

**ACCESS TO JUSTICE IN
NEW ZEALAND'S PRIVATE INTERNATIONAL LAW**

An examination of the doctrines of *forum necessitatis* and *forum (non) conveniens* in
New Zealand.

Rachael Hodge

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“No one who comes to these courts asking for justice should come in vain. The right to come here is not confined to Englishmen. It extends to any friendly foreigner”

- Lord Denning, *The Atlantic Star* [1973] 1 Q.B. 364, 381–1 (Eng. C.A. 1972).

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Introduction

The right to access justice is basic and fundamental. It underpins New Zealand's domestic legal system. Without the ability to have a claim heard, how can one pursue one's rights? However, despite being a fundamental and essential right, whether or not states are under an obligation to open their courts to litigants in an international dispute, is far from clear.

Civil procedure has been described as the gatekeeper of access to meaningful justice in an era of globalisation.¹ The rules and principles that regulate who can access a court can have huge implications on the outcome of a dispute and in the wider sense, 'justice'. When a case has an international element, the parties must decide what court should hear the dispute. The plaintiff does not have an unrestricted right to choose the court. Common law courts help determine whether they can or should exercise jurisdiction by asking two questions. Does the court have jurisdiction over the matter? If it does, is the court the most appropriate forum to hear the case, i.e. is it *forum conveniens*?² However, concerns surrounding these jurisdictional rules have been raised. Do common law jurisdictional rules comply with the right to access justice? Are states entitled to choose who can bring proceedings in their courts? Or are states under an obligation to ensure that every claim is heard? Increasingly, courts are being asked to consider what happens if there is no clearly appropriate forum to hear a claim or if the alternative forum does not satisfy the requirements of the right to access justice.

This dissertation will examine these concerns with a focus on New Zealand's jurisdictional rules. In particular, this dissertation will analyse two jurisdictional doctrines. The relatively new doctrine of *forum necessitatis*, or its common law equivalent, forum of necessity and the older, more established doctrine *forum (non) conveniens*. It will assess whether *forum necessitatis* should be included into New

¹ Trevor C. W. Farrow "Globalisation, International Human Rights and Civil Procedure" (2003) 41 *Alberta Law Review* 671 at 673.

² Notably, the first question mainly concerns the plaintiff's access to the courts in international litigation. However, the second question allows the defendant's concerns to be assessed when ensuring whether or not access to justice can be ensured.

Zealand's law and whether *forum non conveniens* currently satisfies New Zealand's international human rights obligations, in particular, the right to access justice.

This dissertation is divided into four chapters. The first chapter examines the right of access to justice. Despite being fundamental to upholding human rights, access to justice is not defined in international human rights law. Generally, it is understood as encompassing the right to a fair trial and the right to an effective remedy. However, how access to justice fits into the wider matrix of human rights and civil litigation is shrouded in ambiguity and has received little discussion. For example, is access to justice an independent right that is available to all parties in international litigation? Or is it merely a subsidiary right and is only activated when a fundamental international human right is violated? This chapter will assess these arguments, suggesting that the right is found in customary international law and is regarded by states as a subsidiary right. It seems that the right of access to justice is not powerful enough to impose obligations on states.

The second chapter will provide an outline of state jurisdiction, touching on the mix of political and legal concerns raised when exercising jurisdiction over private disputes with an international element. Confidence in the courts and transparent civil procedures are key to an effective and stable international market. Parties engaging in international litigation need a degree of reassurance that their claim will be adjudicated fairly and in an appropriate forum. In the majority of cases, jurisdictional rules will point to a forum that has a fair trial and an effective remedy. This dissertation is concerned with situations where a fair trial or remedies are not guaranteed. This chapter explores the difficulties that these exceptional situations create in regards to exercising jurisdiction. Private international law is concerned with protecting comity,³ preventing exorbitant jurisdiction,⁴ forum shopping and vexatious litigation. These concerns require a high standard for establishing that a fair trial would not be received. This high standard clashes with the right to access justice. Furthermore, while a general principle of international law it is difficult to argue that states are an obligation to provide jurisdiction in exceptional circumstances, many states are behaving as if they were under such an obligation by enacting *forum*

³ See 2.4.2.

⁴ See 2.3.2.

necessitatis provisions. It seems that there is increasing acknowledgment of the right to access justice and this is slowly changing the exercise of jurisdiction in international law.

