A Twail of Two Approaches

How can international law be used to best provide rightsholders with adequate 'access to remedy'?

SUBMITTED BY:

Sarah Chaplin (candidate number M94924)

SUPERVISOR:

Dr Michelle Staggs Kelsall

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Family name: Chaplin
First name: Sarah
Programme of Study: MA Human Rights Law
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Abstract

Despite increasing focus from global actors in relation to business violations of human rights, there remains a legal lacuna in providing access to remedy for those who suffer grave violations at the hands of multinational corporations. Moreover, the long term impacts of the avenues that do exist are rarely explored and need to be better situated in the history of how imperial actors have tended to impose their institutions upon the Global South. This paper seeks to look at access to remedy specifically from a 'TWAIL' perspective. In doing so, it finds that both 'home' and 'host' state domestic avenues, as well as the international solutions to date (including the United Nations Guiding Principles and the current Draft Treaty) are unsuitable in providing both adequate and targeted remedies adapted to the needs of the specific victims, as well as ensuring that the Global South retains its sovereignty in this area. In this context, it explores a further two approaches, being a world court and international peoples' tribunals. It finds that the latter, albeit not perfect, could and should be utilised by civil society, and in doing so, make some progress into revitalising international law from below.

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CHAPTER 1: INTRODUCTION

"Corporate law…does not speak the language of human rights."[1]

1.1 Background

It is of no doubt that multinational corporations ("**MNCs**") are globally important actors, creating potentially enormous economic and social benefits to their employees and customers. However, their operations can simultaneously cause lasting harm to individuals, communities and the planet itself, with allegations of human rights violations being made across a plethora of MNCs, including those producing the coffee we drink,[2] the clothes we wear[3] and our internet search histories.[4] The complaints themselves range from MNCs being implicated in creating, facilitating or tolerating situations of "*land acquisition that fail to respect the land rights of traditional and indigenous communities; the industrial use of powerful chemicals impacting on the environment; forced labour…polluting of rivers; tolerance of poor safety standards and working conditions; and accounts of collaboration with State military and paramilitary groups against a backdrop of widespread violence against human rights defenders*."[5]

There have been numerous attempts over the preceding decades to regulate business conduct at the international level, as will be detailed further herein. The most successful is the United Nations Guiding Principles ("**UNGPs**"), a soft law instrument devised by John Ruggie and endorsed by the Human Rights Council ("**HRC**") in 2011.[6] The UNGPs rest on a three pillar

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[1] Lucien Dhooge, "Due Diligence as a Defense to Corporate Liability Pursuant to the Alien Tort Statute" (2008) 22 Emory Int'l L Rev 455, 473.

[2] Deborah James, "As the Global Coffee Crisis Worsens, a Human Rights Organization Launches a Grassrootscampaign Demanding That Folgers Start Offering Fair Trade Coffee" *Democracy Now* (24 December 2001) https://www.democracynow.org/2001/12/24/as_the_global_coffee_crisis_worsens accessed 25 May 2021.

[3] Kathy Marks, "Exposed: The Reality Behind London's 'Ethical' Olympics" *The Independent* (16 April 2012) http://www.independent.co.uk/news/world/asia/exposed-the-reality-behind-londonsethical-olympics-7644013.html accessed 25 May 2021.

[4] Amy Schatz, "Web Firms Under Fire to Protect Human Rights" *Wall Street Journal* (2 March 2010), http://online.wsj.com/article/SB10001424052748704548604575097603307733826.html accessed 25 May 2021.

[5] Daniel Blackburn *Removing Barriers to Justice How a Treaty on Business and Human Rights Could Improve Access to Remedy for Victims* (Stichting Onderzoek Multinationale Ondernemingen, 2017) <https://media.business-humanrights.org/media/documents/files/documents/Removing_barriers_web.pdf> accessed 25 May 2021, 7.

[6] UN Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie* UN doc A/HRC/17/31 (21 March 2011) ("**UNGPs**").

"Protect, Respect and Remedy" framework, with 'Remedy' requiring States to guarantee access to redress through "*judicial, administrative, legislative or other appropriate means.*"[7] The importance of remedy cannot be understated, as if this remains outstanding the remaining pillars cannot be said to have functioned.[8]

However, as will be shown, there are immense legal, practical and political barriers to victims of abuse accessing remedy, which must be appropriate and commensurate to the harm suffered.[9] By exploring these barriers, and the legal lacuna that exists in holding MNCs accountable at both the international and domestic levels, it will be shown that despite their vast financial and political influence, MNCs are "*accountable to no-one – a political power without responsibility, a state within and above the state.*"[10] The HRC itself has articulated concerns regarding "*legal and practical barriers … for victims of business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy.*"[11]

Beyond immediate implications that access to remedies has for victims, the scholarship could benefit from a stronger 'Third World Approach to International Law' ("**TWAIL**") lens. Whilst not homogeneous in their critiques, TWAIL scholars articulate certain common concerns with international law and the way in which it perpetuates Western structures and power dynamics.[12]

Accordingly, and using a desk-based approach grounded in TWAIL scholarship, this paper sets out to critically assess approaches to access to remedy in domestic and international law. It will be shown that whilst it might be tempting to hold MNCs accountable in Western jurisdictions in light of barriers that exist in the Global South, this might exacerbate the imperial structures inherent in the international system. This has implications for the current Draft Binding Treaty being negotiated, which as explained below, envisions victims having a broad range of choice

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[7] Ibid, Principle 25.
[8] UN Web TV, 'Building Coherence on Essential Elements of Human Rights Due Diligence Organized by the UN Working Group on Business and Human Rights in Collaboration with the OECD' (27 November 2018) comments by Joseph Wilde-Ramsing, Coordinator, OECD Watch <http://webtv.un.org/watch/panel-on-human-rights-due-diligence-forum-on-business-and-human-rights-2018/5972028985001/?term=> accessed 9 December 2020.
[9] UNGPs (n6), Principle 25.
[10] Fleur Johns, "The Invisibility of the Transnational Corporation: an Analysis of International Law and Theory" (1994) 19 Melb UL Rev 893, 914.
[11] UN Human Rights Council, *Business and Human Rights: Improving Accountability and Access to Remedy* UN A/HRC/32/L.19 (29 June 2016).
[12] See for example Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005); Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (CUP, 2003); Bhupinder Chimni "Third World Approaches to International Law: A Manifesto" (2006) 6 International Community Law Review 3.

for where their grievances are to be heard, but in practice is likely to perpetuate the use of Western systems. The alternative of a 'World Court' would likely lack legitimacy and the practical ability to enforce judgments. To overcome these issues, use should be made of often overlooked 'People's Tribunals' which are designed to perform roles that official institutions fail to. Whilst not a panacea to all the issues at hand, these can provide remedies and procedures adapted to local cultures.

1.2 Structure

This paper is split into a further 5 Chapters. Chapter 2 will outline why MNCs should be subject to human rights obligations, focussing on their global political and economic dominance and their associated human rights violations.

Chapter 3 will then discuss how domestic systems have (failed) to regulate MNCs to date. It will begin by exploring the nature of how States can take jurisdiction over MNCs and then outline the key issues with both host-state and home-state redress. With regard to host-states, it will be shown that the key barriers to access to remedy are political will and resource. By contrast, home-states have typically been reluctant to take jurisdiction over cases, including by asserting that the doctrine of 'forum non conveniens' applies. Even where they have taken jurisdiction, we see that they do not adapt to the needs of local cultures. Worryingly, the decision to use this route could also propagate Western procedures and notions of justice.

Chapter 4 looks to the international law that has attempted to fill the lacuna to date. It will show that the UNGPs, whilst an important step in many ways, has not practically made access to remedy easier. The current Draft Treaty being negotiated is ambitious, but does not overcome the issues discussed in Chapter 3.

Thus, Chapter 5 looks at two other options through a TWAIL lens. The first of these is a 'world court', which will be shown to be an impractical alternative. Instead, use of People's Tribunals is proposed, with specific mandates to look at violations by MNCs of human rights. It will be shown that this bottom-up approach to international law, with a focus on victims and their communities, is one way in which access to remedy can be achieved whilst also preventing neo-colonialism remaining dominant.

Chapter 6 concludes the findings of this paper, summarising how international law needs revitalising in this area.

CHAPTER 2: MULTINATIONAL COMPANIES AND HUMAN RIGHTS ABUSES

Whilst not this paper's core focus, it is important to firstly address why MNCs should have human rights obligations. This has not always been obvious and remains debated. Milton Friedman famously articulated that in a free economy, the only social responsibility of a business is to use its resources to increase profits, so long as it stays within "*the rules of the game*" (i.e. open and free competition, without deception or fraud).[13] On this view, and given that international human rights law addresses only State responsibilities, which MNCs cannot observe, accountability and respect for human rights should be limited to States.

