The Case for an International Court of Civil Justice. By Maya Steinitz. Cambridge: Cambridge University Press, 2019. 241 + xiv pages.

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The late scholar John Gardner once wrote that "[u]ncontroversial ideas need not less but more critical scrutiny, since they generally get such an easy ride."[1] On the other hand, controversial ideas, when presented at an appropriate time, ought to be lauded as bold and audacious for moving forward otherwise stagnant discourses. In that vein, the proposal for an International Court of Civil Justice (ICCJ) by University of Iowa College of Law professor Maya Steinitz is such an idea that deserves the mantle of audacity.[2] Just as literature on the role of international adjudicative venues to address mass atrocities proliferated after the Cold War, particularly concerning individual criminal responsibility, the ICCJ is one attempt to address harm perpetrated by transnational corporations (TNCs) in a time of ubiquitous cross-border trade and foreign investment. Rather than looking at corporate criminal liability, this book considers civil claims rooted in tort law with the potential for compensatory remedies.

Choosing to present more than the administrative, substantive, and procedural aspects of such a court, the author seemingly approaches the topic as a realist and expends considerable thought grappling with the underlying financial and political concerns that may deter states and TNCs alike from supporting its existence. Without neglecting the interests of affected parties, Steinitz asserts that the time is now ripe to begin discussions on the court's necessity. She presents what she refers to as a contemporary "transnational litigationscape" defined by a set of circumstances that have facilitated cross-border dispute resolution at the national level. These include the onset of litigation-financing firms, the rise of the global entrepreneurial lawyer, the enactment of blocking statutes and other pro-plaintiff legislation, and the emergence of global class action litigation. These realities have propelled mass tort litigation forward in a way that would have been unthinkable only decades ago. For Steinitz, translating this success into the international sphere marked by the creation of a court that is separate and apart from any national system has the ability to yield similar results.

Previous authors have identified a "multinational challenge" or a "governance gap" for transnational corporate liability when mass tort allegations

[1] John Gardner, *From Personal Life to Private Law* (Oxford: Oxford University Press, 2018) at 189.

[2] Maya Steinitz, *The Case for an International Court of Civil Justice* (Cambridge: Cambridge University Press, 2019).

arise, particularly in the Third World.[3] For avenues to curb corporate transgressions in developing countries, there seem to have emerged two camps of scholars. In the first camp, there are what can be called regulatory scholars who advocate for corporate responsibility to be governed by internal mechanisms that originate in domestic or international norms-based soft laws.[4] These scholars tend to focus on the positive consequences of international business such as increased employment and societal development. They are also proponents of incremental, yet cautious, steps to address corporate harms so as to maintain a profitable transnational commercial environment. They appear to prefer slaps on the wrist as opposed to a cudgel in light of the tangible power shift over the past several decades that has resulted in TNCs surpassing many states in financial wealth and, consequently, power and authority.

The second camp is that of adjudicative scholars. This group of academics is of the opinion that modifying corporate behaviour has to be considered alongside avenues to compensate harmed victims and establish a body of law that will govern the cross-border conduct of TNCs into the future. These scholars span a range of areas and proposals. For example, Phillip Blumberg and other scholars who have written on the effects of corporate structural fragmentation tend to support enterprise theories of liability in domestic courts.[5] In the burgeoning space of business and human rights, Surya Deva has proposed a joint World Trade Organization–United Nations adjudicative mechanism.[6] International law and international relations experts such as Steven Ratner are of the view that adjudicative avenues lie in expansive international law theories derived from agency and complicity arguments.[7] The "adjudicativists" equally fall within Marie-Bénédicte Dembour's classification of protest scholarship on human rights in that they persistently press for expansive notions of liability, whether that be through recognizing TNCs as

[3] See e.g. Phillip I Blumberg, *The Multinational Challenge to Corporation Law* (Oxford: Oxford University Press, 1993); Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage* (New York: Routledge, 2014).

[4] See e.g. John G Ruggie, "Business and Human Rights: The Evolving International Agenda" (2007) 101:4 Am J Intl L 819; Adefolake Adeyeye, "Corporate Responsibility in International Law: Which Way to Go?" (2007) 11 SYBIL 141; Andreas G Scherer et al, "Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0" (2016) 53:3 J Management Studies 273.

[5] See e.g. Phillip I Blumberg & Kurt A Strasser, *The Law of Corporate Groups: Enterprise Liability in Commercial Relationships, Including Franchising, Licensing, Health Care Enterprises, Successor Liability, Lender Liability, and Inherent Agency* (New York: Aspen Law & Business, 1998). See also Hannah L Buxbaum, "The Viability of Enterprise Jurisdiction: A Case Study of the Big Four Accounting Firms" (2015) 48 UC Davis L Rev 1769.

