12-2018

The Case for an International Court of Civil Justice

Maya Steinitz

University of Iowa
Legal Studies Research Paper

Number 19-12

April, 2019

Book Introduction: The Case For an International Court of Civil Justice

Maya Steinitz

University of Iowa, College of Law

The Case for an International Court of Civil Justice

MAYA STEINITZ
University of Iowa College of Law

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107162853
DOI: 10.1017/9781316678428

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A *catalogue record for this publication is available from the British Library*.

Library of Congress Cataloging-in-Publication Data
Names: Steinitz, Maya.
Title: The case for an international court of civil justice / Maya Steinitz, University of Iowa College of Law
Description: Cambridge, United Kingdom; New York, NY, USA: Cambridge University Press, 2019. | Includes bibliographical references and index.
Identifiers: LCCN 2018027874 | ISBN 9781107162853 (hardback)
Subjects: LCSH: Tort liability of corporations. | Liability for human rights violations | Liability for environmental damages. | Complex litigation. | Class actions (Civil procedure) | International courts.
Classification: LCC K1329.5 .S74 2019 | DDC 346–dc23
LC record available at https://lccn.loc.gov/2018027874

ISBN 978-1-107-16285-3 Hardback

Introduction

More than thirty years have passed since courts in the United States and India denied adequate compensation to the victims of the most tragic industrial disaster in history for the catastrophic harms they suffered – the Bhopal industrial accident, which took the lives of many thousands. And we still do not have a system of global civil justice that gives victims a meaningful day in court against the multinational corporations (MNCs) responsible for those kinds of injuries. That does not (and should not) stop victims from trying to obtain relief, however. When they do, as is happening with increased frequency, the corporations defending against those claims can incur massive direct and indirect costs – not just once, but in one country after another, as plaintiffs pursue their case in multiple national courts, in what can amount to a never-ending game of global whack-a-mole. Courts in developed countries where MNCs are based do not want the cases, and frequently pass the buck to the countries where the injuries happened. But the courts in those countries often lack the resources to handle complex mass tort litigation and the rule of law culture to generate judgments that courts in the MNC's home jurisdiction, where its assets are often found, would enforce. The small numbers of victims fortunate enough to get a judgment in their favor, therefore, find it all but impossible to enforce. The stakes are high enough for them to try, however, increasingly with backing by deep-pocketed financiers, in as many places as the global corporate defendants have assets. This process can stretch for years or even decades, the irresolution hanging over the heads of plaintiffs and defendants alike. There is no easy fix at the domestic level; the inability to handle cross-border mass torts is a feature of a patchwork system of national courts applying doctrines never designed to handle the kinds of transnational claims produced by our global economy.

Starting with the dual premise that access to justice is a human right that must become a reality and that foreign direct investment (FDI) undertaken by MNCs is a powerful economic force that can reduce poverty and increase global welfare,

I argue that the best solution for both victims and corporations is an International Court of Civil Justice (ICCJ).

On December 3, 1984, a gas cloud from a chemical plant in Bhopal, India, killed thousands of the city's residents and injured approximately half a million more. A New York judge dismissed the case brought by survivors of the disaster, ruling that the Indian judicial system, despite being notorious for its inefficiency, was better placed to handle what would be a hugely complex litigation. The plaintiffs eventually accepted a settlement of less than half a billion dollars, translating to approximately five hundred dollars for the "lucky ones" who managed to get at least some compensation.

Little has changed since. Claiming decades of sickness and death from environmental contamination, residents of the Ecuadorian rain forest sued Texaco for causing the pollution. In 2002 a New York court sent the case to Ecuador, specifically rejecting the allegation that its judicial system was corrupt. Yet when the plaintiffs went back to New York a decade later to collect on an $8.6 billion judgment they obtained in Ecuador, the very same court ruled that the award was unenforceable because of judicial corruption. The plaintiffs in that case have yet to see a dollar of their judgment. Maria Aguinda, the original plaintiff in the class action against Chevron (which acquired Texaco), was in her late teens when Texaco began its operations in the Orienté. She is now in her late sixties. Compensation in her lifetime is unlikely.