However, Friedman's assertion is compatible with MNCs respecting human rights pursuant to 'stakeholder' theories of corporate governance, under which long-term corporate profitability is dependent on decisions that consider a wider class of stakeholders than merely shareholders.[14] Observing human rights can provide economic benefits, including promoting positive reputations, attracting customer loyalty and providing 'social licences to operate' in communities.[15] Moreover, it helps in avoiding associated costs of violations such as litigation and supply chain disruptions.[16] Studies show workers will maximise productivity and output if they have a better quality of life, such as a 2015 study by the International Labour Organisation ("**ILO**") and International Finance Corporation which cites that factory workers performing in better conditions reach production targets up to 40 minutes faster.[17] Stakeholder theories have translated into company sentiment and rhetoric, with the British NGO Traidcraft reporting in 2015 that directors of 69% of UK companies agree companies should be accountable for harms caused abroad.[18]

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[13] Milton Friedman *Capitalism and Freedom* (40th Anniversary edn, University of Chicago Press 2002) 133.
[14] Peter Muchlinski, *Multinational Enterprises and the Law* (3rd edition, OUP, 2021), 557.
[15] Ibid, 562.
[16] Ibid, 557.
[17] Drusila Brown and others "Are sweatshops profit-maximizing? Answer: No. Evidence from Better Work Vietnam'" *International Labour Organisation and International Finance Corporation* (March 2015) <https://betterwork.org/wp-content/uploads/2020/01/DP17-with-cover.pdf> accessed 26 May 2021, 2.
[18] Grietje Baars, '"It's Not Me, It's the Corporation': The Value of Corporate Accountability in the Global Political Economy" (2018) 4 Lond.rev.int.law 127, 140 citing Traidcraft, 'Two-thirds of British business leaders agree', Press Release (27 November 2015).

Business case aside, it is well-documented that numerous MNCs are currently wealthier than some States, with 57 of the top 200 economic entities by revenue being corporations (rather than States) in 2018.[19] This differential in economic power extends beyond just States in the Global South – in 2017 Walmart "*earned more than the whole of Belgium*"[20] – but pertinently, by 2025, it is predicted that nearly half of the Global Fortune 500 will be domiciled in emerging markets.[21] Given these statistics, it is right that corporations should have human rights responsibilities to some degree, notwithstanding their private law status. Otherwise, as we have seen across both centuries and geographies, human dignity will not be protected.[22] Indeed, of 229 MNCs surveyed by the 2020 Corporate Human Rights Benchmark, nearly half had at least one allegation of a serious human rights issue made against them, with just 4% being said to having remedied the situation satisfactorily with the victim.[23]

[19] "69 of the Richest 100 Entities on the Planet are Corporations, not Governments, Figures Show" *Global Justice Now* (17 October 2018) https://www.globaljustice.org.uk/news/69-richest-100-entities-planet-are-corporations-not-governments-figures-show/ accessed 26 May 2021.
[20] Fernando Belinchón and Qayyah Moynihan, "25 Giant Companies that are Bigger than Entire Countries" Business Insider (25 July 2018) https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7?r=US&IR=T accessed 26 May 2021.
[21] Chiara Macchi 'A Treaty on Business and Human Rights: Problems and Prospects' in Jernej Černič and Nicolas Carrillo-Santarelli (eds) *The Future of Business and Human Rights* (Intersentia, 2018), 79.
[22] Muchlinski (n14) 558.
[23] "Corporate Human Rights Benchmark: 2020 Key Findings" *World Benchmarking Alliance* (Netherlands, 2020) https://assets.worldbenchmarkingalliance.org/app/uploads/2020/11/WBA-2020-CHRB-Key-Findings-Report.pdf accessed 26 May 2021, 36.

CHAPTER 3: EXPLOITING THE CORPORATE STRUCTURE: HOME AND HOST STATE JURISDICTION

The statistics explored in Chapter 2 are startling. Despite moral and practical reasons for MNCs being subject to human rights obligations and the number of abuses occurring, remedy is a misnomer. What is going wrong?

3.1 An overview of jurisdiction

As mentioned, MNCs are not traditional subjects of international law, and accordingly there is no international enforcement mechanism to bring accountability for their offences. International law regards jurisdiction as the prerogative of sovereign States.[24] Pursuant to the 'territorial' principle, States can claim jurisdiction over offences which take place in their territory. Additionally, there are ways States can claim 'extraterritorial jurisdiction' to prosecute offences outside their borders. Firstly, the 'nationality' principle allows States to claim jurisdiction over offences committed by their nationals, irrespective of location.[25] The 'passive personality' principle allows States to take jurisdiction over offences in which the victim is a national of the prosecuting State.[26] The 'protective personality' allows States to take jurisdiction over offences where the harmful consequences take place in their territory.[27] Finally, the concept of 'universal jurisdiction' has also been developed, pursuant to which any State can prosecute a very limited category of the most 'heinous' offences that occur where there is otherwise a lack of authority or willpower to prosecute.

Notwithstanding certain legal nuances, these principles are relatively simple to apply to natural persons, but complexities proliferate with regard to MNCs, which employ complex organisational structures. 'Parent' companies are often incorporated in Western countries (the '*home-state*') and have subsidiaries operating elsewhere globally (each a '*host-state*').[28] States do not, as a general rule, have powers to prescribe laws for foreign subsidiaries of locally incorporated parent companies.[29] Additionally, pursuant to the doctrine of separate legal

[24] Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45(1) Harv.Int'l L.J. 184, 188.
[25] ibid, 189.
[26] ibid.
[27] Meghna Rajadhyaksha, 'Universal Jurisdiction in International Law' (2002-2003) 2 Law Rev Gov't LC 1, 2.
[28] Blackburn (n5), 18.
[29] Jennifer Zerk, *Multinationals and Corporate Social Responsibility - Limitations and Opportunities in International Law* (CUP, 2006) 106.

personality, companies are separate legal entities from their shareholders (whether or not natural) regardless of the degree of control that the shareholder(s) have. Overall therefore, a parent company is "*generally not liable legally for the conduct (both acts and omissions) of its subsidiaries.*"[30]

Whilst there are some exceptions to this (as explained in more detail below) in general it leads MNCs to 'misuse' the corporate form[31] by 'exploiting' differences in regulations between States for commercial gain. They set up operations in regions with lower costs[32] and design their corporate structures to help "*avoid liability.*"[33] Therefore, where violations take place in the Global South, victims of abuses must look either to the 'host-state' to provide remedy or otherwise find an innovative way for the 'home-state' to accept jurisdiction. As will be shown, each of these can be problematic, leading to a legal lacuna in accessing remedy.

3.2 Problems with host-state redress

As explained, States are entitled to regulate and hold accountable entities incorporated or operating within their territory. However, many lack political will to do so 'effectively'[34] with many States in the Global South economically dependent on foreign direct investment.[35] For example, it is reported in 2008, 90% of Nigeria's foreign exchange earnings come from Shell alone.[36] Moreover, Shell had someone on its payroll in every government department in Nigeria.[37] Accordingly, King Emere Godwin Bebe Okpabi, ruler of the Ogale Community

[30] Surya Deva, "Briefing Paper for Consultation: Parent Company Liability" *ESCR-Net Treaty Initiative* (2015) <https://www.escr-net.org/sites/default/files/parent_company_liability_briefing_paper_first_draft_sept_2015_-_eng.pdf> accessed 26 May 2021.
[31] Baars (n18), 128.
[32] Zerk (n29), 1.
[33] Sandra Cossart and Lucie Chatelain "Key Legal Obstacles Around Jurisdiction for Victims Seeking Justice Remain in the Revised Draft Treaty" Business and Human Rights Journal Blog (31 October 2019) https://www.business-humanrights.org/en/blog/key-legal-obstacles-around-jurisdiction-for-victims-seeking-justice-remain-in-the-revised-draft-treaty/ accessed 26 May 2021.
[34] Zerk (n29), 57.
[35] Judith Schrempf-Stirling and Florian Wettstein, "Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations' Human Rights Policies" (2015) 145 Journal of Business Ethics, 545.
[36] Salisu Usman, "The Opacity and Conduit of Corruption in the Nigeria Oil Sector: Beyond the Rhetoric of the Anti-Corruption Crusade" (2011) 13(2) Journal of Sustainable Development in Africa 294.
[37] Grietje Baars *The Corporation, Law and Capitalism: A Radical Perspective on the Role of Law in the Global Political Economy* (Brill, 2019) 338.

which had a case against Shell, stated that "*Shell is Nigeria and Nigeria is Shell…You can never, never defeat Shell in a Nigerian Court.*"[38]

Even where will is forthcoming, many host-state legal systems are perceived to be 'underdeveloped,' and lack the means to offer class actions or conduct investigations.[39] Whilst it might appear cheaper to litigate in the host-state, there may be a less well-established tradition of pro bono work, and fewer possibilities to secure case funding or legal aid.[40] Additionally, the law firms that are able to take on such cases may not be equipped to do so on a contingency (no win/no fee) basis[41] and insurance may be unavailable. These problems are compounded by MNCs having vast financial resources (and legal sophistication) whereas victims are "*often poor, marginalised and under-resourced*."[42] Craig Forcese has described the 'corporate social responsibility' paradigm itself as only being "*necessary*" because countries in the Global South have "*underdeveloped*" legal systems and "*oppressive leaders*."[43]

Occasionally, these concerns are articulated by the States themselves. Following the Bhopal catastrophe on 3 December 1984, where a gas explosion tragically killed over 2,500 people in India,[44] there was a jurisdictional tug between the USA and India.[45] Neither State wanted to assume responsibility for proceedings against the majority shareholder Union Carbide Corporation, which was incorporated in the USA.[46] The Indian Government "*argued that its own legal system was not geared to deliver justice,*"[47] noting procedural and substantive problems including court understaffing and difficulties in collecting evidence.[48]

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[38] "High Court Blocks Nigeria Oil Spill Case Against Shell" *Al Jazeera* (26 January 2017) <https://www.aljazeera.com/news/2017/01/26/high-court-blocks-nigeria-oil-spill-case-against-shell/> accessed 26 May 2021.
[39] Schrempf-Stirling (n35).
[40] Blackburn (n5), 39.
[41] Ibid, 39.
[42] Ibid, 54.
[43] Craig Forcese, "Regulating Multinational Corporations and International Trade Law" in Daniel Bethlehem and others (eds) *The Oxford Handbook of International Trade Law* (OUP 2009) 723.
[44] Jamie Cassels, "The Uncertain Promise of Law: Lessons from Bhopal" (1991) 29(1) O.H.L.J. 1, 2.
[45] *Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986)
[46] Upendra Baxi, "Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?" (2016) 1 Business and Human Rights Journal 21, 28.
[47] Ibid, 29.
[48] Based on an affidavit written by Professor Marc Galanter, whose views are accessible via: Marc Galanter, "Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy" (1985) 20 Tex.Int'l L.J. 273.