The third chapter will examine *forum necessitatis*. This doctrine relates to the first question asked by common law courts; does the court have jurisdiction to hear the matter? The common law has been credited with being flexible and discretionary, adapting to the needs of individual cases. However, assuming that the common law's flexibility can adapt to all new situations can be misleading. It overlooks the technicalities inherent in jurisdictional rules. In fact, *forum necessitatis* emerged to mitigate overly rigid jurisdictional rules. In essence, *forum necessitatis* seeks to prevent a denial of justice by enabling a court to exercise jurisdiction in the absence of traditional grounds of jurisdiction. The exact nature of *forum necessitatis* remains contentious and is outside the scope of this dissertation.⁵ Instead, this chapter will provide a brief explanation of the elements and examine the role of *forum necessitatis* in the common law. Both England and New Zealand do not have a *forum necessitatis* rule. However, Canada (in particular, the province of Ontario) has adopted a *forum necessitatis* rule through the common law. The arguments made in England and Ontario in favour of a *forum necessitatis* rule will be applied to New Zealand to assess whether such a rule is required. This chapter will argue that there is a strong basis for the doctrine to be adopted into New Zealand's common law.

The fourth chapter will consider *forum non conveniens*. This doctrine relates to the second question for common law courts. Once jurisdiction is established under the traditional grounds of jurisdiction, the court asks whether it is the most appropriate forum or *forum conveniens*? Common law courts retain the discretion to decline to exercise jurisdiction in the interests of justice. If invoked, *forum non conveniens* effectively denies a party access to a court. The elements of *forum non conveniens* and its compliance with the right to access justice will be examined. This chapter will suggest that private international law principles should be interpreted with an

⁵ Many articles have provided an in-depth discussion on the scope of *forum necessitatis*, see Chilenye Nwapi "A Necessary Look at Necessity Jurisdiction" (2014) 47 U.B.C.L. Rev. 211. and Chilenye Nwapi "Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor" (2014) 30 Utrecht Journal of International Law and European Law 24.

approach consistent with human right standards. While there are similarities between the doctrines of *forum non conveniens* and *forum necessitatis*, the arguments in this chapter help to expand why *forum necessitatis* is necessary as a separate doctrine.

Underlying this discussion are numerous debates embedded in the framework of international law. There is a constant tension between state sovereignty and the rights of individuals and between private and public interests. In international law, questions are constantly raised surrounding the impact of globalisation and the adequacy of judicial discretion. Each one of these tensions could be the subject of a dissertation. However, this dissertation is focused on the doctrines of *forum necessitatis* and *forum non conveniens* and their compliance with the right to access justice. A balance must be maintained to ensure predictability and consistency while safeguarding fairness and equal access for parties in international litigation. Without clear and consistent rules of civil procedure, the right to access justice may never be fully realised.

Chapter I: The Right of Access to Justice under International Law

1.1. Introduction

The right to access justice is seen as fundamental to the operation of a healthy legal system. However, the ‘right’ to access justice is an overused concept, which lacks a consistent definition. While residents of a state may have an inherent right to access their courts for domestic disputes, how far this right extends to litigation with an international element is unclear.

This chapter will define ‘access to justice’ and its status in international law. While there is limited jurisprudence on the extraterritorial scope of domestic guarantees of access to justice,⁶ it is argued to be a general obligation under customary international law and a “basic concept of the law of procedure”.⁷ This chapter will provide a brief summary of the rise of international human rights norms, before examining the right to access justice. While human rights are seen to impose restraints and obligations on states, state sovereignty remains decisive in determining the protection of human rights. Recently, human rights have gained prominence in the sphere of public international law. However, globalisation means that human rights may need just as much protection through the realm of private international law.

1.2. The Rise of International Human Rights

Originally, international law revolved around state sovereignty, governing the relationships between state actors. However, the horrors of World War Two illustrated that it was unacceptable for international law to leave citizens to the mercy of the State.⁸ International bodies, particularly the United Nations and regional bodies, such as Europe under the European Convention of Human Rights 1950

⁶ Michael M Karayanni “The Extraterritorial Application of Access to Justice Rights” in Horatia Muir Watt and Deigo P. Fernandez Arroyo (ed) *Private International Law and Global Governance* (Oxford University Press, Oxford, 2014) at 218.

⁷ At 217.

⁸ Alex Mills “Rethinking Jurisdiction” (2014) 84 *British Yearbook of International Law* 187 at 219.

(ECHR),⁹ were established in an attempt to create standards of protection for individuals. These standards led to the emergence of individual human rights and obligations that have challenged the traditional role of states.¹⁰ States continue to be the dominant players in the international arena, although it would be “foolish” to deny individuals and private parties have some rights and obligations under international law.¹¹ However, the extent of these rights and obligations remains controversial.