Conversely, on April 20, 2010, the Deepwater Horizon oil rig, operated by British Petroleum (BP), a foreign corporation, caught fire and poured millions of barrels of oil into the Gulf of Mexico. Mere days later, BP announced a $20 billion trust that backed an uncapped commitment and an administrative program to compensate fully all victims of the spill. By its second month of operation the program had paid more than $27 million a day, for a total of $840 million, in emergency advance payments. By the end of its eighteen-month tenure it had processed more than a million claims and paid more than $6 billion to individuals and businesses. The discrepancy between the prompt settlement of claims arising from the Deepwater Horizon spill and the persistent inability of the Ecuadorean plaintiffs to secure compensation is prima facie unjust.

The lack of accountability for MNCs is a matter of great public concern. As the importance of MNCs increases so does the urgency of solving what I call "the problem of the missing forum." Today, MNCs are global governance players whose influence can at times equal or exceed that of some sovereigns.

> Transnational businesses have seen incredible growth over the last forty years. In 1970, there were approximately 7,000 transnational corporations [] in the world; that number grew to 30,000 by 1990, 63,000 by 2000, and to 82,000 by 2009. Today,

> there are more than 100,000 multinational corporations with 900,000 foreign affiliates… [FDI has increased] more than ten-fold between 1990 and 2000.[1]

Currently, of the world's 100 largest economies, 51 are companies while only 49 are countries. For example, G.M. is larger than Denmark.[2] As MNCs' activity rises, so do the mass harms attendant on their activity.[3] MNCs simply can no longer be above the law.

In addition to the need to advance the goals underlying tort law – namely, deterring behavior that presents risks that exceed its social value and compensating innocent victims – access to justice is a human right. It is "guaranteed as a legal right in virtually all universal and regional human rights instruments, since the 1948 Universal Declaration, as well as in many national constitutions."[4] The right to bring a suit has also been described by some as derived from freedom of expression, and participation in mass tort trials, in particular, has been regarded by some as an aspect of democratic participation.[5]

I ADJUDICATING CROSS-BORDER MASS TORTS: A PROBLEM OF FORUM, NOT JUST OF LAW

Three cases help to illustrate the problems an ICCJ could help resolve. The cases are Bhopal, an industrial disaster case; the Chevron–Ecuador litigation, an environmental dispute; and the Kiobel litigation, a human rights case.[6] I selected Bhopal because it is the largest industrial disaster of all time. I chose Chevron–Ecuador because it is the largest and longest-running transnational environmental dispute, and has yielded the largest-ever judgment in an environmental suit. And I decided on *Kiobel*, a human rights case, because the United States Supreme Court's recent decision in that case represents the end of an era in which it seemed that the United States would progressively provide a forum for transnational mass tort litigation for harms created by MNCs. Kiobel is generally considered to be the death knell of transnational human rights, environmental, and similar cross-border mass tort litigation in US courts.

In brief summary, the plaintiffs in Bhopal, as mentioned, suffered from one of the largest industrial disasters of all time. US courts refused to hear the case (against a US company) and transferred it instead to India. There, problems with the Indian court system and vigorous resistance from the defendant led the plaintiffs to accept a settlement that was paltry in comparison to the harms they suffered. In Chevron–Ecuador, US courts again refused to hear a case against a US corporation and instead sent it to Ecuador. Against all odds, the plaintiffs secured a multibillion-dollar judgment in Ecuadorian court. But Chevron's assets are located in the United States, and US courts refused to enforce the Ecuadorian judgment, finding it was tainted by fraud and judicial corruption. That was not the end of the story, however.

The Ecuadorian plaintiffs continue to try to enforce the judgment anywhere and everywhere Chevron has assets. In *Kiobel*, survivors sued Royal Dutch Petroleum (Shell) for its alleged complicity in the extrajudicial execution of environmental activists in the oilfields of Nigeria. In deciding the case on appeal, the US Supreme Court ruled that the Alien Tort Statute (ATS)[7] – the vehicle through which foreign plaintiffs had for decades brought lawsuits in US courts for human rights violations in their own countries – did not apply outside the territory of the United States.

I make no claim that these illustrations are representative of the universe of transnational mass harms or of transitional mass litigation. Legal scholars have long known that, because of the unavailability of data as well as other methodological challenges "the behavior of the tort litigation system is … unknown[] or unknowable."[8] Rather, I offer these because they bring to life known problems that are the natural consequences of the procedural characteristics of contemporary legal systems in both the developing and the developed world, as well as known coordination problems between national legal systems. In other words, the case studies are vivid, real-world examples of the procedural difficulties that an analytic approach to the characteristics of cross-border mass litigation reveals to be systemic. While, like all litigation, each of these cases is unique, involving specific facts and idiosyncratic procedural twists and turns, they are all largely representative of the main, relevant features of the contemporary transnational litigationscape.