Indeed, it is rare to hear of MNCs being prosecuted in host-states, partly because such cases are not widely reported in Western outlets.[49] Of those that have been, the fears discussed above appear legitimate. Albeit against individuals rather than the corporation itself, a telling example is that of the 2006 case in the Democratic Republic of Congo, where three ex-employees of the Australian mining company Anvil Mining (together with nine Congolese soldiers) were each acquitted in relation to complicity in a 2004 massacre.[50] On 17 July 2007, numerous NGOs published a report detailing how the proceedings were "*plagued with obstructions and political interference*."[51]

Ironically, these criticisms often ignore that a key reason why host-states cannot strengthen their legal systems and regulations is due to certain law that has been imposed upon them. Often bilateral investment treaties and free trade agreements create strong protections for MNCs and simultaneously impose regulatory constraints on host-states, such as stabilisation clauses which prevent them from strengthening domestic standards without fear of challenge.[52] Notoriously, the practices of the IMF and World Bank (institutions in which Western States have dominant influence) to provide conditional loans to Global South States, required deregulation and privatisation.[53] The effect of these included "*weakening or undermining the ability of these states to undertake social reform, including measures to…fulfil the human rights of those subject to their jurisdiction*".[54]

3.3 Problems with home-state redress

As explained in section 3.1, the doctrine of separate legal personality makes it difficult to bring cases in home-states. Whilst courts, on occasion and subject to high burdens of proof, 'pierce' the 'corporate veil' if they find that certain exceptions such as fraud apply,[55] in general courts cannot hold parent companies responsible for acts or omissions of their subsidiary incorporated and operating elsewhere.

[49] Baars (n37), 336.
[50] Ibid, 337.
[51] Ibid.
[52] Penelope Simons "International Law's Invisible Hand and the Future of Corporate Accountability for Violations of Human Rights" (2012) 3(1) JHRE 5, 16.
[53] Ibid, 23.
[54] Ibid, 25.
[55] Deva (n30), 2.

Despite these obstacles and given the legal, practical and political barriers to receiving redress from host-states explained, lawyers look for innovative ways of holding MNCs accountable in their home-states, which as mentioned tend to be Western. Indeed "*[a]s a moth is drawn to a light, so is a litigant drawn to the United States*."[56] Foreign direct liability cases against MNCs involved in violations "*have been filed with increasing frequency since the 1990s.*"[57]

One method is pursuing claims in tort law. Whilst exact legal frameworks vary between States both procedurally and substantively, the general idea is that direct liability of a parent company is established through a breach of a duty of care said to be owed to the claimant.[58] However, courts have traditionally been reluctant to accept jurisdiction on the basis of '*forum non conveniens*' doctrine.

The trajectory of 'forum non conveniens'

The doctrine of '*forum non conveniens*' allows actions to be dismissed because another forum is more appropriate to hear the case (i.e. that of the host-state). The application of this principle differs slightly between States and can become legally complex, with the US and England being explored here as case studies.

Use by US courts can be dated back to the 1930s.[59] In general, courts will question whether an alternative forum is 'adequate' and if so, there is a rebuttable presumption that the plaintiff's choice of forum is the most convenient. Sufficient public and private reasons can rebut the presumption, the former including access to evidence, logistics, costs and witness availability; and the latter including public policy concerns.[60] The Bhopal case discussed above provides an example of the US courts applying these tests. They found that India was an adequate alternative forum and the 'public' and 'private' considerations also balanced in its favour. Judge Keenan of the US court insisted it would constitute 'legal imperialism' were he not to recognize that the Indian judicial system had the capacity to stand "*tall*" before the world.[61]

[56] *Smith Kline & French Labs. Ltd. v Bloch* [1983] 1 W.L.R. 730 [733].
[57] Schrempf-Stirling (n35).
[58] Ekaterina Aristova, "Tort Litigation against Transnational Corporations in the English Courts: The Challenge of Jurisdiction" (2018) 14(2) Utrecht Law Review 6, 7.
[59] *Canada Malting v Paterson Steamships Ltd*, 285 US 413 (1932).
[60] *Gulf Oil Corp. v Gilbert* 330 US 501 (1947).
[61] *Re Union* (n45), 867.

In England, the historical position was that where the alternative jurisdiction was a European State contracted to the Brussels Regulation, the courts could not invoke the doctrine. However, the courts applied a two-stage test regarding non-contracting States. Firstly, a defendant had the burden of proving there was another 'available' forum which was clearly more appropriate. If demonstrated, the court would stay the English proceedings unless the plaintiff could rebut this by showing there were circumstances "*by reason of which justice requires that the stay should nevertheless not be granted.*"[62] This could be proven if the "*practical effect*" of disadvantages would prevent the plaintiff from "*prosecuting any claim at all.*"[63] However, following *Owusu v Jackson,*[64] the European Court of Justice held that the Brussels Regulation prevents staying proceedings due to forum non conveniens, regardless of whether the alternative forum is a contracting State or not (the position following Brexit remains to be seen).[65]

Nonetheless, English courts find other ways to strike out claims which they do not wish to accept jurisdiction over. In November 2020 the English High Court struck out the claims of over 200,000 Brazilian claimants against the BHP Group (domiciled in England and Australia) arising out of the Brazilian Fundão Dam collapse in 2015, tragically killing 19 people and destroying numerous villages.[66] It held the English claims were an 'abuse of process' given ongoing parallel proceedings in Brazil, despite the claimants arguing that there were procedural hurdles which made it impossible for them to sue the English and Australian entities in Brazil and that they were unable to obtain timely redress.

However, it is not true to say that Western courts will always dismiss cases on these grounds, and there have been numerous developments where courts have taken more 'plaintiff-friendly' attitudes, causing uncertainty.[67] The English Supreme Court made two landmark judgments in February 2021 and April 2019 in relation to the cases of *Okpabi and others v Royal Dutch Shell Plc*[68] and *Vedanta Resources PLC and another v Lungowe*,[69] respectively. In these cases, the

[62] *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, 478.
[63] Ibid, 473.
[64] Case C-281/02, *Owusu v. Jackson* [2005] 2 WLR 942.
[65]Clare Francis "Brexit and Dispute Resolution" Pinsent Mason (7 January 2021) <https://www.pinsentmasons.com/out-law/analysis/brexit-and-dispute-resolution> accessed 27 May 2021.
[66] *Municipio de Mariana v BHP Group plc and BHP Group Ltd* [2020] EWHC 2930.
[67] Zerk (n29), 123.
[68] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3.
[69] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20.

Supreme Court accepted jurisdiction over claims of negligence and breach of statutory duty against parent companies incorporated in England and their subsidiaries, for harms which took place in each of Nigeria and Zambia. In contrast to the Brazilian *Fundão Dam* case above, the court held in *Vedanta* that whilst Zambia would be the 'proper' place to hear the claims, there was a real risk that the claimants would not be able to obtain substantial justice there. The factors considered included that legal aid would be unavailable, conditional fee agreements are illegal, and the claimants are too poor to fund legal representation.[70] Moreover, the court held that Zambia lacks legal teams of sufficient size and experience to pursue mass claims effectively.[71] Even in the US, there have been some developments. For example, in the 2002 tort-based claim of *Martinez v Dow Chemicals*,[72] the court held there was no adequate alternative forum for the dispute for the Filipino plaintiffs on the basis that there was 'corruption' in Filipino courts.

