanal v Freeport-McMoRan Inc, 969 F Supp 362 at 370 (ED La 1997).
81 Supra note 39.
82 630 F (2d) 876 (2nd Cir 1980) (Paraguayan plaintiffs allowed to sue a former Paraguayan police officer for torturing and killing their relatives).
83 542 US 692 (2004) (ATS held to be a purely jurisdictional statute that does not create a private right of action).
84 See Curtis A Bradley, "Customary International Law and Private Rights of Action" (2000) 1:2 Chi J Intl L 421 at 421–29 (noting that second wave has been much less successful than the first wave between alien litigants and particularly individual defendants acting under the colour of law).
85 Beth Stephens has reported that from 1980 (when Filártiga was decided) to 2014, there were 4,244 academic publications referencing the ATS with more than 3,300 publications after 2010. See Stephens, supra note 33 at 1468, n 3.
predominantly sided with international law’s traditional statism. And while the *Nevsun* majority did not elaborate the statute and its cases by name, the academic literature upon which Abella J’s opinion relied to conclude that CIL applies to private corporations revolved around ATS interpretation in US courts.\(^86\) The general thrust of corporate ATS cases that have preceded *Nevsun* cautions Canadian courts from straying too far from their common law counterparts in applying CIL to corporate actors. Doing otherwise i) would cast Canada as an outlier in the dominant interpretation of CIL; and ii) hold Canadian corporations to a higher standard than corporations from other developed countries. Below, I review seminal ATS cases that have involved non-state actors.

The 1984 decision in *Tel-Oren v Libyan Arab Republic*\(^87\) was perhaps the first denunciation of the inclusion of non-state actors within the ATS’s scope. With no prior guidance from the SCOTUS, the District of Columbia (DC) Circuit produced three separate opinions with Judges Edwards and Bork agreeing that the ATS’s law of nations requirement does not encompass non-state actors—a conclusion Paust criticized as judges “not fully informed about the reach of international law to private actors.”\(^88\) Judge Edwards held that *Tel-Oren* could be distinguished from *Filartiga* on its facts as it did not involve state officials. He unequivocally stated, “I do not believe the law of nations imposes the same responsibility or liability on non-state actors, such as the PLO, as it does on states and persons acting under color of state law.”\(^89\) For him, the law of nations was meant to outlaw what he termed “official torture” committed by a state official or person

\(^86\) See *Nevsun*, supra note 2 at paras 111–14 (and literature mentioned therein). Cf Brown and Rowe JJ’s dissent, *ibid* at paras 188–91, 212 (detailing distinctions between the American framework that includes the ATS and the Canadian framework that does not).

\(^87\) 726 F (2d) 774 (DC Cir 1984) [*Tel-Oren*].


\(^89\) *Tel-Oren*, supra note 87 at 776.
acting under the colour of law. In *Tel-Oren* there was no indication of official or state-initiated torture to attract the ATS’s jurisdiction.

Tracing the inclusion of non-state actors in international law, Judge Edwards noted an academic emergence of ‘statism’ in the 19th century and its entrenchment in the 20th century. By the 20th century “states alone were subjects of international law, and they alone were able to assert rights and be held to duties developed from the law of nations.” In sum, he took the position that “the law of nations provides no substantive right to be free from the private acts of individuals, and persons harmed by such acts have no right, under the law of nations, to assert in federal courts.”

Judge Bork, a recognized ultra-conservative on the DC bench at the time, spent much of his opinion explaining why international law prohibitions do not, without explicit legislation, create domestic causes of action. However, he cited Oppenheim for the traditional proposition that “[s]ince the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law.” Judge Bork accepted the statist view that individuals and non-state actors generally have a derivative role to states in vindicating international law violations. To seek a remedy for a violation of private rights, a non-state actor must “repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal.”

Contrary to the DC Circuit, in a number of decisions at the turn of the century, the Second Circuit allowed the possibility for CIL to encompass

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90 *Ibid* at 795 (Judge Edwards reviewed the definition of torture in the draft Convention against Torture and the UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, both of which limit torture to acts of “public officials”).

91 *Ibid* at 794.


93 *Ibid* at 817 [internal citation omitted].

94 *Ibid* at 817. See also *ibid* at 819 (noting that the European Convention for the Protection of Human Rights and Fundamental Freedoms allowing individuals to commence claims for international human rights violations “is an extraordinary exception that highlights the general absence of individual-complaint procedures”).
non-state actors when alleged human rights violations have a “universal concern”. The SCOTUS’s refusal to hear those cases left a circuit split. When the Court granted certiorari pursuant to the Second Circuit’s decision in Kiobel—a ruling that broke with circuit precedent to conclude the corporate defendant was not subject to ATS jurisdiction—it was expected there would finally be nationwide authority as to whether CIL obligations apply to private corporations. Unfortunately, the Court decided to canvass submissions on the limited issue of the ATS’s applicability to extraterritorial conduct.

Without Supreme Court authority, the appellate decision in Kiobel excluding private corporations from the scope of CIL obligations remained authoritative for a number of years. In that decision, the Court of Appeals concluded that there was no CIL norm of corporate liability to ground an ATS claim. Moreover, as previous courts had “never extended the scope of

95 See e.g. Kadic v Karadzic, 70 F (3d) 232 (2nd Cir 1995) [Kadic]; Flores v Southern Peru Copper Corp, 414 F (3d) 233 (2nd Cir 2003) at 248 (although the Court’s review of academic and judicial authorities on the definition of CIL suggested it is formed by and, as such, only applies to states); Presbyterian Church of Sudan v Talisman Energy Inc, 244 F Supp (2d) 289 (NY Dist Ct 2003).

96 In between the Second Circuit’s denial of the ATS’s applicability to private corporations and the SCOTUS’s decision in Kiobel, supra note 71, decisions from the Fifth and Seventh Circuit Courts of Appeals followed the Second Circuit’s decision in Kiobel to conclude that the ATS did not apply to alleged CIL violations on the part of private corporations. See Flomo v Firestone Natural Rubber Co LLC, 643 F (3d) 1013, (7th Cir 2011) (where the Court dismissed an ATS suit by a group of Liberian plaintiffs claiming that the MNC defendant violated CIL norms by using hazardous child labour in a rubber plantation). See also Beanal, supra note 80 (where the court dismissed allegations under the ATS and TVPA by Indonesian citizens against US mining corporations for environmental abuses, individual human rights violations, and cultural genocide).

97 See e.g. Licci v Lebanese Canadian Bank, SAL, 673 F (3d) 50 (2nd Cir 2012) (following reasons in Kiobel, supra note 71).

98 Kiobel 2010, supra note 71 (“modern international tribunals make it abundantly clear that, since Nuremberg, the concept of corporate liability for violations of customary international law has not even begun to ‘ripen []’ into a universally accepted norm of international law” at 137).
[CIL] liability to a corporation,” the Second Circuit was not willing to depart with established practice in order to apply the ATS to the defendant MNC for its part in alleged human rights violations that took place in the course of protests renouncing its extractive activities in Nigeria.