Human rights were first recognized in the United Nations Universal Declaration of Human Rights 1948 (UDHR).¹² Human rights are inalienable, universal and indefeasible as “all human beings are born free and equal in dignity and rights”.¹³ For the purposes of this dissertation, human rights are those that have been recognised as universal.¹⁴ The UDHR “signaled the beginning of the international human rights movement”.¹⁵ However, the exact role that human rights norms play in international law and the restrictions placed on states is undecided.¹⁶ Nonetheless, the emergence of human rights standards means that the actions of states can be viewed in terms of a minimum standard of fair treatment and respect for human dignity¹⁷ and no state is immune to such accountability.¹⁸

The core of international human rights law consists of three treaties and is often referred to as the ‘international bill of rights’.¹⁹ These are the UDHR, the International

⁹ European Convention on Human Rights 1950 (signed 4 November 1950, entered into force 3 September 1953).

¹⁰ Mills “Rethinking Jurisdiction”, above n 8, at 235.

¹¹ Francesco Francioni “The Rights of Access to Justice Under Customary International Law” in *Access to Justice as a Human Right* (Oxford University Press, Oxford, 2007) at 6.

¹² Universal Declaration of Human Rights 1948 (UDHR) GA Res 3/217A, A/810. Notably, this document did not have binding affect. The Preamble states that it was “a common standard of achievement for all peoples and all nations”. However, some provisions have been argued to reflect customary international law. See Bruno Simma and Philip Alston “The Sources of Human Rights Law: Custom, Jus Cogens and General Principles” (1992) 12 *Austral. Y. Bk. Int’l Law*. 82.

¹³ UDHR article 1.

¹⁴ UDHR Preamble states that the “recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace”.

¹⁵ Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed. Brookers, Wellington, 2007) at 925.

¹⁶ Alex Mills *Confluence of Public and Private International Law* (Cambridge University Press, Cambridge, 2009) at 83.

¹⁷ Francioni, above n 11, at 30.

¹⁸ Margaret Bedggood “Economic, Social and Cultural Rights: The International Background” in Margaret Bedggood and Kris Gledhill (eds) *Law in Action: Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomas Reuters, Wellington, 2011) at 5.

¹⁹ Farrow, above n 1, at 679-680.

Covenant on Civil and Political Rights 1966 (ICCPR)²⁰ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).²¹ The separation of the rights in the ICCPR and ICESCR was a result of the political tension during the Cold War reflecting ideological differences. Generally, civil and political rights have been conceptualised as negative rights, classified as freedoms from arbitrary interference. Subsequently, the rights in the ICCPR have been considered justiciable in contrast to the rights encapsulated in the ICESCR, which are perceived as goals rather than as rights. This approach is too simplistic as the right to a fair trial imposes positive obligations on the state.²² Furthermore, while the justiciability of individual rights goes outside the scope of this dissertation, disagreement surrounding what rights can be asserted under the right to access justice remains.²³

1.3. Definition of Access to Justice

The right of access to justice is considered the cornerstone of human rights protection. It is fundamental, as “in international law, as in any domestic legal system, respect and protection of human rights can be guaranteed only by the availability of effective judicial remedies”.²⁴ States are increasingly considered to be under obligations in human rights treaties to guarantee rights²⁵ to all persons “within its jurisdiction”.²⁶

‘Access to justice’ has a generally accepted (albeit, broad) meaning.²⁷ However, as this discussion will illustrate, access to justice eludes a straightforward definition. It is “much more than improving an individual’s access to courts, or guaranteeing legal representation. It must be defined in terms of ensuring that legal and judicial outcomes are just and equitable”.²⁸ Therefore, in general terms, access to justice can

²⁰ International Covenant on Civil and Political Rights 1966 UNTS 999 (adopted 16 December 1966, entered into force 23 March 1976) (hereinafter ICCPR).

²¹ International Covenant on Economic, Social and Cultural Rights 1966 UNTS 993 (adopted 16 December 1966, entered into force 3 January 1976).

²² Sarah Joseph and Melissa Castan *The International Covenant on Civil and Political Rights* (3 ed, Oxford University Press, Oxford, 2013) at [1.100]–[1.101].

²³ See 1.5.

²⁴ Francioni, above n 11, at 1.

²⁵ As indicated above, these rights are generally limited to the rights recognised in the ICCPR.