The uncertainties and complexities of this doctrine, and the problems it creates in generating access to remedy, is epitomised in the jurisdictional battle between Chevron and 30,000 Ecuadorian citizens in relation to a long-running dispute concerning one of its subsidiaries' activities between 1964-1992, in which it polluted the Amazon allegedly causing health problems amongst local residents.[73] The plaintiffs' lawyers originally initiated proceedings in the US via a class action in New York, partly on the basis that they lacked confidence they could secure a fair hearing in Ecuador. Chevron disputed this, arguing that the lawsuit should be dismissed and heard in Ecuador on the basis of forum non conveniens, given "*Ecuador's sovereign interests make Ecuador the most appropriate forum for plaintiffs to pursue their claims against all interested parties.*"[74] It further contended on appeal that "*Ecuador can and does dispense independent and impartial justice.*"[75] However, following the Ecuadorian $18 billion judgment against it, Chevron's position swiftly changed, calling this finding a "*product*

[70] Ibid [90].
[71] Ibid [89].
[72] *Martinez v Dow Chemicals* 219 F Supp 2d 719 (ED La 2002).
[73] "Chevron Wins Ecuador Rainforest 'Oil Dumping' Case" *BBC* (8 September 2018) https://www.bbc.co.uk/news/world-latin-america-45455984 accessed 27 May 2021.
[74] Texaco Inc's Memorandum of Law in Support of Its Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity at 10 *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (S.D.N.Y. Jan 11 1999).
[75] Appellee's Brief 54-57 in *Aguinda v. Texaco, Inc.,* 303 F.3d 470 (2d Cir. 2002).

of bribery, fraud and…is illegitimate"[76] and successfully used the US courts to declare the judgment unenforceable.[77]

3.4 Imperialist implications of home-state remedies

At this juncture, acknowledging that victims often do not have their first-choice forum hearing their dispute, it is important to consider the long term consequences of allowing cases (or appeals) to proceed in home-states, which are typically (albeit not always) Western, neo-liberal democracies. Curtis Bradley has noted that "*[m]any international law scholars have assumed that the rise of international human rights litigation in the US courts is an unequivocally positive development…*"[78] given it publicises events. Some also concur that the expansion of legal power is the "*natural outgrowth of an interconnected world*."[79] If so, it is understandable that the uncertainty over whether Western States will take jurisdiction raises frustrations amongst those who have had their rights abused.

On deeper reflection however, there are risks associated with Western States taking jurisdiction to provide access to remedy. One risk is it advances a discourse characterised by a "*damning metaphor*" consisting of "*savages, victims and saviours.*"[80] Makau Mutua, in articulating this concern in relation to contemporary human rights advocacy more generally, notes there is a danger in replicating the dominant and submissive binary of the colonial encounter.[81] By home-states taking jurisdiction, it is possible that the 'Othering' process is propagated. Western democracy is seen as a panacea and the only way in which developing States can 'advance' is by replicating the West – in both substance and procedure. Angela Lindt explains that during the course of the United Nations' 6th Forum on Business and Human Rights in 2017, there

[76] Eduardo Garcia "Ecuador Plaintiffs File Lawsuit in Canada against Chevron" Reuters (31 May 2012) <https://www.reuters.com/article/ecuador-chevron-idUSL1E8GV09B20120531> accessed 27 May 2021.
[77] *Chevron Corp. v. Donziger* 974 F. Supp. 2d 362 (S.D.N.Y. 2014).
[78] Curtis Bradley, "The Costs of International Human Rights Litigation" (2001) 2(2) Chicago Journal of International Law 457, 458.
[79] William Glaberson, 'U.S. Courts Become Arbiters Of Global Rights and Wrongs' *New York Times* (2001) <https://www.nytimes.com/2001/06/21/us/us-courts-become-arbiters-of-global-rights-and-wrongs.html> accessed 7 April 2021.
[80] Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 Harv. Int'l L.J 201.
[81] Ibid, 221.

seemed to be a consensus that access to remedy in the Global South was unrealistic and "*hardly anyone talked about bringing human rights violations to courts in the host-states*."[82]

This appears analogous to the historical practice that imperialist States employed of consular jurisdiction. For example, in the nineteenth century, "*justice in the Ottoman Empire appeared to international jurists deeply corrupted and far from the Western model*"[83] and imperial States 'solved' this in their self-interest to control others by setting up courts which could take jurisdiction over their citizens living in these countries. This practiced extended beyond the Ottoman Empire, for example, the USA created a 'United States Court for China' in 1906 which had extraterritorial jurisdiction over all American citizens within its district.[84] Thus, in the colonial era the imperial powers went "*far beyond the nationality or protective principles to exercise near-complete extraterritorial jurisdiction in colonized territories, either through capitulation treaties or territorial control*."[85]

Consular jurisdiction, and its analogous modern day counterpart, therefore promulgate the notion that civilised and uncivilised States exist and that the former have "*rights of direction, control and administration*" over the latter by legitimating "*unequal juridical language.*"[86] The practice of extraterritorial jurisdiction thus "*emerged as a key technology of a kind of nonterritorial imperialism—in effect, a colonialism without colonies as such*."[87] This type of imperialism and the analogy with historical practices is acknowledged by certain Western academics, including Burt Neuborne, a law professor at New York University who stated "*[w]hat we are exporting now, just as Britain did in the 19th century, is our conception of law.*"[88] As Grietje Baars articulates, even the language used by some politicians and academics, including for instance 'underdeveloped legal systems' "*clearly echoes that of international law's 'civilising mission', the export of 'western' law… as a tool for intervention.*"[89]

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[82] Angela Lindt, "Transnational Human Rights Litigation A Means of Obtaining Effective Remedy Abroad?" (2020) 4(2) Journal of Legal Anthropology 57, 60.
[83] Eliana Augusti "From Capitulations to Unequal Treaties: The Matter of an Extraterritorial Jurisdiction in the Ottoman Empire" (2011) 4(2) Journal of Civil Law Studies 285.
[84] Teemu Ruskola, "Colonialism Without Colonies: on the Extraterritorial Jurisprudence of The US Court For China" (2008) 71 LCP 217.
[85] Bhupinder Chimni, "An Outline of a Marxist Course on Public International Law" (2004) LJIL 1, 18.
[86] Augusti (n83), 288.
[87] Ruskola (n84) 218.
[88] Glaberson W, 'U.S. Courts Become Arbiters Of Global Rights and Wrongs' *New York Times* (2001) <https://www.nytimes.com/2001/06/21/us/us-courts-become-arbiters-of-global-rights-and-wrongs.html> accessed 7 April 2021 citing Burt Neuborne.
[89] Baars (n18), 153.

Accordingly, the "*power is used, among other things, to universalize the national laws of imperial states.*"[90]

This approach is not only problematic when situated in this legal history and the trajectory of colonialism and neo-colonialism generally, but also has practical problems, given different cultures have varying attitudes to redress. Western legal systems are often based on "*legal, political and social experience*" which is "*foreign*" to victims.[91] The *Monterrico Metals*[92] lawsuit is instructive on this point. In 2009, eight Peruvian citizens launched proceedings in the English High Court against the British mining company Monterrico Metals and its Peruvian subsidiary Rio Blanco Copper for human rights abuses allegedly committed during the course of an industrial mining project, whereby following protests, a person was killed, several were injured and 28 were detained three days and subjected to torture.[93]

This case settled out of court and the parent company paid compensation to the claimants in return for refusing to admit liability and waiving the need for a judgment.[94] This led to a public outcry with affected people stating they were deprived of their right to be heard. Moreover, rumours circulated within the community alleging that the claimants had collaborated with the corporation and the individuals who received compensation were seen as disloyal to the wider community.[95] Thus, situated in a different legal culture, the type of remedy received pursuant to the Western model of settlement was potentially more harmful to certain community members given such communities understand themselves as a 'collective', a concept not represented in Western subjecthood.[96]

Notably, many settlements are reached in return for victims abandoning the right to file future claims, as the one just discussed,[97] and some such settlements have been unsuccessfully challenged on this basis as infringing an individual's right to redress.[98] It is acknowledged that

[90] Chimni (n85), 19.
[91] Christopher Byrnes et al "We All Stand Before History': Corporate Impunity as a Colonial Legacy—The Case of the Niger Delta" [2019] Harv.Hum.Rts.J. <https://harvardhrj.com/wp-content/uploads/sites/14/2019/04/We-All-Stand-Before-History-HHRJ_04.09.2019.pdf> accessed 14 April 2021, 2.
[92] *Guerrero v Monterrico Metals Plc* [2009] EWHC 2475 (QB).
[93] Lindt (n82), 62.
[94] Ibid, 65.
[95] Ibid ,67.
[96] Byrnes (n91), 10.
[97] Baars (n18), 148.
[98] Ibid.

the third pillar of the UNGPs requires States to guarantee access to remedy through "*judicial, administrative, legislative or other appropriate means*"[99] and outcomes such as settlements are not necessarily opposed to this. Nonetheless, ideas surrounding how best to remedy atrocities have to be seen in the context of what victims actually want, and questions must be asked as to whether they want financial compensation, or whether alternatively (or additionally) they want "*official recognition and apportionment of blame for the wrongs that they suffered*."[100]

In addition to the mode of redress, Western legal systems and epistemologies contain numerous assumptions which have implications for victims. For example, the Western conception that 'time is linear', which is fundamental to its legal system.[101] To exemplify how this becomes problematic, it is helpful to look at the case of the Ogoni people's attempts to seek redress against the practices of the Royal Dutch Shell and its subsidiaries in Nigeria. The Ogoni notion of time is reflected in their 'ancestral lands' in which they hold land in a 'past-present-future' model whereby the living owner holds land in trust for future generations (and to honour previous generations).[102] The Western conceptualisation arguably does not have the flexibility to do justice to this understanding as it does not reflect the "*time, generational and collective land tenure,*"[103] for example given its procedural rules such as statutes of limitations.[104]

Given this, it appears unsurprising that research shows that some victims prefer cases to be filed locally, if the process is known to be fair and effective,[105] but the barriers discussed above often deny them their day in their chosen forum.[106] In light of the barriers previously discussed in which the processes in the Global South are rarely fair and effective, and the concerns articulated with imposing Western notions of justice on the Global South where they do accept jurisdiction, it appears that a legal lacuna has arisen with respect to access to remedy. The next Chapters will explore how the international system might be used to overcome this.