Bhopal, Chevron–Ecuador, and Kiobel all highlight what I call "the problem of the missing forum": The courts of MNCs' home state will often not hear cases based on activities in developing countries, and the courts of the host state where the injuries happened are often ill equipped to handle complex litigation.[9] Even when they attempt to do so the resulting judgments are often unenforceable in the home jurisdictions of the defendant MNCs, where assets which can satisfy the judgment are often found. The lack of capacity of the courts in host states is caused by, among other things, corruption (real and perceived), bias, lack of judicial capacity, antiquated tort law, and the absence of procedures to handle mass claims. The unavailability of US and European courts results from the operation of doctrines such as *forum non conveniens*, which gives judges the discretion to decline to hear a case when it would more easily and naturally be tried elsewhere. Those doctrines, in turn, are underpinned by concerns about judicial resources, the inefficiency of trying a case far from the location of evidence and witnesses, and the foreign relations implications of such litigation. There are also good, legitimacy-based reasons why the courts of the United States, or any other nation, should not serve as a world court.

But if not US or European courts, perhaps some other existing mechanism would work? I explain why arbitration is inappropriate for mass tort cases. And I similarly explore other alternative solutions to the access to justice deficit in the area of

transnational tort – such as single-issue courts, Corporate Social Responsibility, and self-regulation initiatives – and explain why an ICCJ represents a superior solution. An ICCJ would successfully address the normative and practical problems posed by attempts to adjudicate such cases in national courts, or through arbitration or single-issue courts.

This is a good opportunity to note that while the problem of the missing forum that this book seeks to solve applies with equal force with respect to all MNCs, there are a number of reasons I choose to focus (albeit not exclusively) on United States–based MNCs and on US law. First and foremost, American businesses, responsible for a quarter of the world's FDI,[10] have a leading stake and potentially a leading role in opposing or supporting the ICCJ. In addition, the United States has long been considered the most open forum for mass claims by non-American plaintiffs. The reason for this perception was twofold. First, the United States is a relatively plaintiff-friendly jurisdiction because of a combination of juridical features (including, but not limited to, the existence of juries, punitive damages, and an "each party pays its own" approach to legal costs) and economic features such as the existence of an entrepreneurial plaintiff bar willing to take cases based on contingent fees. Second, during the years when the ATS was interpreted to permit claims for human rights abuses occurring overseas, prior to *Kiobel*, US courts did in fact provide one of the only places in the world where such claims could be adjudicated. The *Kiobel* decision sent access-to-justice advocates back to the drawing board to consider new possible ways to provide victims of human rights and other violations their day in court.[11] This book is part of that effort.

II INCENTIVES AND FEASIBILITY OF A NEW COURT

Even with all the problems of the current system, would businesses and governments ever agree to the establishment of an ICCJ? I answer "yes." MNCs may be persuaded to support its establishment because an ICCJ would solve many problems they face doing business internationally. First, it is important to understand the magnitude of the costs, direct and indirect, of transnational litigation for MNCs. Direct costs include, for example, attorneys' fees, travel costs, investigation and evidence gathering, witness preparation, experts, and translation. They also include the cost of any preliminary injunctions, for instance, when a court orders a defendant to post a substantial cash bond, or freezes corporate assets, as well as any permanent injunction that may preclude certain forms of doing business. When litigating in the courts of developing countries, those costs are compounded by real and perceived corruption.

As high as they are, direct costs can be dwarfed by indirect costs. Corporations facing large lawsuits may find that their share price falls for the duration of the

litigation, that raising capital becomes more expensive in the face of lenders' uncertainty about the outcome of the litigation, or that they are forced to refrain from undertaking business activities such as expansion or mergers, to name but a few of the cascading effects. These and other indirect costs can threaten a company's very existence. Furthermore, direct costs can be replicated many times over, and indirect costs persist for years and decades because the decisions of the courts in one country are not binding on the courts of another country. As I mentioned previously, a final decision in the courts of one country does not mean that the litigation is definitively ended. So even though the Chevron–Ecuador plaintiffs lost their enforcement case in the United States, the story is not over; they continue to seek enforcement in other countries such as Canada and Brazil. And even though Mrs. Kiobel lost her case in the United States she is now relitigating it in the Netherlands. It is important to note that direct and indirect costs, compounded by corruption and multiplied by successive rounds of litigation, are independent of any judgments for the plaintiffs; MNCs are forced to pay the costs even if they never pay a judgment.