In 2018, the SCOTUS released its decision in *Jesner v Arab Bank PLC,* an ATS case against a Jordanian bank with a US branch. The dispute, at last, called for a ruling as to whether the ATS, and by inference CIL, applies to non-state actors. In the end, the Court could not produce a majority on the ATS’s application to private actors. Justice Kennedy along with the Court’s four conservative judges held that allowing foreign corporations to fall within the ATS’s ambit would impinge on US foreign relations—a matter beyond the judiciary’s powers. Joined by Chief Justice Roberts and Justice Thomas, Justice Kennedy tackled the separate issue of private corporate liability for CIL violations. He followed the Second Circuit's approach in *Kiobel* that the ATS applies to states and individuals who act under the colour of law since that is how CIL developed post-World War II. However, absent express legislation, CIL does not apply to juridical persons such as corporations. He also agreed with *Kiobel* that, at least to date, there is no “specific, universal, and obligatory” norm of corporate liability under international law. After *Jesner,* whether foreign

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99 *Ibid* at 120 [emphasis in original; clarification added].

100 138 S Ct 1386 (2018) [*Jesner*].

101 See *ibid* at Parts I, II-B-1, and II-C.

102 See *ibid* at Parts II-A, II-B-2, II-B-3, and III. The three justices were of the opinion that, in theory, ATS claims could be brought against corporate employees acting under the colour of law, but not the corporate person itself.

103 See *ibid* at 1406. The Court cited *Kiobel,* supra note 71 at 116 for the proposition that “[c]ongress, 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” [internal quotations omitted]. Cf US, Bill S 1874, *Alien Tort Statute Reform Act,* 109th Cong, 2006, online: <congress.gov/bill/109th-congress/senate-bill/1874/text>, which, if enacted, would have subjected MNCs to ATS obligations.

104 See *Jesner,* supra note 100 at 1400.
plaintiffs have the ability to sue US corporations for CIL violations remains an open question under American law. Although, that window has been closing with each subsequent decision. 105

II. NEVSUN’S APPLICATION OF CIL TO PRIVATE CORPORATIONS

Within the above spectrum of debate on the inclusion of non-state actors in international law came the SCC’s decision in Nevsun. The defendant, Nevsun Resources, is incorporated under the laws of British Columbia (BC). Through local Eritrean companies, it operates the Bisha Mine that houses base metal reserves, such as gold, copper, and zinc. Upon seeking refuge in Canada, a number of Eritreans commenced a tort claim alleging they were conscripted into Eritrea’s National Service Program (NSP) after which they were forced to work in inhumane conditions and subjected to torture. 106 Alongside pleading the domestic torts of conversation, battery, unlawful confinement, conspiracy, and negligence, the plaintiffs claimed that Nevsun Resources’ actions violated CIL norms. 107

After affirming Canada’s doctrine of adoption as it was presented in Hape and Kazemi, the Court’s majority addressed CIL’s application to

105 In Doe I v Nestlé USA, Inc, 766 F (3d) 1013 (9th Cir 2014), the plaintiffs filed a writ of certiorari to the SCOTUS in September 2019 asking the Court to “Resolve the Recognized Conflict As To Whether There Is A Well-Defined International-Law Consensus That Corporations Are Subject To Liability For Violations Of The Law Of Nations.” See “Nestlé USA, Inc v Doe I” (last accessed 20 February 2021), online: <scotusblog.com/case-files/cases/nestle-usa-inc-v-john-doe-i/>. See also "Brief for the United States as Amicus Curiae in Doe I v Nestlé USA, Inc", online (pdf): <supremecourt.gov/DocketPDF/19/19-416/144192/20200526124654669_Nestle.Cargill%20final.pdf>.

106 For background facts, see Araya v Nevsun Resources Ltd, 2016 BCSC 1856 at paras 14–70 [Araya].

107 For discussion on the distinction between domestic torts and a potential CIL tort, see Nevsun, supra note 2 (where it is noted that CIL norms “are inherently different from existing domestic torts. Their character is of a more public nature than existing domestic private torts since the violation of these norms shocks the conscience of humanity” at para 124) [internal citation omitted].
private actors. Since much of the defendant’s argument on the inapplicability of CIL to private actors rested on the trajectory of ATS litigation, cited above, the Court was well-versed on that line of jurisprudence. Nevertheless, it largely ignored ATS case law and chose to align its decision on CIL corporate liability with the progressive view that international law has expanded from its statist origins to now govern the rights and duties of non-state actors. Citing a number of American academics, the Court characterized a bifurcated application of CIL between state and non-state actors as “misconceive[d].” It acknowledged that certain topics such as treaty making will continue to remain within the realm of inter-state conduct. However, it indicated two phenomena that substantiate a basis to hold corporations civilly liable for an international law violation. Delving deeper into how those two phenomena have actually been applied—something the Court did not do—militates in favour of Canadian judges applying a functional analysis going forward, rather than applying CIL to corporations writ large.

The first phenomenon the Court described to warrant CIL obligations for corporations was the advent and proliferation of international human rights post-World War II. After the statist entrenchment of the early 20th century that Judge Edwards described in Tel-Oren, this phenomenon brought individuals into the fold of subjects of international law. For the majority, as international law instruments have increasingly implicated human rights, particularly the protection of “individuals, their liberty, their health, [and] their education,” the field has moved beyond its traditional

108 For the majority’s analysis of the application of CIL norms to private actors, see ibid at paras 104–12.
109 See Nevsun, supra note 2 (Factum of the Appellant).
110 See Nevsun, supra note 2 at para 105.
111 See ibid at para 105.
112 See ibid at paras 106–08.
113 See ibid.
state-based character. Relatedly, the Court endorsed a stream of scholarship that sees human rights as accessible to all individuals, and imbibing a universal and sovereign nature that transcends state boundaries. Pursuant to this human-centric conception of international law, it concluded that “[t]here is no reason, in principle, why ‘private actors’ exclude corporations.”

The second phenomenon upon which the Court seized was predominantly taken from US law professor Harold Koh, who asserted that since corporations can now be held liable in international criminal law, they can equally be held civilly liable for CIL violations—an argument that the SCOTUS explicitly rejected in Jesner. In his article on the myths of corporate liability in US courts, Professor Koh asserted that the ATS and another human rights statute, the Torture Victims Protection Act (TVPA) “constitute a form of domestic legislative internalization of an international norm” of individuals being subject to CIL obligations. For him, CIL’s application for the purposes of an ATS claim is not contingent upon the public or private nature of the actor in question. Alternatively, he argued that even if those statutes do not form the basis for a direct domestic obligation from an international law norm, they supplement international criminal law remedies as they allow for the possibility of civil redress for international law violations.

Unfortunately, for both phenomena, the Court—and even the authors that it cited—did not engage with their referential sources. Consequently, they misconstrued the manner in which international law has been applied to private actors in domestic tort claims. For the first phenomenon, although the Court was correct that human rights treaties and norms have

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116 *Ibid* at para 111.