[99] UNGP (n6), Principle 25.
[100] Tom Frost and Sascha-Dominik Bachmann, "Human Rights, Colonialism and Post-Colonial Conflict Resolution: Historical Justice Litigation" (2012) 92 Amicus Curiae 20, 22.
[101] Byrnes (n91), 11-13.
[102] Ibid.
[103] Ibid, 21.
[104] Ibid, 12-13.
[105] Blackburn (n5), 39.
[106] Upendra Baxi, "Mass Torts, Multinational Enterprise Liability and Private International Law" (1999) 276 Recueil des Cours 297, 352.

CHAPTER 4: INTERNATIONAL LAW'S PROGRESS TO DATE

4.1 The History of International Regulations: UNGPs

Given failures at the domestic levels to regulate business conduct in relation to human rights and provide adequate access to remedy, questions have arisen as to whether businesses should be directly subject to international human rights standards.[107]

There have been numerous multilateral efforts to do this, which can be traced back to the 1960-1970s and the initiative of the New International Economic Order,[108] the declaration of its establishment explicitly calling for *"[r]egulation and supervision of the activities of transnational corporations.*"[109] Subsequently, many documents, including draft codes of conduct on transnational corporations in the 1980-1990s[110] and a set of draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' in 2003[111] were negotiated. However, none of these attempts came to fruition.

It was considered an unprecedented benchmark moment therefore when the UNGPs, were endorsed by the HRC in 2011. The second pillar to 'respect' human rights was directed towards businesses (defined broadly to include "*all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure*"[112]) with the aim of addressing negative human rights impacts that such enterprises have. Unlike its predecessors, this approach gained support from various actors, including capital-exporting States and the business sector.[113] The UNGPs have in some aspects achieved "*notable and far-reaching success,*"[114] by raising awareness and mainstreaming ideas of corporate human rights due diligence and supply chain responsibility.

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[107] Lee McConnell, "Assessing the Feasibility of a Business and Human Rights Treaty" (2017) 66 Int'l & Comp LQ 143, 144.
[108] Karl Sauvant, "The Negotiations of the United Nations Code of Conduct on Transnational Corporations" (2015) 16 Journal of World Investment & Trade, 11 15.
[109] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI) (1 May 1974).
[110] Sauvant (n108).
[111] Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (26 August 2003).
[112] UNGPs (n6), General Principles.
[113] Pierre Thielbörger and Tobias Ackermann, "A Treaty on Enforcing Human Rights Against Business: Closing the Loophole or Getting Stuck in a Loop?" (2017) 24(1) Ind.J.Global Legal Studies 43, 46.
[114] Blackburn (n5), 62.

However, they have also been criticised, in particular regarding their non-binding nature,[115] being grounded instead in 'pragmatic principlism.'[116] Other than domestic implementation, they therefore contain very little incentive for businesses to follow them and accordingly, the "*major legal barriers to access to remedy…have changed very little*".[117] Whilst there are reputational benefits that businesses may gain by adhering to them which can be powerful, many argue that they do not go far enough and "*ultimately fail to ensure access to effective remedies by not providing a comprehensive implementation mechanism*."[118] For example, Surya Deva, a member of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, discusses how neither voluntary initiatives alone nor measures merely at national level will ever be adequate to regulate corporate activities.[119] Further, as Carlos López suggests, any theory that proposes a set of rules with normative force needs to incorporate a theory of compliance in which the consequences of a lack of observance to the norm are addressed.[120] However, compliance with the UNGPs is "*basically left to the market mechanism*."[121]

Moreover, it is pertinent that whilst "*[n]early all Western governments expressed unqualified support for the document…many others from the global South expressed misgivings publicly or privately.*"[122] Accordingly, many States felt unable to oppose the UNGPs[123] and other critics point out that Ruggie failed to engage sufficiently with rightsholders when formulating them.[124] Indeed an explicit mandate that would have required him to pay country visits and look into

[115] Thielbörger (n113), 45.
[116] UNCHR *Interim Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* U.N. Doc. E/CN.4/2006/97 (22 February 2006), [70]-[81].
[117] Blackburn (n5), 62.
[118] Thielbörger (n113), 52.
[119] Surya Deva, "The Zero Draft of the Proposed Business and Human Rights Treaty, Part I: The Beginning of an End?" (*Reflections on the Zero Draft Treaty*, 14 August 2018) <https://www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-i-the-beginning-of-an-end> accessed 18 March 2021
[120] Carlos López, "'The 'Ruggie Process': from Legal Obligations to Corporate Social Responsibility?" in Surya Deva and David Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect?* (CUP 2013) 58, 72.
[121] Ibid.
[122] Ibid, 58.
[123] Ibid, 59.
[124] Daria Davitti, "On the Meanings of International Investment Law and International Human Rights Law: the Alternative Narrative of Due Diligence" (2012) 12(3) HRL Rev 421, 439.

specific violations was never adopted, leading to suggestions that it was the acceptance of the business community which was deemed more important than the affected communities.[125]

4.2 The History of International Regulations: The Draft Binding Treaty

In fact, the UNGPs were never intended to be the end of the process, but rather the "*end of the beginning.*"[126] Accordingly, at the 24th session of the HRC in 2013, Ecuador tabled the idea of a directly binding business and human rights treaty.[127] Following this in 2014, the HRC adopted a resolution which established the need for such a treaty.[128] To date, four drafts have been published: Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights in 2017, the Zero Draft in 2018, the Draft Treaty in 2019, and most recently on 6 August 2020, the Second Revised Draft Treaty.[129]

The Second Revised Draft Treaty contained some amendments to the previous draft treaties, relating to, amongst other things, access to remedy and provisions on legal liability and jurisdiction.[130] The current draft Article 9, concerning jurisdiction, reads:

> "*1. Jurisdiction with respect to claims brought by victims, irrespectively of their nationality or place of domicile, arising from acts or omissions that result or may result in human rights abuses covered under this (Legally Binding Instrument), shall vest in the courts of the State where:*
>
> *a. the human rights abuse occurred;*
> *b. an act or omission contributing to the human rights abuse occurred; or*

[125] López (n120), 70.
[126] UNGPs (n6) [13].
[127] UN Human Rights Council "Republic of Ecuador: Statement on behalf of a Group of Countries at the 24th Session of the HRC, Transnational Corporations and Human Rights" (Geneva, September 2013) <https://media.business-humanrights.org/media/documents/files/media/documents/statement-unhrc-legally-binding.pdf> accessed 28 May 2021.
[128] UN Human Rights Council, *Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, UN Doc. A/HRC/RES/26/9 (14 July 2014).
[129] Nadia Bernaz, "Conceptualizing Corporate Accountability in International Law: Models for a Business and Human Rights Treaty" (2021) 25 H.R.R. 45, 46.
[130] OEIGWG Chairmanship, *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises* (6 August 2020) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf accessed 28 May 2021.

c. the legal or natural persons alleged to have committed an act or omission causing or contributing to such human rights abuse in the context of business activities, including those of a transnational character, are domiciled.

The above provision does not exclude the exercise of civil jurisdiction on additional grounds provided for by international treaties or national law.

2. Without prejudice to any broader definition of domicile provided for in any international instrument or domestic law, a legal person conducting business activities of a transnational character, including through their business relationships, is considered domiciled at the place where it has its:
a. place of incorporation; or
b. statutory seat; or
c. central administration; or
d. principal place of business; or

3. Where victims choose to bring a claim in a court as per Article 9.1, jurisdiction shall be obligatory and therefore that courts shall not decline it on the basis of forum non conveniens.

4. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State, if the claim is closely connected with a claim against a legal or natural person domiciled in the territory of the forum State.

5. Courts shall have jurisdiction over claims against legal or natural persons not domiciled in the territory of the forum State if no other effective forum guaranteeing a fair trial is available and there is a sufficiently close connection to the State Party concerned."

Article 9(3) (and Article 7.5)[131] explicitly exclude the doctrine of forum non conveniens, preventing courts from using this to dismiss "*legitimate*" judicial proceedings brought by

[131] Article 7.5 reads: "*State Parties shall ensure that the doctrine of forum non conveniens is not used by their courts to dismiss legitimate judicial proceedings brought by victims*."

victims. Pertinently, Article 9.4 grants jurisdiction to State courts over claims against legal or natural persons not domiciled in their territory, if the claim is nonetheless "*closely connected with a claim against a legal or natural person domiciled in the territory of the forum State,*" thus allowing foreign subsidiaries or business partners to be sued in home-states, so long as the claims against the two companies are closely connected. Finally, Article 9.5 gives any court jurisdiction if no other effective forum guaranteeing a fair trial is available and "*there is a sufficiently close connection to the State Party concerned,*" known as the 'doctrine of forum necessitates.'