In the past, MNCs could perhaps have counted on avoiding the pernicious effects of litigation, confident that the combination of resource-poor plaintiffs and friendly host governments would insulate them. But those days are ending.

The lack of corporate accountability for harms gives rise to a host of backlash effects that compound both the direct and indirect costs of litigation, while systemic changes in the global legal system make it less likely that MNCs will be able to avoid costly litigation and relitigation. Backlash effects include, for example, the increasing adoption by foreign jurisdictions of pro-plaintiff procedural features, at times tailored to apply only to cases brought against MNCs; statutes designed to block the application of *forum non conveniens* in US courts; the use of domestic criminal procedures against corporate executives and employees in host states; and even contribution to regime change (from pro-FDI to populist). These backlash effects, and the contemporary "transnational litigationscape" they create, intersect with three important developments that increase the potential transnational litigation risk that MNCs face: the rise of litigation finance, the development of global lawyering, and the increasing adoption of claim aggregation devices worldwide.

An ICCJ would alleviate such problems for MNCs by providing a final, once-and-for-all decision in cross-border mass tort cases. Direct costs would be incurred only once, and indirect costs, driven for the most part by uncertainty, would end when the trial and appeal, if any, were over. This "global legal peace" would in and of itself be an immense benefit to MNCs. In addition to that, the ICCJ would offer them a neutral forum, based on the rule of law and applying clear, previously disclosed law. I will summarize the ways the ICCJ would do all that later. But first, a brief look at the incentives of states to join and an examination of what the theory of international courts and tribunals tells us about whether the time is ripe for an ICCJ.

Beyond plaintiffs and defendants, nations would benefit from the ICCJ as well. Governments of capital importing nations – such as India and Ecuador – would be incentivized to join the ICCJ because it would offer their citizenry a forum capable of holding MNCs accountable. That, in turn, should deter practices that are likely to result in mass torts. In addition, such nations would be more competitive as investment hosts than nations that declined to join the ICCJ and therefore could not offer foreign investors the prospect of global legal peace should they find themselves defending against mass claims. Governments of capital exporting nations – such as the United States, European countries, and China – on the other hand, would have a different set of incentives. They might wish to provide their businesses with the advantages described without ceding the power of their own courts. The two-tier structure for the ICCJ that I propose (which I discuss in more detail later in this Introduction) would give capital exporting countries the ability to join the enforcement regime, thus helping the ICCJ fulfill its promise of enforceable judgments (for plaintiffs) and global legal peace (for defendants), but to remain separate from the ICCJ's jurisdiction so that, for example, US federal courts would retain the power to adjudicate cross-border mass torts that occur in the United States.

Despite concerns that they may decide to hold out, there are reasons to believe that both the United States and China would support an ICCJ. Certainly, there is a kind of "schizophrenia" evident in American attitudes toward international courts. Successive administrations' views oscillate between cosmopolitanism and institutionalism, on the one hand, and "exceptionalism" and unilateralism, on the other. This may suggest that an ICCJ, sure to be many years in the making, may only be joined by the United States when the pendulum has shifted from the stark isolationism of the contemporary Trump administration to an equally authentic American desire to participate and even lead international governance and rule of law through support of its institutions. This view is bolstered by empirical work that documents the consistent support by American citizens of international courts, a consistency that may help explain why the United States has, in fact, been instrumental to the establishment of most international courts over the course of the past two centuries.

As to China, I acknowledge that the ICCJ may join the large group of international courts designed and launched without China's participation. That said, there is evidence that China is increasingly willing to submit to international regimes that might limit its sovereignty in order to foster economic growth. These include the dispute resolution regimes of the WTO, the International Centre for Settlement of Investment Disputes (ICSID, which resolves investment disputes arising under bilateral investment treaties BITs), and the New York Convention mentioned later. To that evidence I would add that participation in either one of the two tiers of the ICCJ – the jurisdiction regime or the enforcement regime – would

serve the economic interests of China, which is both a significant capital importer and a capital exporter. The competitive disadvantages of holding out will increase as more capital importing nations join the court, making it more likely that China will be a late joiner, even if it is not a founding member.