117 See *ibid* at para 112; *Jesner*, supra note 100 at 1401.


119 See *ibid*. 
for decades considered the well-being and fundamental security and dignity of individuals, none of those instruments create a private law remedy.

Even if it is now considered CIL, the International Bill of Human Rights\(^{120}\)—comprised of, among others, the International Covenant on Civil and Political Rights and the International Convention on Economic, Social, and Cultural Rights—does not create a private law cause of action against non-state actors. And the ILO’s Tripartite Agreement as well as the Organisation for Economic Co-operation and Development’s Guidelines for Multinational Enterprises are better classified as international soft law mechanisms, which encourage modes of conduct for corporations that operate extraterritorially.\(^{121}\) Absent domestic legislation specifying as such, those instruments do not by themselves create binding legal obligations against corporations under domestic tort law.

The UN Guiding Principles on Business and Human Rights (UNGPs) create a protect, respect and remedy framework in which, similar to other soft law instruments, corporations are required to “respect” individual human rights, but do not have binding legal obligations that translate into a tort claim.\(^{122}\) As with other soft law instruments, national governments are to implement legislation that would create remedies against corporate actors for violating international law norms. To date, despite condemnation from UN bodies,\(^{123}\) Canada has failed to pass legislation that would create a

\(^{120}\) GA Res 217A-E (III), UNGAOR, 3rd Sess, Supp No 13 (1948).

\(^{121}\) For further details on these mechanisms, see Deva, supra note 6 at 9–17. The point above that these mechanisms are soft laws is arguable as, at times, they create binding obligations on their members. For a review of when the mechanisms do and do not create binding obligations on states that can trickle down to alter MNC conduct, see Clapham, supra note 6 at 201–18.


\(^{123}\) See e.g. Consideration of Reports Submitted by States Parties Under Article 9 of the Convention, 80th Sess, CERD/C/CAN/CI/19-20 (3 April 2012) (the CERD
cause of action against corporations alleged to have violated fundamental human rights in the course of transnational business operations. And the sparse academic literature that argues the UNGPs now constitute CIL and should automatically be integrated into domestic tort law to warrant a private cause of action has received little attention in scholarly circles and was not cited by the Court in *Nevsun*.115

Where international law has been integrated into domestic law to create causes of action against private actors—mainly individuals—those claims have only been embraced by courts on the basis that defendants are characterized as state officials or are otherwise so closely intertwined with the state apparatus so as to be considered state actors and thus subject to CIL norms.126 One example of the latter is a US district court’s decision in *Jama*, where asylum seekers held in a private correctional facility that contracted with the US government brought ATS claims pursuant to allegations of physical and psychological abuse.127 The detainees argued that the facility violated CIL by subjecting them to cruel treatment and punishment. The Court held that the defendants who had carried out the impugned acts could be liable in tort pursuant to “law of nations” violations on the ground that the correctional facility had contracted with the government. Debevoise J wrote, “by virtue of the contract ... to perform

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126 See e.g. *Jama*, supra note 73; *Salim*, supra note 73.

127 See *Jama*, supra note 73.
governmental detention functions *these defendants became state actors and were not acting simply as a private corporation or private individuals.*”

*Jama* illustrates that where international law has been integrated into domestic tort law to ground a cause of action against private corporations and individuals, US courts have only applied the ATS when private defendants function *like* state actors. If Canadian courts are to take seriously how the domestic application of international law has evolved in the US—especially since the majority’s reasoning on this issue almost entirely relies on American authorities—then a functional approach that limits CIL to instances when private actors behave *as if they were* states is more appropriate.

The second phenomenon, namely the domestic internalization of international criminal law norms, that supposedly undergirds a CIL claim against private corporations also failed to account for how US jurisprudence has actually evolved. Professor Koh’s argument, which the majority adopted, relied upon the TVPA—a statute that the SCOTUS has since concluded does not apply to private corporations.129 And although corporate bodies have been held liable in the US for acts of their officials that implicate, for instance, environmental, labour, tort, and antitrust law, contrary to what the *Nevsun* Court would have its audience believe, there have been no American criminal prosecutions against private corporations for violating CIL norms.130

Even in *Kadic*, a case Professor Koh used in order to substantiate the second phenomenon, the individual defendant, Radovan Karadzic was the self-proclaimed president of the republic of “Srpska” and controlled armed forces that were implicated in torture and summary execution of Bosnian citizens during the Yugoslavian civil war.131 The salient aspect of the case, which the Court in *Nevsun* ignored, was that Mr. Karadzic fell under ATS

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128 Ibid at 371–72 [emphasis added].
129 See generally *Mohamad v Palestinian Authority*, 132 S Ct 1702 (2012).
131 See *Kadic*, supra note 95 at 237.
and TVPA jurisdiction because he was behaving like a state actor. The Second Circuit explicitly stated, “Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor.”\footnote{Ibid at 236 [emphasis added].} It is unlikely that the Second Circuit would have asserted ATS jurisdiction if Mr. Karadzic were just any private individual—particularly since \textit{Kadic} was a foreign-cubed matter where the parties and conduct were unrelated to US territory. In other words, the US court applied a functional analysis to determine whether a non-state actor could be liable for violating international law norms. Even though he was not part of a recognized state apparatus in any of the Balkan territories, Mr. Karadzic was deemed a state actor for the purpose of domestic liability.

In sum, when analyzing the US jurisprudence upon which the \textit{Nevsun} majority relied to conclude that CIL norms apply to a private corporation, it becomes clear that American courts have extended international law to private defendants so long as they behaved like state actors—a functional understanding. With that as well as the diversity of above-noted academic and judicial opinions in mind, I argue below that Canadian courts post-\textit{Nevsun} should adopt a functional approach for private CIL tort claims. As mentioned, although the result in each instance would be the same, I divide the functional approach into two categories that accord with existing literature and assist with understanding how MNCs carry out investment operations in host states.

III. A FUNCTIONAL THEORY FOR CORPORATE CIL TORT CLAIMS

With diverging opinions on the inclusion of non-state actors in international law, in this part I present a functional approach that allows Canadian courts to expand CIL in an incremental fashion post-\textit{Nevsun} whilst respecting: i) CIL’s traditional scope of applying to states as well as individuals acting under the colour of law; ii) ATS and TVPA decisions by American courts that have asserted jurisdiction on a functional basis; and
iii) the inherent public nature of CIL. Courts would assess whether MNCs have undertaken a state-like role vis-à-vis host state populations in the course of foreign investment activities. As mentioned in the introduction, for completeness and to align with existing literature the functional approach can be broken into two categories, being instances when MNCs: i) perform a public function in place of failed or fragile governments; or ii) provide public goods and/or services under the terms of an investor-state agreement.

As of late, legal realists—those who focus on how law is practiced in a broader social context—have identified a trend of MNCs increasingly behaving like states to support the assertion that they should be re-characterized under international law. To present the two categories of the functional approach, I predominantly engage with the work of US law professors Jay Butler and Julian Arato, who have respectively argued that MNCs should be considered “semi-states” or international “lawmakers”. These scholars differ as to whether corporations have binding international legal obligations, but tend to agree that MNCs are powerful actors in the contemporary investment environment. As Nevsun resolved that private MNCs are subject to binding international legal obligations in a Canadian tort claim, in each category I confront the factual scenarios Butler and Arato presented in order to congeal domestic doctrine post-Nevsun in conformity with the realities of foreign investment.