Interestingly, these provisions were controversial amongst the participants of the sixth session of the OEIGWG held in October 2020 and Article 9 "*unsurprisingly…provoked much discussion*".[132] There are diverse views even amongst the Global South. While Namibia, Ecuador, Chile, Egypt and the Philippines supported the abolition of the forum non conveniens principle, Brazil, Russia and China argued for its retention. China did so on the basis that regulations should not interfere with State sovereignty and Russia believed that it was important to have a range of grounds to refuse recognition and enforcement of other States' court decisions. Brazil, in slight contrast, advocated for the principle of subsidiarity to apply, i.e. that national legal mechanisms should be exhausted first.[133] All three delegations thought that the current draft would create uncertainty for business.[134]

Outside of States, commentary on the draft by civil society has been generally positive on the issue of jurisdiction. They generally believe that by excluding the doctrine of forum non conveniens, the draft makes progress in ensuring access to remedies. For example, Treaty Alliance Germany commented that amendments to the jurisdiction rules have *"improved the possibilities of legal protection for persons affected.*"[135] However, it is still not without certain

[132] "UN Talks Day 3: As Participation Drops, Some States Attempt to Water Down Key Provisions" (*European Coalition for Corporate Justice*, 29 October 2020) https://corporatejustice.org/news/un-talks-day-3-as-participation-drops-some-states-attempt-to-water-down-key-provisions/ accessed 31 May 2021.
[133] Karolin Seitz, "Report on the Sixth Session of the Open-Ended Intergovernmental Working Group on a Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights" (Global Policy Forum Europe e.V and Rosa-Luxemburg-Stiftung, February 2021) <https://rosalux.nyc/wp-content/uploads/2021/02/Briefing_On_Standby_6th_Session_UN_Treaty.pdf> accessed 31 May 2021.
[134] European Coalition for Corporate Justice (n132).
[135] "Important Step for the Human Rights and Ecological Orientation of the Global Economy: Statement of the Treaty Alliance Germany on the Second Revised Draft for a Legally Binding UN

critiques. Some argue that the use of the term 'legitimate' in Article 7.5 should be deleted given it is "*vague and open for interpretation*"[136] and have called for more clarity on terms such as "*closely connected*" in order to more easily establish joint liability of parent companies and their subsidiaries.[137]

This paper argues that the treaty, as currently drafted, does not go far enough in solving the issues discussed above. On one hand, Article 9 widens choices for victims as to which jurisdiction they wish to bring a claim, and excludes the possibility of home-state courts relying on the doctrine of 'forum non conveniens,' potentially accelerating the trend that Western States accept jurisdiction. In turn however, and particularly coupled with the language of Article 9.5 — that States must accept jurisdiction if there is a sufficiently close connection to it and if there is no other "*effective forum guaranteeing a fair trial*" — it risks repeating historic mistakes of dividing the world into the binary terms of 'civilised' and 'uncivilised' countries, with only the former 'able' to produce justice.

This issue is compounded given there is no definition of 'effective forum' or 'fair trial,' creating a real risk that these terms are constructed by Western notions and powers. Irrespective of good intentions, Western States could once again be portrayed as the pillar of international order and benchmark to assess (colonial) subjects.[138] The problem remains, as Baars discusses in relation to what she terms cause lawyering' generally, that people would be persuaded to "*bring cases in (western) foreign courts is in some way the equivalent of 'spreading capitalist law' (as part of the civilising or capitalising mission) as done by the corporate colonisers in the 19th century*."[139] Victims must articulate their "*needs, grievances and desires in legal vocabulary and in a western courtroom, through the mouth of (usually) a white man*"[140] which eventually

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Treaty on Business and Human Rights" (*Treaty Alliance Germany*, September 2020) <https://archive.globalpolicy.org/images/pdfs/TreatyAllianceGermany_Statement_2ndREvisedDraft_2020.pdf> accessed 31 May 2021.

[136] "Comments and Amendments on the Second Revised Draft of the Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Regard to Human Rights" (Stop Corporate Immunity, 6 August 2020) https://www.stopcorporateimpunity.org/wp-content/uploads/2020/10/Position-paper-Global-Campaign_2nd-revised-draft-TNCs_FINAL-2.pdf accessed 31 May 2021.

[137] Ibid.

[138] Luis Eslava and Sundhya Pahuja, "Beyond the (Post) Colonial: TWAIL and the Everyday Life of International Law" (2012) 45(2) Law and Politics in Africa, Asia and Latin America, 195, 196.

[139] Baars (n18), 155.

[140] Ibid.

undermines speaking for the oppressed and for justice. Judgments rendered in this way may ultimately be delegitimised in the eyes of those who matter most – the victims – being dismissed "*by the affected societies on the ground that they do not reflect a full understanding of the local history, culture, and conditions.*"[141]

At this point, it is important to reiterate that when claims are brought in Western courts they can increase awareness and education, because "*lawsuits against MNCs enjoy high publicity, as the media is interested in cases of corporate misconduct*."[142] As mentioned above, this is one deterrent for MNCs in becoming involved in such violations in the first place, given stakeholder theory and the need for MNCs to internalise financial and reputational costs. However, this approach "*precludes states from developing their own human rights norms*" and in actuality, the development and application of meaningful domestic remedies would be the "*most effective deterrent.*"[143] Finally, this argument also ignores the fact that Western courts taking cases may "*effectively remove awareness of the… violations from the societies most affected by them*" which accordingly may lead to "*deterioration of the local judiciaries, an ignorance of individual rights in the local community and… a removal of pressure on the government of a target locality to hold itself accountable before its own domestic legal tribunal*."[144]

Moreover, this paper argues that the media and civil society can ensure that awareness and education campaigns are undertaken and promoted regardless of where a disaster happens or where proceedings are brought. Whilst this has historically been weak where proceedings are brought in Global South countries (for instance the DRC case mentioned in Chapter 3.2 above) that is not to say this always has to be so, particularly with recent proliferation of social media and news outlets.

Taken together, it is not believed that the Second Revised Draft Treaty provides an effective answer to access to remedy whilst simultaneously ensuring that Western models do not dominate, and instead, we must look even deeper for a solution.

[141] Bradley (n78), 469.
[142] Schrempf-Stirling (n35).
[143] Charles Hollis, "Perpetual Mistrial: The Impropriety of Transnational Human Rights Litigation in United State Courts" (2003) 1 Santa Clara J Int'l L 1, 50.
[144] Ibid, 51.

CHAPTER 5: A TWAIL OF TWO SOLUTIONS

5.1. A World Court?

One option would be to go further than the current draft treaty and to compose a new international court which can take jurisdiction. At the second session of the OEIGWG in 2017, some of the NGOs present called for such an international tribunal to be established.[145]

There have also been historical discussions of such a possibility, albeit in more limited respects, which failed to come to fruition. For instance, following the Second World War, pursuant to which businesses had profited from selling gas used by the Nazis in Auschwitz, there were "*crucial months… when theories of corporate and conspiracy liability were considered and debated.*"[146] However, the Nuremberg tribunals that followed only prosecuted individuals and viewed businesses as "*an instrument necessary to commit the crime, but not as criminal organizations.*"[147] Similarly, the draft of the Rome Statute of the International Criminal Court ("**ICC**") originally included corporations, but this was ultimately excluded from the final draft, primarily due to the speed at which it needed to be agreed and the insufficient number of States that at the time, held corporations liable under criminal law.[148]

Marco Fasciglione previously explored three possible models for adapting present-day institutions, being: (1) creating a specialized Chamber of the International Court of Justice ("**ICJ**"); (2) reorganizing regional human rights courts; and (3) amending the ICC Rome statute.[149] However, none of these models were deemed by him to be politically feasible, in part due to the need for State parties to agree to amend existing international instruments.[150] Additionally, it should be noted that at least some of these institutions have complicated

[145] Carlos López "Struggling to Take off?: the Second Session of Intergovernmental Negotiations on a Treaty on Business and Human Rights" (2017) 2 Business and Human Rights Journal 365, 367.
[146] Jonathan Bush "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said" (2009) 109(5) Columbia L. Rev 1094.
[147] Luis Gallegos and Daniel Uribe, "The Next Step against Corporate Impunity: A World Court on Business and Human Rights?" (2016) 57 Harvard International Law Journal 7, 8.
[148] David Scheffer, "Corporate Liability under the Rome Statute" (2016) 57 Harv.Int'l L.J. 35, 38.
[149] Marco Fasciglione 'An International Mechanism of Accountability for Adjudicating Corporate Violations of Human Rights? Problems and Perspectives' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds) *Judicial Power in a Globalized World* (Springer, Cham 2019).
[150] Ibid.

histories with colonialism. For example, the ICC has been critiqued for its selectivity bias in relation to its focus on African cases,[151] the perception of it as the "*court of victors,*" and its "*sheer ignorance of violence perpetrated by Western state actors*."[152] Indeed, some go as far as alleging that it attempts to undermine and control Africa.[153]

Thus, the answer could lie in establishing an entirely new court to address business violations of human rights. There are numerous hurdles in establishing such a court. Theoretically, a key issue centres on whether MNCs are subjects of international law and therefore able to be tied to direct obligations. It is contended, as previously explained, that dominant positivist scholarship is generally reluctant to include non-state actors, including MNCs, as subjects of regulation in part because of the (unhelpful) binary divide that currently exists between them and States,[154] meaning only States and individuals can be held directly liable under international law.