²⁶ ICCPR article 2(1).

²⁷ Tom Cornford “The Meaning of Access to Justice” in Ellie Palmer and others (ed) *Access to Justice: Beyond the Policies and Politics of Austerity* (Bloomsbury Publishing United States, 2016) at 27.

²⁸ United Nations Development Programme *Access to Justice Practice Note* (2004) at [6].

be understood as the right of an individual to have their claim adjudicated in accordance with substantive standards of justice and fairness and the ability to get an effective remedy through formal and informal institutions.²⁹

At a glance, access to justice embodies the core principles of modern liberal democracies. It is concerned with procedural fairness and protecting the rule of law.³⁰ The right to access justice is essential to a system of protection and enforcement of human rights,³¹ as it “affirms interests of human dignity that are core democratic ideals”.³² The implementation and enforcement of rights depends on the proper administration of justice.³³ However, the right to access justice is not defined in human rights instruments. Instead, together the right to a fair trial and the right to an effective remedy form the right to access justice.

1.3.1. A Right to a Fair Trial

The right to a fair trial is a fundamental principle of any established legal system and is necessary to “ensure the proper administration of justice”.³⁴ It encompasses having a dispute heard in a fair and impartial court. It is generally accepted that the right of access to a court is included in the right to a fair trial.³⁵ The right should be practically enforceable, rather than merely theoretical.³⁶

The right to a fair trial has been recognised in numerous human rights treaties and is considered part of customary international law.³⁷ In particular, it is protected under

²⁹ Francioni, above n 11, at 3.

³⁰ JJ Fawcett (ed) in *Human Rights and Private International Law* (Oxford University Press, Oxford, 2016) at [3.12].

³¹ Francioni, above n 11, at 1.

³² DL Rhode “Access to Justice” (2001) 69 *Fordham Law Review* 1785 at 1799.

³³ The aim to ensure the proper administration of justice encompasses the right of equality before the law, equal protection and to be free from discrimination. See UDHR articles 7 and 8.

³⁴ Joseph and Castan, above n 22, at [14.01].

³⁵ *Golder v United Kingdom* (1975) 1 EHRR 524 (ECHR) at [36]: “The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”.

³⁶ *Airey v Ireland* (1979) 2 EHRR 305 (ECHR) at [26]: “Article 6(1) may sometimes compel the state to provide assistance of a lawyer when such assistance proves indispensable for an effective access to court”.

³⁷ Human Rights Committee *General Comment No. 29: Article 4: Derogations during a State of Emergency* CCPR/C/21/Rev.1/Add.11 (2001) at [11].

article 6(1) of the ECHR³⁸ and under article 14 of the ICCPR. There is an extensive body of international jurisprudence as to what a fair trial constitutes from decisions by the European Court of Human Rights (ECtHR) and the Human Rights Committee (HRC) respectively. In fact, article 14 of the ICCPR has received more jurisprudential attention than any other right in the ICCPR.³⁹ The relevant part of article 14 ICCPR for these purposes states:

All persons shall be equal before the courts and tribunals... of his rights and obligations in a suit at law,⁴⁰ everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

In a similar vein, article 6(1) of the ECHR states that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Both articles impose positive obligations on the state to meet the standard of a fair trial. How this is implemented is up to the discretion of the individual state.⁴¹ While a fair trial is vital, the right must also be enforceable through an effective remedy.

1.3.2. The Right to an Effective Remedy

The enforcement of a final judgment is essential to preventing a denial of justice. Without an effective remedy, the decision of the dispute would be rendered practically ineffective.⁴² Victims of human rights violations should always have recourse to judicial remedies if other remedial remedies are not sufficient.⁴³ Francesco Francioni even argues that failure to provide an effective remedy is a gross violation

³⁸ The ECHR has limited territorial scope to its Contracting States. New Zealand is not a contracting state and therefore is not bound to follow its jurisprudence.

³⁹ Joseph and Castan, above 22, at [14.216].

⁴⁰ At [14.08] – [14.19]. There is no clear guidance as to what constitutes a ‘suit at law’ and is the only element of the provision that specifically addresses non-criminal proceedings. Generally, the focus is on the nature of the claim rather than the status of the parties involved.

⁴¹ At [14.64]. The point of a right to fair trial is to maintain the integrity of the judicial system by preventing any reasonable apprehension of bias. The standards simply seek to prevent judicial errors, ensuring that the decisions of the courts are based solely on the merits of the case and points of law.