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134 See Wettstein, supra note 37; David Bilchitz, “Corporations and the Limits of State-Based Models for Protecting Fundamental Rights in International Law” (2016) 23:1 Ind J Global Legal Stud 143; Deva, supra note 6.
136 See generally Arato, supra note 20. See also Butler, “Keepers”, supra note 31.
137 Butler does not seem to adopt the notion of international legal obligations for corporations in “Semi-States”, supra note 18 but he alludes to it in “Keepers”, supra note 31 (noting that “[i]ndeed, the fact that a state is acting out of self-interest in abiding by international law does not negate the possibility that it is also acting out of a sense of legal obligation” at 202).
The opportunity for Canadian courts to temper their application of a corporate CIL tort in accordance with the functional theory I propose arises because there are, in fact, discrete instances in which corporations act like states when they conduct commercial activities abroad. With that knowledge, not every instance of foreign investment should then serve as a baseline for a CIL claim. Rather, only when MNCs supply goods and/or services to a host state’s population will they functionally fall within the scope of a CIL tort claim. This approach balances between fairness to foreign plaintiffs who deserve a separate cause (or causes) of action for egregious wrongs committed overseas with fairness to corporations that should not have to fear the financial and reputational costs of a CIL tort every time they invest abroad.

A. CORPORATE SEMI-STATES IN THE GOVERNMENT DEFICIT

The first category of instances in which a Canadian court could assert jurisdiction in a CIL tort claim against a corporate actor under a functional approach is when a Canadian-headquartered MNC discharges public functions vis-à-vis a host state population in place of a failed or fragile host state government. Some of today’s MNCs are large global conglomerates with vast amounts of wealth. Going back to the 1960s, an article in The New Republic noted that by 1975 there would be 300 American companies that would control 75% of the world’s industrial assets. See Richard J Barber, “Big, Bigger, Biggest—American Business Goes Global”, The New Republic 154:18 (30 April 1966) 14, cited in US Committee on Small Business, Role of Giant Corporations: Hearings on the Role of Giant Corporations in the American and World Economies, 1st Sess, 91st Cong (Washington, DC: US Government Printing Office, 1969) at 969. In 2000, Anderson and Cavanagh found that 51 out of the world’s 100 biggest economies were corporations. See Sarah Anderson & John Cavanagh, “Top 200: The Rise of Corporate Global Power” (4 December 2000), online: Institute for Policy Studies <ips-dc.org/top_200_the_rise_of_corporate_global_power/>. See also Ruggie, supra note 37 (noting that “about 80% of global trade (in terms of gross exports)
have proven themselves immeasurably effective to mobilize manpower, capital, equipment, and technology in order to complete a project or, for the herein purposes, provide basic goods and services to host state populations that are no longer able to rely on their own governments.

In his recent article characterizing MNCs as semi-states, Butler cites a number of examples where corporations—as if they were the host state government itself—have provided security, housing, food, water, transportation, infrastructure, and healthcare to a host state’s population. For Butler, these MNCs “reach beyond their own private domain to respond to challenges impacting the local community.” He views MNCs that fill the deficit left by governments in failed and fragile states as “functional equivalents to the State, filling gaps in the provision of public services or exercising a degree of authority or territorial control ordinarily associated with government actors.”

Although not Canadian-headquartered MNCs, here is a list of some examples Butler provides where the host state government, in effect, defaulted its public functions over to MNCs:

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140 On MNC mobilization, see Vagts, supra note 6 at 760.

141 See Butler, “Semi-States”, supra note 18 (defining the term as “used to describe business entities that not only maintain operations in failed or fragile States but also themselves take on and discharge important quasi-State functions” at 229).

142 Ibid at 225.

143 Ibid at 258. The term “failed and fragile states” may sit uncomfortably with some readers. I adopt the term directly from Butler who also recognizes the controversy that could be elicited by it and similarly pejorative accounts of certain states. See ibid at 225 (noting that “[t]he ‘failed’ or ‘fragile’ States moniker is not without controversy, but it is here used as a shorthand so as to engage the debate upon terms deployed by global policymakers” at n 15). See also World Bank Group, “Information Note: The World Bank Group’s Harmonized List of Fragile Situations”, online (pdf): <pubdocs.worldbank.org/en/586581437416356109/FCS-List-FY16-Information-Note.pdf>, cited in ibid.

144 For the full list of examples below, see Butler, “Semi-States”, supra note 18 at 230–46.
• In Liberia, American-headquartered tire company Firestone operated a hospital and health clinics that served a patient pool of almost 80,000 Liberians who were not employees of the company. It also operated schools for employees’ families, provided housing and clean water, and subsidized foods. It even ran its own magistrate court.145

• In Haiti, Bermudan-headquartered phone company Digicel erected street signs in its corporate colours. And after the 2010 earthquake that ravaged the government’s ability to undertake public functions, the company rebuilt the iconic Marché de Fer (Iron Market) and constructed over 170 schools.146

• In Cote d’Ivoire, French-headquartered logistics company Bolloré African Logistica invested heavily in the transportation infrastructure of Abidjan.147

• In South Sudan, the Chinese National Petroleum Company invested in infrastructure and provided housing for employees.148

• In Libya, American-headquartered APR Energy established camps that housed workers and took care of their eating, sleeping, bathing, and laundry facilities.149

• In the eastern part of the Democratic Republic of the Congo, various business groups have jointly built new roads and undertaken a tax collection scheme from local residents.150

• In Syria, German-headquartered DHL delivers parcels in high-conflict areas where the government’s mail system cannot.151

146 See ibid at 232.
147 See ibid at 235.
148 See ibid at 236, 240.
149 See ibid at 240.
150 See ibid at 241.
• In Yemen, American-headquartered FedEx and Western Union ensure mail delivery and money transfers through a third-party logistics firm.152

• In Syria, Swedish-based Ikea assists the UNUN High Commissioner for Refugees support displaced persons that have fled the country. For instance, the company has provided over 10,000 new “flat-pack” shelter units that are equipped with solar power to fuel families’ electronics.153

• In Libya, Chad, Burkina Faso, Ethiopia, and South Sudan, Ikea has provided furniture and shelter for accommodations in refugee camps.154

For Butler, the functional equivalency between governments and MNCs in failed and fragile states results from two overarching realities. First, MNCs are able to make decisions in the absence of external constraint. There is no reasonable fear of sanction from domestic or international legal authorities.155 And second, MNCs become the public regulator thereby building relationships of trust with host state communities.156 He acknowledges that the added public responsibilities MNCs sometimes take on in failed and fragile states play a part in buttressing profits as, in the eyes of host state populations, MNC “semi-states” achieve a heightened degree of legitimacy.157 Arguably, that public role ought to be accompanied by a commensurate level of legal

151 See ibid.
152 See ibid at 242.
153 See ibid at 243.
154 See ibid at 244.
155 See ibid at 257–58.
156 See ibid at 264–66.
157 See ibid at 265.