[6] See further Surya Deva, "Human Rights Violations by Multinational Corporations and International Law: Where from Here?" (2003) 19 Conn J Intl L 1.

[7] See further Steven R Ratner, "Corporations and Human Rights: A Theory of Legal Responsibility" (2001) 111:3 Yale LJ 443.

subjects of international law or loosening restrictions imposed by common law doctrines such as the corporate veil and *forum non conveniens*.[8]

Characterizing the gap in transnational corporate liability as a "missing forum," the ICCJ falls within the adjudicative camp as it looks to create a venue with the ability to both modify corporate behaviour and compensate harmed individuals. With that said, read closely, Steinitz remains cognizant of the first camp. She reminds the reader throughout her book that an ICCJ would not only ameliorate the prospect of redress for citizens of capital-importing countries who seem to bear the brunt of corporate irresponsibility; it would also benefit the business community by offering a "global peace premium."[9] Summarized, this argument proceeds as follows: TNCs and the states that afford them legal personality would be willing to forego their current impunity (and, for states, their sovereignty) in return for a single venue that would preclude all other claims and provide a sense of finality at the end of adjudication. In theory, as the author presents it, the ICCJ would be a potentially faster and cheaper, yet equally legitimate, option to the multitude of national systems in which TNCs seem to be endlessly defending transnational human rights and environmental claims.

After laying out the problem of transnational corporate impunity that has most prominently manifested itself in a series of high profile American court cases that have failed at jurisdictional phases of litigation, the author delves into the "business case for the ICCJ."[10] She identifies direct and indirect litigation costs that TNCs currently incur in defending complex and protracted claims in domestic courts, primarily in the United States and Europe. Direct costs include fees and expenses paid to lawyers, consultants, and experts. Indirect costs can be related to a TNC's reputation and/or goodwill. They can also include a change in the broader environment whereby previously pro-investment regimes become insular and therefore reticent to engage with foreign corporations. To make her business case, the author cites studies and figures on the inordinate amount of legal fees that some of the world's largest TNCs have incurred in defending claims, often in multiple jurisdictions. She also points to examples where TNCs have had to forego business opportunities or were unable to secure funding from lenders. Arguably, however, each set of costs — and more likely indirect costs — would equally be present in ICCJ claims.

The book's last substantive chapter details the ICCJ's contours, most important of which is a two-tiered membership structure that takes into

[8] See further Marie-Bénédicte Dembour, "What Are Human Rights? Four Schools of Thought" (2010) 32 Hum Rts Q 1.

[9] Steinitz, *supra* note 2 at 123–26.

[10] *Ibid*, ch 4. See also *In re Union Carbide Corp Gas Plant Disaster*, 809 F 2d 195 (US CA 2d Cir 1984); *Aguinda v Texaco*, 303 F 3d 470 (US CA 2d Cir 2002); *Kiobel v Royal Dutch Petroleum*, 569 US 108 (2013).

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account that most capital-exporting states would not sign onto the court. States parties that choose to participate fully would ratify the ICCJ Statute. Accordingly, those parties would subject their legal (and even natural) persons to the court's jurisdiction. This approach would be akin to becoming a state party to the *Rome Statute of the International Criminal Court*, although Steinitz prefers that states parties not have the option of complementarity arguments as they do before the International Criminal Court.[11]

The second tier of membership is an enforcement statute in which states would not have to subject their own TNCs to the ICCJ's jurisdiction but, rather, would be obligated to recognize and enforce ICCJ orders and judgments. Steinitz foresees widespread acceptance of the enforcement treaty on the basis that similar treaties in the arbitration sphere, such as the 1958 *New York Convention*,[12] have received widespread approval. Of course, other treaties, such as the recent *Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*[13] and the new *Singapore Convention on Mediation*[14] have not been met with as much fanfare (although it may be too soon to judge). Nevertheless, with the uneven level of past success for similar treaties, an informed reader can only equivocate on the support the ICCJ's enforcement treaty would garner.

After outlining the dual treaty-based system at the heart of the proposed court, the author addresses issues of jurisdiction and admissibility. For the latter, she remains open-minded as to how the ICCJ would interact with existing courts. She prefers that her proposed ICCJ be a court with exclusive jurisdiction, but she does not foreclose the possibility of following established concepts of complementarity developed in international criminal law whereby a case would be admissible at the ICCJ only if national jurisdictions were unable or unwilling to adjudicate. Distinct from admissibility, Steinitz presents the court's jurisdictional scope in more rigid terms. Concerning personal jurisdiction, the court would exist to fill the gap for transnational corporate liability, but it could also assert jurisdiction over natural persons. With respect to subject matter, the court would focus on addressing issues that stem from cross-border intentional torts or negligence related to enterprise liability that result in physical injury or environmental harm. This

[11] *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

[12] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

[13] 2 July 2019, online: *Hague Conference on Private International Law* <https://assets.hcch.net/docs/806e290e-bbd8-413d-b15e-8e3e1bf1496d.pdf> (not yet in force).