The feasibility of the ICCJ becomes clearer when placed in the context of the development of international dispute resolution, the international judiciary, and the resolution of transnational mass torts in the past century. The international judiciary in the twentieth century has grown from a handful of courts to more than a hundred.[12] In parallel, international arbitration – where private parties contractually agree to settle their disputes through a private process rather than through litigation in court – has also gained acceptance and has grown exponentially.[13]

The body of theory on the question of how new international courts come into being suggests that creation of new courts is preceded by the confluence of a dizzying array of factors. These include states' self-interests; democracies' desire to spread ideals of democracy and the rule of law; the desire of states transitioning out of illiberal regimes to bind their own hands lest they lapse back; a desire to enhance the credibility of international commitments, as well as many others. The explosive growth of the international judiciary has given scholars many opportunities to study real-world examples. Those analyses show that factors that affect whether a new court will be created include the use of legalist arguments by Western leaders that limit the range of nonjudicial responses acceptable to their constituencies; a "constitutional moment," such as the end of a world war or the collapse of Communism; and the desire to cement a new world order in the wake of such historical moments. Governments' lack of credibility in terms of their willingness or ability to solve legal problems ignites social movements that push for international courts. Social entrepreneurs, visionaries, and leaders can also be instrumental. The desire to avoid incurring the diplomatic costs of setting up an ad hoc tribunal, in particular, has been identified as a reason to set up a new permanent court. All these factors, and others, help explain the emergence, often over the course of decades, of new courts.

Examining the emergence of several previously unimaginable courts shows how the theory plays out in practice. The creation of the International Criminal Court (ICC), for instance, is a remarkable development in human history because it has the power to impose criminal liability on heads of states as well as the soldiers and military leaders they send to battle. The combination of individual criminal liability and the subject matter, namely, the conduct of war, which goes to the very heart of state sovereignty, can hardly lead to greater resistance to delegation of judicial sovereignty to the international level. Yet, after a century of striving, and despite a lack of participation by the United States, the ICC became a reality in 2002. The WTO, with its Dispute Settlement Understanding (WTO DSU), developed over nearly half a century to become a lynchpin of today's global trade regime. Among other

things, it attracted China – generally hostile to international courts – as a member beginning in 2001. The Iran–United States Claims Tribunal (IUSCT) was set up by two nations in an active state of hostility; indeed, it was the consequence of and was set up during the height of the 1979 hostage crisis to adjudicate thousands of private claims arising from the Iranian Revolution. Qualitative explorations of the coming into being of those institutions highlight the broad array of historical, economic, political, and other forces that converge to make international courts a reality, often over the course of many decades and despite reluctance by or within some of the world's superpowers.

Similarly, cross-border mass claim aggregation by ad hoc international tribunals is not new. Its origins can be traced at least to the Jay Treaty of 1794,[14] which established commissions that dealt with claims of US and British nationals against the other state. More contemporary examples of such claims facilities include the United Nations (UN) Compensation Commission, which was created to adjudicate claims arising from the 1990–1991 Gulf War, and the Claims Resolution Tribunals for Dormant Accounts in Switzerland, which were set up in the 1990s to resolve claims regarding assets deposited in Swiss bank accounts.[15] "Governments … have intervened to facilitate … [transnational mass tort claims in] situations where the numbers of parties affected is too large to ignore or resolve through informal or diplomatic means. During the nineteenth century, approximately eighty claims commissions adjudicated private litigant cases arising out of war and civil unrest… Between World War I and World War II nearly thirty commissions and arbitral bodies adjudicated private litigant disputes."[16] The proposal to establish a permanent ICCJ builds on that institutional history, providing a permanent institution to deal with such claims. That will help to ensure that like cases are treated alike, and will save states the high costs and inefficiencies of negotiating and setting up new ad hoc institutions every time there is enough political will to adjudicate transnational mass claims.

Many of the preconditions for the creation of a new international court identified in theory and practice already exist in the context of cross-border mass torts. These include, among other things, the growing discontent with the existing, asymmetrical international investment dispute resolution system, which by design offers protections to foreign investors (MNCs) but not to those harmed by them, and which takes the form of private arbitration; discontent with the lack of access to justice for plaintiffs and due process deficit for defendants in existing fora; the growing calls to regulate business and human rights, which include calls for permanent international single-issue courts (for human rights, environmental disputes, or corruption); and systemic changes engendered by the growth of litigation finance and the global rise of national collective redress and class action regimes.