To make up for this seeming absence of governance, economic actors instead form parallel institutions to provide for a degree of self-regulation and to ensure the predictability of transactions. . . . And thus, it may be argued that the quasi-States activities outlined above give business actors a way to construct such relationships in and among communities. [internal citations omitted].
obligations when wrongdoing is alleged. 158 In the Canadian context at least, those obligations can take the form of a CIL-specific tort.

Under this category, Canadian courts would assert CIL subject matter jurisdiction if a Canadian-headquartered corporate defendant has provided public goods and/or services in place of a host state government, like Butler’s examples above. Those examples are not exhaustive, but they do underline the general parameters of this first set of instances. A court would assess how a Canadian company operates abroad. Was it simply conducting, for instance, extractive or manufacturing activities at arm’s-length from a host state government and population? Or was it engaging the host state population so as to displace the government’s responsibilities in some way? In the above examples, MNCs were not simply interacting with their employees, suppliers, and other business contacts. They took over the role of regulator and/or public service provider. In doing so, they built relationships of trust with host state communities.

To my knowledge, no Canadian MNCs are currently operating or have in the past operated in failed and fragile states where they have imbibed a “semi-state” character as Butler describes for MNCs headquartered in other countries. 159 However, that does not inhibit Canadian-headquartered MNCs from doing as such in the future. And the fact that no Canadian MNCs currently fill public roles left by depleted host state governments so as to attract a CIL tort claim under a functional approach reiterates the high standard to which CIL should be held. Put another way, in either category a CIL claim should only be available to foreign plaintiffs pleading in a Canadian court in limited circumstances when the alleged conduct is

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158 As relayed in this paragraph, although the end result of applying CIL to corporate actors is the same, this category of the functional approach is factually distinct from the second category. This category creates a functional equivalency between MNCs and states via the public goods and services that corporate actors supply on their own accord. In contrast, the second category produces this equivalency through investment contracts where state and corporate actors jointly agree for the latter to provide specific goods and services to a host state’s population.

159 One example of where a functional approach would not warrant a CIL claim against a Canadian company conducting business in a failed and fragile state is Talisman’s operations in Sudan. There is no indication the company undertook a public role. See Simons & Macklin, supra note 7 at chc 2 for details on Talisman’s work in Sudan.
intertwined with a public function. This can, in theory, be like the examples Butler provides or, be similar to the US cases previously decided, when corporations in failed and fragile states undertake public functions such as operating prisons or interrogating foreign fighters in the course of armed conflict. 160

In this first category, the salient marker for a Canadian court to identify is whether the MNC has provided goods and services of a public nature to a host state population outside its day-to-day business operations. Taking from Butler’s examples, Firestone is clearly not in the business of providing housing or healthcare. Its quotidian operations are not vested in establishing hospitals as it did when the Ebola virus began to ravage the Liberian population in 2014. 161 If Firestone was a Canadian-headquartered MNC, then subject to the public persona it had adopted in the midst of its foreign investment, a CIL tort claim would be available. 162

On the other hand, compare Butler’s examples to those of Canadian companies that have been implicated in violations in host states without simultaneously adopting a public role vis-à-vis host state populations. For years, Canadian mining company Barrick Gold has faced allegations of fundamental human rights violations against host state populations in Tanzania and Papua New Guinea. 163 Its private security forces, hired to protect its gold mines, have been identified to have committed murders and gang rapes against local populations. In 2013, a group of Tanzanian citizens

160 See e.g. Jama, supra note 73; Salim, supra note 73.
161 For a description of Firestone’s health care operations in Liberia during the crisis, see Butler, “Semi-States”, supra note 18 at 223–24.
162 A transnational claim was brought against Firestone in the US Seventh Circuit for allegations of child labour in its Liberian facilities. In a 2011 decision, the Court of Appeals disagreed with the Second Circuit in Kiobel, supra note 71 holding that private corporations can be subject to CIL for the purposes of a tort claim. As in Nevsun, the Seventh Circuit adopted the theory that since corporations can now be held liable in international criminal law, they should be subject to civil suits. However, the Court determined that the alleged violations did not amount to a CIL wrong. See Flomo v Firestone Natural Rubber, 643 F (3d) 1013 (7th Cir 2011).
163 For the sake of the example, I assume these are failed and fragile states that are unable to adequately provide public services to its population.
commenced a civil claim in the United Kingdom (UK) High Court of Justice alleging that the company’s security forces killed or injured a number of employees via shootings or pushing large rocks onto people in an open pit. The claim, which was settled in 2015, pleaded a number of torts against the corporate defendant including negligence, trespass to the person, and conspiracy.

If the claim against Barrick Gold had been commenced in a Canadian court, the equivalent torts as those pleaded in the UK claim would apply. However, under the herein functional theory, a CIL tort against a private corporate actor as envisioned by the Nevsun majority would not be applicable. Barrick Gold did not engage in quasi-governmental functions such as providing health care or housing, like Butler’s examples above. There is also no indication that the mining company undertook projects to construct infrastructure in Tanzania or erected street signs as Digicel did in Haiti. For all intents and purposes, the company was acting qua private business. It concentrated on its mining operations and endeavoured to maximize profits and shareholder value. And although it possesses power and authority like other large MNCs such that it can, for instance, lobby host state governments, secure property and contract rights, and attain a preferable market position vis-à-vis local companies, it did not imbibe a public persona so as to attract a CIL tort claim under this category of the functional approach.

Another example is that of Tahoe Resources, a BC-based mining company implicated in harming Guatemalan citizens via its private security forces. In 2014, a transnational tort claim was commenced in Canada. The notice of civil claim pleaded three causes of action: i) direct liability for battery; ii) vicarious liability for battery; and iii) negligence. Assuming for the moment that the acts alleged against Tahoe’s security forces

165 See ibid at para 8.
166 For the Digicel example, see Butler, “Semi-States”, supra note 18 at 232–33.
167 For the facts of the dispute, see Garcia v Tahoe Resources Inc, 2015 BCSC 2045.
168 Ibid at para 94.
constitute a CIL violation, under a functional approach post-Nevsun a CIL tort would not be available to the plaintiffs as there is no indication that the mining company took on a public role vis-à-vis the host state population. Rather, Tahoe remained a private investor focused on extracting minerals from the host state without taking on the expansive responsibility of providing essential goods and services to the broader public.

B. CORPORATE-STATE GOVERNANCE

The second set of instances in which a CIL tort claim against a Canadian corporation would attract a court’s jurisdiction is when the corporate actor is found to have performed a public function alongside a host state government. Unlike the first category, an MNC need not be investing in a failed or fragile host state for the functional approach to be employed. Also, this category is not simply a consideration of whether the corporation was complicit in a host state government’s human rights violations against its own inhabitants—what Forcese has referred to as “militarized commerce.”169 Canadian corporations such as the Quebec-based Anvil Mining have been alleged to be complicit in violations committed by host state militaries.170 That, in and of itself, would not ground a CIL tort claim. Rather, the question to ask under this category of the functional approach is whether the corporate and state actors entered into an investment contract that concerns a public good and/or service to be provided to the host state’s population.