[14] *United Nations Convention on International Settlement Agreements Resulting from Mediation*, 20 December 2018, UN Doc A/RES/73/198, online: *UNCITRAL* <https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf> (not yet in force).

means that the court would have a role when at least a non-trivial percentage of plaintiffs and the defendant come from different countries.

For Steinitz, the ICCJ would be what Karen Alter has characterized as a "new style" international court.[15] Able to adjudicate between private parties, the court would assert compulsory jurisdiction over litigants from states parties that have ratified the ICCJ Statute. As in domestic settings, litigants would be obligated to appear before the court in the course of proceedings and required to abide by its rulings. While the court's compulsory and exclusive nature would undoubtedly be welcomed by access-to-justice scholars and activists in an age when large corporations, particularly in the extractive sectors, have chosen to fiercely defend mass tort claims, compulsory jurisdiction may not be a panacea that would result in compensation to allegedly harmed victims. On the contrary, the ICCJ could simply become another layer of legalese to which TNCs can resort in defending transnational claims for decades on end.

Procedurally, Steinitz picks out elements of civil and common law jurisdictions that would facilitate the ICCJ's work. She prefers a civil law approach of inquisitorial adjudication that lessens the adversarial environment in which these already contentious disputes exist. Moreover, she would give ICCJ judges discretion to implement an opt-in or opt-out procedure to determine which harmed individuals would be part of the plaintiff class. As a progressive gesture, she also argues that the court should assert jurisdiction over all non-participating claimants — an approach that has been rejected by domestic courts in the recent past.[16] Finally, recognizing the economic realities that have accompanied mass tort litigation in North America and Europe, she foresees the court allowing contingency fees and third-party financing as well as an access-to-justice fund for impecunious claimants (although the fund's necessity should be mitigated by mechanisms that encourage entrepreneurial lawyering).

This book's takeaway comes not as much from the intricacies of how the proposed ICCJ would function or the laws and methods it would follow as much as from its lasting impact, which may be that it spurs a discourse similar to the one that emerged several decades ago on the need for a court to address mass international crimes. That discourse appeals particularly to those who advocate that access to justice and, for civil claims, access to a remedy are independent human rights that should be available to everyone.[17] It is from this fundamental starting point that any further discussion on the ICCJ or a similar institution would — and certainly should — arise.

[15] See further Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton, NJ: Princeton University Press, 2014).

[16] See e.g. *Airia Brands v Air Canada*, 2017 ONCA 792.

[17] See e.g. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, art 2(3) (entered into force 23 March 1976).

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As the author acknowledges in the book's concluding chapter, the ICCJ will not appear anytime soon. However, merely unearthing its potential will galvanize a critical mass into thinking it is possible. Recent populist uprisings around the world have illustrated that convincing a critical mass is quite possible and perhaps not as difficult as once thought. If not insurmountable, convincing powerful TNCs and the governments of capital-exporting states who benefit financially from cross-border trade and investment will be the more difficult part. Even if this book has been an initial step, it is this direct discourse on how to engage TNCs and governments that sits at the root of its audacity.

Hassan M. Ahmad
SJD Candidate, Faculty of Law, University of Toronto

Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples. Edited by John Borrows, Larry Chartrand, Oonagh E. Fitzgerald & Risa Schwartz. Montreal & Kingston: McGill-Queen's University Press, 2019. 236 + xvi pages.

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Adopted over a decade ago, the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) needs no introduction.[1] The declaration is an attempt by the international community to recognize and codify the rights of Indigenous peoples in parallel with rules in domestic and Indigenous law that affect how the declaration should be implemented. Edited by John Borrows, Larry Chartrand, Oonagh Fitzgerald, and Risa Schwartz, *Braiding Legal Orders* seeks to harmonize these rules and approaches to implementation by braiding domestic, international, and Indigenous legal traditions together. The editors explain that, while braiding has importance in different Indigenous traditions, the purpose of the metaphor in this volume is to "see the possibilities of reconciliation from different angles and perspectives" and to "reimagine what a nation-to-nation relationship" in Canada might mean.[2] A vital feature of the book is its inclusion of theories of

[1] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008) at 15–25 [*UNDRIP*].

[2] Larry Chartrand, Oonagh Fitzgerald & Risa Schwartz, "Preface" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Montreal & Kingston: McGill-Queen's University Press, 2019) ix at xv.