III THE PROPOSAL

I propose a new international court, the ICCJ. A single global court would reduce direct and indirect costs by streamlining procedures, ensure global legal peace, and eliminate corruption by providing a neutral forum operating according to the rule of law. It would make FDI more predictable and hospitable in participating host states, and alleviate backlash by giving plaintiffs a viable way to hold MNCs accountable.

At the heart of the proposal is a two-tiered structure, implemented through two separate treaties, reflecting the differing incentives of capital exporting and capital importing countries. The former would be primarily concerned with providing their businesses global legal peace (because their own courts provide a viable forum for their own plaintiffs) whereas the latter would be primarily concerned with providing their citizens with a forum to adjudicate their claims. The first treaty (the ICCJ statute) would create the court and establish its jurisdiction in the territory of states parties. The second would set out the enforcement regime (the ICCJ enforcement treaty), but would not grant the ICCJ jurisdiction in the territory of states parties. All members of the ICCJ statute would also be part of the enforcement regime, but not the reverse. The two treaties would be designed to come into force together, but only after garnering enough support – especially for the enforcement regime – to ensure a reasonable expectation of success.

I argue that the ICCJ should have exclusive jurisdiction over the cross-border mass tort claims arising within the territory of states parties to the ICCJ statute. The grant of exclusive jurisdiction would mean that if, say, Peru were a party, then plaintiffs injured in Peru would only be able to bring their cross-border mass tort claims in the ICCJ. Exclusivity has several advantages. It would remove cross-border mass torts from the morass of transnational litigation and therefore guarantee an end to parallel and sequential litigation. It would also protect both parties from the pernicious effects of real and perceived corruption and bias in national courts. But complementarity, where the ICCJ would defer to the jurisdiction of a national court that was willing and able to take on the case, would be a plausible, albeit inferior, fallback position. The territorial nexus meanwhile would mean that the ICCJ would have jurisdiction over any defendant operating in Peru – no matter that defendant's nationality, and no matter whether its home country were or were not a member of the ICCJ statute.

The ICCJ would grant defendants global legal peace (in legal jargon, "global preclusion") through the operation of the enforcement treaty. States joining the enforcement regime would commit to enforcing the decisions of the ICCJ. The mechanism I propose for this regime is similar to the one that already exists in international arbitration. There, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),[17] generally regarded as one

of the most successful commercial law treaties of all time, requires every state that joins the treaty to give full effect to arbitration decisions (with some rarely invoked exceptions).

Since the ICCJ would adjudicate cross-border mass torts, it is worth defining those terms, as I use them throughout the book. By "cross-border" (or "transnational") I am referring to cases in which plaintiffs from one jurisdiction sue defendants (usually, MNCs) in the courts of another jurisdiction. A "tort" is "an act or omission that gives rise to injury or harm to another and amounts to a civil wrong for which courts impose liability. In the context of torts, 'injury' describes the invasion of any legal right, whereas 'harm' describes a loss or detriment in fact that an individual suffers."[18] In order to provide both plaintiffs and defendants with maximum predictability, to integrate modern advances in tort law, and to ensure fairness the ICCJ should define and apply its own law, defined in the ICCJ statute. The alternative, applying existing national laws, would maintain the unpredictability of the current system and furthermore might deprive injured plaintiffs of their day in court if the country in question lacked, for instance, modern environmental standards. "Mass" means litigation involving a number of claimants that exceeds a numerical (such as twenty) or discretionary (such as when the judges decide efficiency will best be served) threshold.

These are complex cases that can arise from a variety of circumstances such as a single mass disaster, myriad individual contacts with a hazardous product, or environmental contamination over decades. Therefore, the claims may all arise at once or be latent for years, maturing in waves. However, the hallmark of mass tort claims is that they involve identical or near-identical issues, and are brought against the same defendant or group of defendants. Mass torts can be dealt with through a range of options, with individual adjudication on one end of the spectrum, collective redress (also known as claim aggregation) somewhere in the middle, and class actions (in which one or few plaintiffs represent a larger group of unnamed, sometimes unknown, plaintiffs and to which I will also refer as "representative actions") on the other end of the spectrum. The ICCJ should offer procedures all along that spectrum, so that each group of claims can be dealt with in the most efficient way possible. In that way, it will resemble a "multidoor court," offering alternative dispute resolution (ADR), aggregate litigation (coordinating and consolidating part but not all of the trial), representative actions, and supervised settlements. Judges will manage routing the parties through these multiple options.