However, this paper would point out, as scholars such as Harold Koh[155] and Andrew Clapham do, that non-state actors "*already have international human rights obligations…the extent [of which] depends on…their capacity, context, and commitments.*"[156] Direct obligations for corporations exist in other fields of international law outside of human rights,[157] including the UN Convention on the Law of the Sea.[158] Moreover, the idea that a human rights treaty could be binding on a third party is not novel in relation to other non-state actors and has been recognised at the UN level for some time. For example, in 2017 the new General Recommendation on gender based violence against women adopted by the UN Committee on the Elimination of Discrimination against Women specifically asserts that human rights law

[151] Ovo Imoedemhe, 'Unpacking the Tension Between the African Union and the International Criminal Court: the Way Forward' (2015) 23(1) AFJICL 74, 79.
[152] Thamil Ananthavinayagan, 'Panem et circences? People's Tribunals from a TWAIL perspective' in Regina Menachery Paulose (ed) *People's Tribunals, Human Rights and the Law Searching for Justice* (Routledge, 2019), 62.
[153] Charles Jalloh, "Regionalizing International Criminal Law?" (2009) 9 Int.C.L.R. 445, 463.
[154] McConnell (n107), 147.
[155] Harold Koh, "Separating Myth from Reality About Corporate Responsibility Litigation" (2004) 7(2) J.I.E.L 263, 264-268.
[156] Andrew Clapham, "Human Rights Obligations for Non-State-Actors: Where are We Now?" in Fannie Lafontaine and François Larocque (eds) *Doing Peace the Rights Way* (Intersentia, 2019), 11.
[157] Bernaz (n129), 61.
[158] Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3, Article 187(c).

recognises "*the direct obligations of non-State actors… in specific circumstances…*"[159] Other international organisations, such as the ILO, also place obligations on corporations.[160]

There is a concern that by regulating MNCs in this way, they would gain legitimacy to become on par with States politically, either practically or as a result of it being deemed unfair to not allow them to participate in the creation of the international norms that would regulate them.[161] Accordingly, such critics stress that recognising MNCs in this way would "*legitimise their de facto power and convert it into de jure authority*."[162] However, this fear ignores (and should be allayed by) the current reality that MNCs already exist as "*real social actors beyond the mere aggregation of individuals*"[163] which means that they can be subjects of obligations independently of their members. Moreover in practice, MNCs already have involvement in world affairs. Examples include: their right to speak and vote independently of national governments at the ILO;[164] their activeness as "*independent litigants*" in proceedings that involve international law;[165] and their involvement in the process of law-making through lobbying generally.[166] If anything, these developments show MNCs should be subjects of international law given their influence and – some arguably disproportionate power[167] – within it.

Instead, this paper believes that a bigger hurdle is on what basis MNCs would accept the court's jurisdiction. Assuming for these purposes that the court would need to be established via a treaty, it would need State consent. Whilst there have been powerful movements forward in establishing more robust mechanisms from certain countries in the Global South, per the

[159] UN Committee for the Elimination of All Forms of Discrimination against Women, 'General Recommendation No 35' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (14 July 2017) UN Doc CEDAW/C/GC/35 [25].
[160] ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (204th Session Geneva, November 1977) (obliges corporations not to interfere with employees' rights to form unions and not to use child or slave labour).
[161] López Latorre "In Defence of Direct Obligations for Businesses under International Human Rights Law" (2020) 5(1) BHRJ 56, 66.
[162] Johns (n10), 913.
[163] Latorre (n161), 66.
[164] Constitution of the ILO (adopted 1 April 1919, entered into force 28 June 1919) 15 UNTS 35, Article 3(3).
[165] Johns (n10), 902.
[166] Latorre (n161), 67.
[167] Johns (n10), 912.

discussion regarding the Draft Treaty above, that is not to say they would be willing to go as far as accepting an international court. For instance, Article 16 of the Draft Treaty still envisions "*State Parties*" take "*all necessary…action*" to implement it. Furthermore, even if some States consent, issues with enforcing and recognising judgments would remain, meaning the problems of the corporate structure being designed to evade liability by having assets located in particular jurisdictions would resurface. Finally, the establishment of such a court would face practical barriers *"regarding funding, the role of States in proceedings, and matters of access to the court, including costs and legal representation of victims.*"[168] Thus, whilst in an idealist world there might be a court with the power and support to hold MNCs to account, "*human rights activists cannot achieve justice in a political vacuum*."[169]

5.2 Peoples' Tribunals

Given international law's contribution to the failure to hold MNCs accountable for human rights violations and enabling capitalist considerations to take precedence, it might be tempting to assume that it is not the appropriate means to provide a solution.[170] This appears to be the case given inequality between States and that the institutions and categories of international law seem not to consider these matters to be their responsibility.[171]

As explained above, TWAIL scholars in particular tend to be critical of the way "*international law has been used as a hegemonic tool, and how international human rights law itself has been co-opted in the service of economic globalisation*."[172] Simultaneously however, many TWAIL scholars also see the "*potential*" of international human rights law to provide redress to these issues and to constrain power. With respect to international human rights law specifically, Bhupinder Chimni for example has stated that international human rights law "*holds out the hope that the international legal process can be used to bring a modicum of welfare to long suffering peoples of the third and first worlds."*[173] Anthony Anghie too accepts that "*the Third*

[168] Gallegos (n147), 7.
[169] Ananthavinayagan (n152), 61.
[170] Simons (n52), 40.
[171] Simona Fraudatario and Gianni Tognon, "The Participation of Peoples and the Development of International Law: The Laboratory of the Permanent Peoples' Tribunal" in Andrew Byrnes and Gabrielle Simm (eds), *Peoples' Tribunals and International Law* (CUP, 2018), 133.
[172] Simons (n52), 40.
[173] Chimni (n12), 27.

World cannot abandon international law because law now plays such a vital role in the public realm in the interpretation of virtually all international events."[174]

The issue, according to Rajagopal Balakrishnan, is that the mainstream historiography of human-rights discourse sees the contribution of the Global South as minimal[175] and lawyers, by professional training, do not concern themselves with mass politics or popular resistance.[176] He proposes that international law be strengthened by using third world social movements, which often emerge as a result of the failure of geo-political orders.[177] Therefore here, international law can be used to address biases and problems this paper has reviewed by instead changing the focus from a "top-down" to a "bottom-up" approach to international law. Specifically, the solution proffered would be for civil society to provide greater focus on establishing an international peoples' tribunal with a specific mandate of looking at MNC violations of human rights.

International peoples' tribunals ("**IPTs**"), are civil society initiatives functioning independently of State authorities (as distinct from People's Courts in China, which are the judicial organs of the Chinese state). Whilst they each differ slightly from each other and there is "*no predetermined formula*,"[178] particularly in terms of how closely they follow a traditional 'court' model, the idea is that they are fora where "*eminent persons and/or experts to consider allegations of violations of specific standards of international law (and possibly also other bodies of law such as national law, indigenous law or 'peoples' law') in the light of documentary and other forms of evidence presented to them in formal proceedings*."[179] IPTs were originally conceived of by Bertrand Russell, and can be traced back to the Russell Tribunals held in the late 1960s and early to mid-1970s in order to hold the USA and its allies to account for their actions in prosecuting the war in Vietnam in circumstances where there was no formal international court where such allegations could be addressed.[180] IPTs present a reasoned set of findings based on its evaluation of the material brought before it and draw on

[174] Anghie (n12), 318.
[175] Rajagopal (n12), 174.
[176] Ibid, 233.
[177] Ibid, 236.
[178] Ananthavinayagan (n152), 63.
[179] Andrew Byrnes and Gabrielle Simm, "International Peoples' Tribunals: Their Nature, Practice and Significance" in Byrnes (n171), 14.
[180] Ibid, 11.

each of international law, national law, and 'peoples' law', as well as moral and ethical standards.[181]

Since the 1960s, over 80 IPTs have been established outside of formal state and international structures.[182] Notably, there have been IPTs that have examined the actions taken by MNCs in various contexts. For example, the London session of the Russell Tribunal on Palestine made findings in relation to the involvement of Veolia Transport in building the Jerusalem Light Railway and the pension fund Zorg en Welzijn's investment in certain Israeli companies, both of which engaged with the tribunal. In addition, the Permanent Peoples' Tribunal ("**PPT**") which was established in Bologna in 1979 has responded to calls from civil society to hold sessions on MNC behaviour. This has included sessions regarding the oil company Elf Aquitaine in Africa (1999),[183] on Global Corporations and Human Wrongs (2000)[184] and on European Transnational Corporations in Latin America (2008).[185] In its 2010 judgment, it condemned 30 MNCs for "*serious, clear and persistent violations"* of human rights and international principles that protect the rights of individuals and communities in Latin America.[186]