As mentioned, I have separated out this category from the first to highlight existing literature. Although Vagts was initially hesitant to acknowledge that MNCs can act as equal partners to host state governments in the course of foreign investment, Arato has recently characterized them as international “lawmakers” from their

169 Forcese, supra note 64 (defining the term as “the acquisition by companies of military services from military or para-military forces as security for firm operations and includes assistance granted these troops in return for protection” at 175).

170 See Anvil Mining, supra note 10.
“internationalized power to contract”\(^\text{171}\). He comes to this conclusion in light of MNCs' ability to create primary rules of international law by converting investor-state arrangements from basic contractual agreements to a treaty-like status that supersedes domestic laws and through investor-state arbitration that enforces those international contracts. He deems MNC power to contract with host state governments as coming at a high cost to the state's domestic capacity to regulate investment in accordance with its population's interests.

I am partial to Arato's characterization of MNCs as international actors but take it one step further. As I see it, MNCs not only have the power to contract with host state governments on a horizontal plane as equal partners; rather, they acquire an internationalized power to govern by taking on a public persona via investor-state agreements that concern the supply of goods and services directly to host state populations. Specifically, this category of the functional approach would allow for a corporate CIL tort claim when the investor-state contract concerns a public good or service to be provided to a host state population (for example, providing basic utilities) as opposed to an investment activity that does not engage with the host state population broadly (for example, oil and mining exploration and extraction).

Consider the following examples Arato provides of MNCs entering into investor-state agreements for the provision of public goods and services to host state populations. It is examples like these that would garner a CIL tort claim in a Canadian court under this second category of the functional approach:

- A concession agreement between the Argentinian subsidiary of US-based parent company Azurix Corporation and the Argentinian government to provide potable drinking water as

\(^{171}\) Arato, supra note 20 at 245 (“[B]oth parties to an internationalized state contract are equal participants in making the law. The private party's capacity to enact international legal instruments is not simply derived from the sovereign prerogatives of the state party.”). I am not concerned with the corporation's ability to make international law through the investor-state contracting process. Rather, for the purposes of a CIL tort claim, the focus is on the corporation's conversion into a quasi-public actor through the supply of goods and/or services part of the contract.
well as treat and dispose of sewage in the Province of Buenos Aires.\footnote{See Azurix Corp v Argentine Republic (2006), No ARB/01/12 (International Centre for Settlement of Investment Disputes) (Arbitrators: Bernard Hanotiau, Donald M McRae), cited in ibid at 232.}


- A concession agreement between the Bolivian wholly owned subsidiary of US-based company Bechtel Corporation and the Bolivian government to provide potable water and sewage treatment in the city of Cochabamba.\footnote{See Aguas del Tunari SA, v Republic of Bolivia (2005), No ARB02/3 (International Centre for Settlement of Investment Disputes) (Arbitrators: Henri C Álvarez, José Luis Alberro-Semerena), cited in Arato, supra note 20 at 233, 246.}

- A concession agreement between a Venezuelan corporation and the Venezuelan government to design, construct, operate, exploit, conserve, and maintain a major highway route, a bridge, and associate tolls.\footnote{See Autopista Concesionada de Venezuela v Bolivarian Republic of Venezuela (2001), No ARB/00/5 (International Centre for Settlement of Investment Disputes) (Arbitrators: Karl-Heinz Böckstiegel, Bernardo M Cremades), cited in Arato, supra note 20 at 250.}

- An agreement between a Belgium company and the Hungarian government to supply electricity in the private market for Hungarian citizens.\footnote{See Electrabel SA v Republic of Hungary (2012), No ARB/07/19 (International Centre for Settlement of Investment Disputes) (Arbitrators: Gabrielle Kaufmann-Kohler, Brigitte Stern), cited in Arato, supra note 20 at 250.}

- An agreement between Siemens and the Argentinian government for the privatization of the services related to...
immigration control, personal identification, electoral information, and the country's national identity cards.\footnote{Siemens AG v Argentine Republic (2007), No ARB/02/8 (International Centre for Settlement of Investment Disputes) ( Arbitrators: Charles Bower, Domingo Bello January), cited in Arato, supra note 20 at 250.}

Conversely, investments that do not supply public goods and services would not fall within the purview of a CIL tort claim. The most straightforward examples are those investments that concern the exploration and extraction of natural resources such as crude oil and minerals. Although they may warrant other tortious causes of action before a Canadian court, scenarios like those in \textit{Kiobel} or related to Barrick Gold's operations in Tanzania do not accord with the public nature of a CIL wrong.

Another example where this category of the functional approach would not apply is illustrated by Canada's alleged role in human rights violations as a result of Saudi Arabia's deployment of Light Armoured Vehicles (LAVs) against Yemeni civilians.\footnote{For background on the Canada-Saudi arms deal, see Secret Memorandum for Action from Deputy Minister of Foreign Affairs, Jean Daniel to Minister of Foreign Affairs (21 March 2016) re: Export of Light Armoured Vehicles Weapon Systems to Saudi Arabia, online (pdf): <international.gc.ca/controls-controles/assets/pdfs/documents/Memorandum_for_Action-eng.pdf>.} This scenario provides a Canadian example to elucidate the distinction in this second category between investments that do and do not concern the provision of public goods and services. The LAVs at the centre of the controversy were manufactured in London, Ontario and sold to Saudi Arabia as part of a bilateral contract negotiated by the two countries' governments.\footnote{For commentary on the arms deal, see Srdjan Vucetic, “A Nation of Feminist Arms Dealers? Canada and Military Exports” (2017) 72:4 Intl J Can J Glob Policy Anal 503 at 516. See also Ellen Guttermann & Andrea Lane, “Beyond LAVs: Corruption, Commercialization and the Canadian Defence Industry” (2017) 23:1 Can Foreign Pol'y J 77; Thomas Juneau, “A Realist Foreign Policy for Canada in the Middle East” (2017) 72:3 Intl J 401.}

Like \textit{Nevsun}, a putative transnational tort claim against the Canadian manufacturer, General Dynamics Land Systems Canada (GDLS-C), would
likely plead the domestic torts of negligence, conspiracy, and battery, among others. However, under a functional approach, there would be no basis to plead a CIL tort as neither the Canadian manufacturer nor its Saudi subsidiary had adopted a public persona by providing goods and services to the Saudi population. Distinct from Arato’s examples above, the contract between the two countries, accompanied by a subcontract with GDLS-C, did not require the corporate actor to supply public utilities or infrastructure or, otherwise, services traditionally discharged by governments to a host state population.

With the above in mind, is there a real-life example where this category of the functional approach could apply? Brookfield Asset Management’s (BAM) transport, infrastructure, and utilities operations in Brazil is likely one such scenario. BAM was founded in 1899 as the São Paulo Tramway, Light and Power Company and helped develop Brazil’s first electrical utilities. In 1912, it was incorporated in Canada as the Brazilian Traction, Light and Power Company Ltd., a holding corporation engaged in hydroelectric power operations in Brazil. After re-structuring a number of times, it became BAM in 2005.