As a general approach, I propose that the ICCJ adopt streamlined procedures derived from the increasing convergence of common law and civil law approaches in the areas of adjudicating mass claims. That would mean, among other things, that the ICCJ's version of the representative action would be structured differently than the American class action (which is generally regarded with skepticism outside the

United States). Also, I argue that the ICCJ should opt for the more managerial and inquisitorial approach to adjudication favored in countries with a civil law system, as opposed to the system in common law countries, where the judge is more passive and the parties' attorneys drive the process. Among other benefits, this will permit judges to dismiss cases early on, something they are not easily able to do in jury-based systems.

The hybridization means that some of the most controversial features of the American legal system would be restricted or dispensed with altogether. Among those features are expansive discovery, punitive damages, and juries. Discovery would be limited, along the lines of what is permitted in international commercial arbitration. Punitive damages, too, would be restricted; they would only be available where provable beyond a reasonable doubt (as opposed to the more lenient standard of preponderance of the evidence used in most parts of civil trials). The ICCJ would have no juries; all trials would be bench trials. Further efficiencies for MNCs would accrue through the predictability of a single body of law, known *ex ante*; a neutral forum free from actual or perceived corruption; and state-of-the-art aggregation procedures tailored to the specific needs of each case. By adopting a hybrid of common law and civil law procedures, drawing on cutting-edge thinking coupled with freedom from path-dependent domestic legal arrangements, and creating specific solutions custom-designed for mass torts that do not operate as precedent domestically, the proposal should assuage MNCs concerns that justice and efficiency for defendants, as well as plaintiffs, would be served by the new institution.

An ICCJ would not, of course, be a panacea. All international courts are the products of political compromises, sometimes painful ones. They are imperfect institutions and the ICCJ will be no different. I invite the reader to ask not whether all problems of mass claims and transnational litigation would be resolved by this proposal. They will not. Aggregate litigation, in particular, is an area characterized by unhappy trade-offs between justice and efficiency; both it and tort law are ideological battlegrounds where competing worldviews cannot all be satisfied. Rather, I ask readers to consider whether the ICCJ will significantly improve on the existing reality – leaving transnational mass tort resolution to flawed, reluctant national courts that were never designed to serve as world courts. The proposal for an ICCJ is an exercise in nonideal theory and as such it inherently seeks to not let the very best be the enemy of the good enough.

Finally, as implied by the institutional histories of other international courts, this is self-consciously a project with a long view. Arriving at a treaty to create the court may take years or decades. And decades more would be needed for the court to build institutional expertise and maturity, to become efficient, and to develop nuanced and predictable jurisprudence. Such is the nature of building an international (or domestic) legal order. Nonetheless, I suggest that we should not let the

formidable challenges that would be involved both in setting up and running an ICCJ, or the fact that it will inevitably be an imperfect compromise, be a barrier to getting started today.

In that vein, I will conclude the book with the outline of an action plan, consisting of steps that academics, activists, policy makers, and others can take to lay the groundwork for the establishment of an ICCJ.

The book proceeds as follows: In Chapter 1, I set out the theory of how international courts come into being, identifying the range of circumstances that have historically merged to spur their creation. This is the first part of the argument that an ICCJ would be feasible, not just desirable. I will then spend much of the rest of the book attempting to show that many, if not most, of those circumstances exist today in the context of transnational civil justice. (Readers less interested in this theoretical exposition may wish to skip to Chapter 2.) In Chapter 2, I offer three case studies – Bhopal, Chevron–Ecuador, and *Kiobel*, to highlight the limits of the ability of the current system to deal with cross-border mass torts committed by MNCs. That discussion continues in Chapter 3, where I elaborate on the legal underpinnings of the problem of the missing forum and show how no existing forum can adequately solve it. In Chapter 4, I offer the second part of the argument for feasibility: the business case for an ICCJ. MNCs, their home states, and the states that host FDI all have economic incentives to prefer an ICCJ to the existing transnational litigationscape. In Chapter 5, I offer a blueprint for the ICCJ, addressing issues such as jurisdiction and procedure. The Conclusion provides ideas for action that can be taken to make the ICCJ a reality.