A key benefit of IPTs is that they assert the rights of people(s) to claim for themselves the benefit of international and other forms of law, and to interpret and develop international law.[187] Noticeably, IPTs make effort to recognise the active role of victims in seeking justice and focus on victims as a group to ensure collective justice and reduce potential feelings of social isolation that individual victims might otherwise feel.[188] Additionally, the role afforded

[181] Ibid, 23.
[182] Ananthavinayagan (n152), 64.
[183] Permanent Peoples' Tribunal, *Session on Elf Aquitaine* (Paris, 19-21 May 1999).
[184] Permanent Peoples' Tribunal, *Session on Multinationals and Human "Wrongs"* (Warwick, 22–25 March 2000).
[185] Permanent Peoples' Tribunal, *Session on Neoliberal Policies and European Transnational Corporations in Latin America and the Caribbean* (Lima, 13-16 May 2008).
[186] Permanent Peoples' Tribunal, *The European Union and Transnational Corporations in Latin America: Policies, Instruments and Actors Complicit in Violations of the Peoples' Rights, Judgment* (Madrid, 14-17 May 2010), 23.
[187] Byrnes (n179), 15.
[188] Ibid, 19.

to victims is "*greater than merely that of witness, with peoples' tribunals often aiming to restore dignity and acknowledge the agency of victims*."[189]

Given these benefits to victims and based on the PPT, it is proposed that a permanent body addressing MNC conduct would be helpful in order to have opportunity to develop its own 'jurisprudence' and to contribute to the evolution of international law.[190] However, unlike the PPT, which deals with a broader mandate, this tribunal would be more specialised in its focus, which would assist in developing specific expertise. Crucially, this tribunal could not be financed by States,[191] but would require fundraising and crowd-sourcing to ensure its financial viability (and crowdsourcing may assist in combatting claims of bias as compared to direct financing from civil society).[192] Depending on the preferences of the victims, use could also be made of smaller scale tribunals in addition to this larger international body in order to place greater autonomy and agency into their hands, as exemplified by the aforementioned tribunals related to Palestine and Latin America, respectively. Once established, with enough financial and media backing, accused MNCs would face a difficult choice of three alternatives: "*ignoring the tribunals, attempting to refute their findings, and changing their activities in response to tribunal findings*."[193]

Thamil Ananthavinayagan assesses (criminal) IPTs from a TWAIL perspective, noting that they "*deliver a call for justice from the bottom to the top and urge for global justice of the people than of states*" and that such mechanisms can deliver rights to fair trial.[194] Importantly, he highlights how current power relations are not set in stone, and civil society has a "*substantial role to play in the struggle for the law and political influence.*"[195] Therefore whilst current international institutions are non-representative and capable of being manipulated to serve powerful States and MNCs, IPTs can transfer power back to people (and people of the Global South in particular).[196] He explains how IPTs "*are postmodern mechanisms to dismantle dominant Western state power and empower subaltern voices in civil society of the*

[189] Andrew Byrnes and Gabrielle Simm, "Reflections on the International Peoples' Tribunals" in Byrnes (n171), 263.
[190] Ibid, 261.
[191] Ananthavinayagan (n152), 65.
[192] Byrnes (n179), 37.
[193] Arthur Blaser, "How to Advance Human Rights Without Really Trying: An Analysis of Nongovernmental Tribunals" (1992) 14 Hum Rts Q 339, 365.
[194] Ananthavinayagan (n152), 70.
[195] Ibid, 66.
[196] Ibid, 66.

Global South to harness counter-hegemonic potentials."[197] It is argued here that civil society can and should make more use of these tools in relation to MNC breaches of human rights.

Finally, one implication of a greater use of IPTs in this field is that there would be an argument that their jurisprudence should begin to form part of customary international law. Although it is beyond the scope of this paper to discuss his idea in detail, Chimni has proposed a postmodern doctrine of customary international law, which would have roots in a plural international order in which deliberative reason plays a central role.[198] In accordance with this approach, the formation of customary international law would rest in part on the formation of sounder claims and findings advanced by both state and non-state actors, and would also be linked to the practices of civil society.[199] This approach certainly provides space for the judgments and opinions of IPTs, which would go some way to addressing the concern that the Global South has been ignored to date in the formation of international law.

Critiques

Despite their benefits, it is important to address concerns with IPTs. Crucially, some assert that IPT findings have no legal validity within the positivist system of international law, and cannot be enforced. However, as alluded to above, financial compensation is just one of a number of remedies that might be important to victims of human rights violations. Firstly, the benefits of such a tribunal, as with the PPT, would include providing witnesses the chance for their testimony to be heard and publicly documented. IPTs provide "*healing and closure to victims*" and allow for public acknowledgement of their struggles which restores their dignity.[200] A second set of benefits include *"[p]resenting and rehearsing testimony, arguments and law that can later be used in national and international courts; [e]ducating parties and the public about the human rights dimensions of actions undertaken by the defendants; [and] [i]ssuing judicial findings that can be referenced in future court cases…*"[201] As an example, evidence from the PPT in relation to the sessions on European Transnational Corporations in Latin America was used in legal cases in the UK, the US and Peru, and under the Organisation for Economic Co-

[197] Ibid, 68.
[198] Bhupinder Chimni "Customary International Law: A Third World Perspective" (2018) 112(1) Am.J.Int.Law 1, 38.
[199] Ibid, 42.
[200] Byrnes (n189), 263.
[201] "What Is The Permanent Peoples' Tribunal" (*Tribunal on Fracking*) <https://www.tribunalonfracking.org/what-is-the-permanent-peoples-tribunal/> accessed 1 June 2021.

operation and Development complaint mechanisms.[202] Therefore while judgments of such tribunals are not legally binding, they make an important number of various contributions that can assist with access to remedy.

Secondly, 'defendants' rarely respond or appear before IPTs, despite being invited to. If this practice is repeated, MNCs might assert that any findings against them were unfair, compromising legitimacy. To pre-empt this, it is envisioned that the IPT proposed here, in addition to inviting MNCs to participate directly, should appoint amicus curiae (defence counsel) to put the case of an absent defendant forward. Such defence counsel could derive the relevant case from public statements made by the MNC. Regardless, and with the view of the pre-existing asymmetrical power relationship that exists between such MNCs and the injured, it is noted that MNCs could be said to have waived their right to claim that due process has been denied by refusing to partake in the proceedings.[203]

Allegations of unfair proceedings are also made with regard to apparent bias of such tribunals. In contrast to 'official' courts whose judges are assumed to be impartial, the judges of IPTs are usually chosen by the organisers and are therefore seen as having similar or sympathetic views, leading to arguments that "*the outcome of the tribunal is pre-determined.*"[204] However, not all IPTs have found against defendants.[205] Moreover, safeguards could be put in place by having, as with many arbitration procedures, each of the claimant/defendant choosing from a screened panel – which in turn might also encourage defendant participation. There are also often a range of judges from different backgrounds, for example, the PPT panel consists of between 5 and 11 judges, about half of whom are jurists practiced in international human rights law and about half of whom are other highly respected members of civil society.[206]

It is clear from the preceding analysis that the development of an IPT and use of smaller-scale tribunals, grounded in a bottom-up approach to international law, could be crucial in addressing the deficiencies in the current approaches to remedy. Not only would they focus on the needs of victims and their local cultures, but they would ensure that the system is not dominated by Western procedures and institutions.

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[202] Byrnes (n189), 259-273.
[203] Brynes (n179), 11.
[204] Ibid, 34.
[205] Ibid, 35.
[206] Tribunal on Fracking (n196).

CHAPTER 6: CONCLUSION

"*All of the world's citizens (playwrights, scientists, theologians, labor leaders, lawyers, and international relations scholars alike) must make an important choice: either witness the further denigration of international law or contribute to its revitalization.*"[207]

This paper has shown that the current ways in which victims are expected to access remedy for MNCs violating their human rights falls short and barriers are rife. Host-states frequently lack in will or resources. Home-states historically refused to take jurisdiction and, where this trend appears to be reversing, the solutions they offer do not adapt to the needs or cultures of victims and instead continue to spread Western notions and values, risking 'Othering' the Global South.

International law needs to step in. The UNGPs express the need for access to remedy but do not go further in enforcing or ensuring its implementation, and the current Draft Treaty risks international lawyers falling down the trap of promoting the sole use of Western systems. However, as in all areas of human interaction, nothing is definitive or irreversible in international law. Social expectations and political consensus evolve, sometimes "*more rapidly than one can imagine*."[208] Peoples' tribunals have been growing in popularity and have become a common form of resistance for social movements. They have already made some progress in holding certain MNCs accountable and creating access to remedy, and there is no reason why they cannot be propagated further.

Naturally, such an international alternative is not going to be an overnight panacea for the countless human rights crises afflicting the world today, and its use might be slow in picking up pace. However, TWAIL does no more than to make real the promise of international law to transform itself into a system based not on power, but justice. It is supposed to hand back international law to the many, not the powerful few. People's tribunals are a perfect example of this. Therefore, even if the approach proposed only succeeds in providing appropriate and effective redress to some individuals and communities, or in nudging some MNCs into adopting human rights reforms and ensuring compliance with their increasing expectations, or in increasing knowledge and awareness to some citizens other than those who are already global activists in the field, then it will have made a positive step in the right direction.

[207] Blaser (n193), 366.
[208] Lopez, 77.

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