In 2017, Brookfield Business Partners LP (BBP), a BAM subsidiary, acquired a 70% controlling stake in Odebrecht Ambiental, a Brazilian water treatment and sanitation business. That company is now called Brookfield Ambiental and is the largest private water and sewage treatment

180 See generally “Brookfield Asset Management: Who We Are” (22 November 2019), online (video): YouTube <youtube.com/watch?v=c5SvpXQRQcc> [Brookfield History].

181 From the beginning, the company “was engaged in construction and operating the electricity and transport infrastructure in Brazil, providing electricity and tram services in São Paulo and Rio de Janeiro”: “Brookfield Asset Management Inc” (last visited 5 July 2021), online: Companies History <companieshistory.com/brookfield-asset-management-inc/>.

182 See ibid.

183 See ibid.


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operator in Brazil.\textsuperscript{185} Like the companies Arato discusses, Brookfield Ambiental operates primarily through concession agreements and public-private partnership contracts with Brazilian state entities and municipalities.\textsuperscript{186} Through another subsidiary, Brookfield Infrastructure Partners LP (BIP), BAM has a 27% interest in VLI Logistica, a Brazilian rail and logistics business and a 31% interest in Arteris SA, a Brazilian toll road owner.\textsuperscript{187} VLI has rail concessions governed by Brazil’s transportation regulator.\textsuperscript{188} Arteris has concession agreements with the Agência Reguladora de Serviços Públicos Delegados de Transporte do Estado de São Paulo and Agência Nacional de Transportes Terrestres, the São Paulo State and federal transport regulators, respectively.\textsuperscript{189} According to BIP’s 2019 Annual Report, it operates approximately 3,370 kilometres of inter-urban toll roads that annually transport goods representing approximately 62% of Brazilian GDP.\textsuperscript{190}

To date, there is no indication that BAM, BBP, BIP, or any of their affiliate or subsidiary corporations have been involved in human rights violations that would warrant a CIL tort claim in a Canadian court.\textsuperscript{191}


\textsuperscript{186} See ibid at 53.


\textsuperscript{189} See ibid.

\textsuperscript{190} See ibid at 88. Brookfield Business Partners also conducts transport, infrastructure, and utilities operations in Chile, Peru, and India. Here, I focus on its investments in Brazil.

\textsuperscript{191} However, there have been civil and criminal complaints against BAM subsidiaries in Brazil for paying bribes to state officials. See Tatiana Bautzer, “How Canada’s Brookfield Snatched Bargain Assets Amid Brazil Panic” The Globe and Mail (21 May 2018), online: <theglobeandmail.com/business/article-how-brookfield-snatched-bargain-
However, if allegations similar to those in *Nevsun* were alleged by their Brazilian employees or third parties harmed in the course of business operations in Brazil, there would be a strong basis to proceed with a CIL claim under this category of the functional approach. Without a doubt, alongside state actors, BAM and its subsidiaries in Brazil supply a host of public goods and services to the Brazilian population. BAM has placed itself on equal footing with the host state government and thus resembles a state actor. Distinct from the extractive industry examples noted above, but closer to *Jama, Kadic*, and the examples that Arato outlines, BAM and its subsidiaries have imbibed a public persona via its investor-state arrangements with the Brazilian government. As such, if allegations of torture, forced labour, or arbitrary detention, among others, came to light and subsequently resulted in a transnational tort claim in a Canadian court, a CIL cause of action could proceed under the functional approach proposed by this article.

C. WOULD A CIL TORT HAVE BEEN AVAILABLE IN *NEVSUN* UNDER A FUNCTIONAL APPROACH?

With the two constitutive categories of the functional approach laid out above in which a Canadian court should limit itself in asserting jurisdiction over a corporate CIL tort, in this section I briefly address whether a CIL claim could have proceeded against the corporate defendant in *Nevsun* had the matter not settled. There was no indication that Nevsun Resources displaced the Eritrean government to provide public goods and/or services to the host state population in order to bring it within the fold of Butler’s “semi-states”. Therefore, a determination of whether a CIL tort would have applied rests with the functional approach’s second category of the investor-...
state arrangement concerning the supply of public goods and/or services to the Eritrean population.

Recall in Nevsun that the Bisha Mine was owned 40% by an Eritrean corporation and, through local subsidiaries, 60% by Nevsun Resources. Jointly, the two corporations hired a South African company, SENET, to construct the mine. In turn, SENET subcontracted construction companies Mereb and Segen, which are respectively owned by the Eritrean military and the country’s only political party. 192 In other words, the subcontracts were between SENET and the Eritrean government. Through the National Service Program (NSP), the Eritrean government (and allegedly Nevsun Resources) supplied conscripts to Mereb and Segen to construct the Bisha Mine.193

Under the NSP, after six months of military training, Eritrean conscripts were supposed to serve for 12 months in direct military service and/or “assist in the construction of public projects that are in the national interest.”194 It is appropriate to pause for a moment at this point. If the Bisha Mine was a “public project in the national interest”, then it would have qualified under the second category of the functional approach, similar to Arato’s examples of investor-state agreements concerning infrastructure projects for the benefit of host state populations. Thus, the salient question is whether the Bisha Mine fell within the concept of a public project as I have demarcated it here.

At the hearing before the BC Supreme Court, the corporate defendant adduced the affidavit of Berhane Afewerki Weldemariam, Segen’s head of construction administration. He deposed that the NSP is used only for public projects and not permitted for private contracts. In addition to Mr. Weldemariam not knowing the plaintiffs or ever seeing them at the mine, since they would only have been conscripted through the NSP, the

192 See Nevsun, supra note 2 at paras 7–8.


194 Nevsun, supra note 2 at para 9 [emphasis added].
plaintiffs could not have worked at the mine because it was not a public project.\textsuperscript{195}

Leaving aside whether or not the Bisha Mine’s construction involved NSP conscripts, it is evident that it was not a public project for the purposes of a functional approach.\textsuperscript{196} Even though its construction involved the Eritrean military and government, the mine itself was not meant for the benefit of the Eritrean population. Compare this situation to the infrastructure and utilities projects Arato outlined or BAM’s operations in Brazil, in which the goods and/or services at the centre of the investor-state arrangement were meant to be supplied to the host state population. On the contrary, Nevsun Resources engaged an Eritrean state-owned trucking company to facilitate the export of the mined materials.\textsuperscript{197} There is nothing to suggest those materials were meant to be utilized by the Eritrean public. As such, Nevsun Resources qu\textit{a} private corporation was simply a foreign investor looking to maximize its profits without engaging the host state population. Its engagements with the Eritrean government, military, and state-owned trucking company were not in the public interest so as to attract a CIL tort claim. It likely only engaged those companies as Eritrea remains a so-called \textit{command economy} tightly controlled by a dictatorship.\textsuperscript{198} Therefore, under the functional approach proposed here,

\textsuperscript{195} See \textit{Araya}, supra note 106 (Affidavit #1 of Berhane Afewerki Weldemariam, made 30 July 2015) at paras 18–19.

\textsuperscript{196} Some may refute this argument and assert that the Bisha mine is a public project by the mere fact that it involved both Nevsun Resources and the Eritrean government. However, as explained, that does not suffice for a CIL tort claim under a functional approach. A public-private partnership pursuant to which human rights violations are alleged would be covered by a number of other tortious causes of action as were pleaded in previous transnational claims as well as \textit{Nevsun}. See e.g. \textit{Anvil Mining}, supra note 10; \textit{Garcia}, supra note 10; \textit{Das}, supra note 10.


\textsuperscript{198} For a description of Eritrea as a “command economy”, see \textit{Araya}, supra note 106 at paras 39–41.
the corporate actor would not have been subject to a CIL tort had the matter not settled.

IV. REFUTING POTENTIAL CRITIQUES OF A FUNCTIONAL APPROACH

Having proposed a functional approach to which Canadian courts ought to adhere when considering whether to apply a CIL tort to a Canadian corporation, I address a few critiques that may arise. As a preliminary point, even when a CIL tort does not apply to a corporate defendant under the functional approach, there remain a number of “garden variety” torts available to foreign plaintiffs that commence a transnational claim in a Canadian court. As mentioned, in Nevsun the plaintiffs brought claims for conversion, battery, unlawful confinement, conspiracy, and negligence. There were no jurisdictional challenges advanced against those causes of action, which would have been able to proceed to a merit-based consideration even if the CIL claim were struck. This overlap between CIL and existing torts rebuts the assertion that CIL norms should routinely be available to ground a cause of action against corporate actors.

Unlike Nevsun Resources’ jurisdictional challenge rooted in the act of state doctrine, a functional approach to a CIL tort would not have resulted in the complete dismissal of the transnational claim. Rather, the approach endeavours to align CIL’s symbolic character with its limited use in specific circumstances where harm is allegedly committed in the course of a corporation undertaking a public persona vis-à-vis the host state population. Maintaining a high bar for a CIL claim respects its inherently public nature, but does not necessarily constitute an access to justice issue as foreign plaintiffs could in most, if not all, circumstances proceed with other tortious causes of action.

Carlos Vázquez levels a second potential critique. He discerns that in the circumstance that non-state actors, such as corporations, bear direct international law obligations, states would lose their pre-eminent status in controlling norm compliance. For the herein purposes, Vázquez’s critique

pertainsto international human rights norms. He identifies a potential paradox in which a migration of international law obligations from state to non-state actors ought to lighten the burden on states, but rather attenuates states’ decision-making power about whether and how to abide by particular norms. In other words, the state would no longer remain the only rational actor that determines the manner with which compliance takes place. Also, it would not be the sole actor in determining if and how a new norm is to arise. Likewise, states—as the primary bearers of international law obligations—determine the parameters of a norm’s enforcement through enacting domestic legislation.

The problem with Vázquez’s concern about diminished state control over international law norms if non-state actors bear direct obligations is that the migration he fears has already begun. As examples throughout this article have noted, states have privatized public functions to MNCs and afforded MNCs contractual powers on an equal footing through investor-state agreements. Failed and fragile state governments have also ceded their functions to corporate “semi-states” that are, at times, better resourced and financed to discharge public goods and/or services. Moreover, Vasquez’s contention that states have the ability to craft norms or combat counter-norms through legislation is also unfounded as states —

international law requires states to comply with their obligations, the fact that international law makes states and only states responsible for violations gives states effective control over compliance with these obligations” at 950).

See ibid (“the classic model serves in an important way to empower states” at 950) [emphasis in original].

See ibid at 951.

See ibid (noting that “[t]raditionally ... the regulation of corporations, like that of all non-state actors, has been left to states” at 931).

Canada included—have routinely failed to pass legislation that implicates international law obligations.204

Another critique that may be levelled at the functional approach is that it actually penalizes MNCs that are “doing good” for host state populations and simultaneously exonerates MNCs such as Nevsun Resources that do not directly engage host state populations. 205 For one, there is no indication that Butler’s “semi-states” or Arato’s “lawmakers” engaged host state populations out of an altruistic desire. On the contrary, Butler acknowledges MNCs that displace host state governments do so as a means to bolster profits or, at the least, not diminish them. 206 Second, a CIL tort should not be deterred because a corporate actor did some good alongside its alleged violations. As a means of corrective justice, the tort should be available when wrongdoing occurs. But, as I have presented here, the tort should be proportionate to the added responsibility a corporate actor accepts. If it decides to accept the responsibility of engaging with a host state’s population, it should commensurately bear the responsibility that has traditionally attached to state actors. And third, a functional approach does not exonerate an MNC that does not engage a host state’s population. It only concerns one specific cause of action that pertains to historically public-oriented wrongs.

One last critique that may arise against the functional approach is related to the aforementioned critique—that it places a higher burden on MNCs from particular industries such as those related to utilities or construction as opposed to, for instance, oil and mining. Again, this critique misses the important point that engagement with the public—in the form of supplying goods and/or services to a host state population under either category of the functional approach—as opposed to a select set of employees, suppliers, and/or contracting parties, warrants a symbolically

204 See legislation cited, supra note 124.

205 By “doing good”, I mean the types of activities that Butler and Arato identify and are detailed in each category of the functional approach.

206 Butler, “Semi-States”, supra note 18 at 241 (discussing extractive companies operating as ‘semi-states’ because their investments are deemed too valuable to abandon) [internal citation omitted].
distinct cause of action that can potentially result in higher reputational costs and damage awards. If traditionally private-oriented companies in the oil and mining sector, for instance, were to engage a host state population, like Butler’s “semi-states”, those companies would likewise be subject to a CIL tort claim under this article’s functional approach.

CONCLUSION

For activists and academics alike, the SCC’s decision in *Nevsun* was a watershed moment that may eventually serve as a starting point to free international law from the confines of “statism.” It may also signal a turning point in a cognizable governance gap or missing forum for corporate human rights violations in weak governance zones. But the majority’s decision left too much to the imagination as it did not adequately distinguish CIL from existing tortious causes of action. A functional approach would respect CIL’s distinctive status. It would limit a tort claim to instances where a corporate actor that conducts business abroad behaves like a state vis-à-vis its interaction with host state populations.

Whether or not Canadian courts adopt the functional approach I have introduced here will be answered in time. The underlying impetus though has been to encourage ongoing discussions on how, when, and to what extent CIL can be applied in a tort claim commenced in a Canadian court. With US federal courts becoming increasingly restrictive in their assertion of jurisdiction in transnational corporate tort claims, Canada has the ability after *Nevsun* to become a doctrinal exporter. The desire from the herein analysis is that, rather than a blunt instrument, doctrine in Canada and potentially other states will develop in accordance with the realities and nuances of foreign investment.

207 For elaboration of these terms, see generally Simons & Macklin, *supra* note 7; Steinitz, *supra* note 7.