⁴² Richard Fentiman *International Commercial Litigation* (Oxford University Press, Oxford, 2015) at [13.74].

⁴³ Gwynne Skinner and others “The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” (May 6 2016) European Coalition for Corporate Justice www.corporatejustice.org at 29-30.

of human rights under customary international law.⁴⁴ The ICCPR provides an obligation on states to extend their rights to give an effective remedy⁴⁵ and take proceedings before a court.⁴⁶

An effective remedy must be an enforceable judgment and made within reasonable time. What is reasonable will depend on the complexity of the case. The reparation should be proportional to the seriousness of the harm suffered.⁴⁷ This reasoning may enable victims of human rights violations from developing countries with weak judicial systems to seek remedies in countries with more developed legal systems where defendant corporations might have a higher pool of assets.⁴⁸ It has been observed that when transnational corporations (TNCs) are allowed to choose legal systems that impose lower regulatory burdens than their domestic courts, they are effectively lowering regulatory standards.⁴⁹ However, while the right to access justice encompasses an obligation to provide an effective remedy, what is ‘effective’ is arguable on the circumstances.⁵⁰ Therefore, the right of access to justice can be defined as the right to a fair trial and an effective remedy under international human rights law.

1.4. Limitations on the Right to Access Justice

The right to access justice has a universal rather than regional character.⁵¹ The right is not absolute.⁵² The right protects the ability to have a case heard in a forum that is

⁴⁴ Francioni, above n 11, at 41.

⁴⁵ Article 2(3). Also see UDHR article 8. Notably, there is no equivalent ‘effective remedy’ clause in the ICESCR. Nor does the ICCPR prescribe in general what remedies to be provided in respect of particular rights.

⁴⁶ Article 9.

⁴⁷ Maria Chiara Marullo “Access to Justice and Forum Necessitatis in Transnational Human Rights Litigation” (2010) HURI-AGE, Consolider-Ingenio 1 at 8.

⁴⁸ Beth Stephens “The Amoralism of Profit: Transnational Corporations and Human Rights” (2002) 20 Berkeley Journal of International Law 45 at 85.

⁴⁹ Mozeffer Eroglu *Multinational Enterprises and Tort Liability* (Edward Elgar Publishing, UK, 2008), at 110.

⁵⁰ It is difficult to adequately define ‘effective’. ‘Effective’ does not necessarily correlate to monetary compensation as is often sought in civil proceedings. Instead, jurisprudence on the right to an effective remedy suggests a more public international law focus to investigate, prosecute, punish and find the ‘truth’ of the circumstances. See generally Valeska David “The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court” (2014) 3 Brit. J. Am. Legal Stud 259.

⁵¹ Benedetta Ubetazzi “Intellectual Property Rights and Exclusive (Subject Matter) Jurisdiction: Between Private and Public International Law” (2011) 15 Marq. Intell. Prop. L. Rev. 357 at 414.

procedurally fair. However, what is considered ‘fair’ or ‘just’ is difficult to define.⁵³ A claimant does not have an unfettered right to choose a forum, but neither should their choice of forum be unreasonably dismissed. Furthermore, the exercise of state jurisdiction is discretionary. States’ ability to control which parties can access their courts helps prevent an influx of litigation.⁵⁴ States are conscious of the need to prevent forum shopping and opening their courts to frivolous or vexatious litigants. A balance needs to be achieved between “the needs of the community and the rights of individuals to access a court”.⁵⁵ Therefore, reasonable limitations can be placed on the right to access a particular court. These include sovereign and diplomatic immunities,⁵⁶ *forum non conveniens*,⁵⁷ comity concerns,⁵⁸ public policy,⁵⁹ mandatory rules of the forum,⁶⁰ procedural rules⁶¹ and doctrines of non-justiciability.⁶² The following chapters will examine whether *forum necessitatis* and *forum non conveniens* are reasonable.

⁵² *R v Lord Chancellor, ex parte Witham* [1997] 3 LRC 349 the court described access to the court “as near to an absolute right as any which can be envisaged”.

⁵³ See generally Oliver Lissitzyn “The Meaning of the Term Denial of Justice in International Law” (1936) 30 *American Journal of International Law* 632.

⁵⁴ Karayanni, above n 6, at 218.

⁵⁵ Fawcett, above n 30, at [3.22].

⁵⁶ For example, the Act of State Doctrine. Policy concerns may require immunity clauses to be respected. See *Phillips v Eyre* (1870), LR 6 QB 1 (UK). This has been followed in New Zealand. See *Fang v Jiang* [2007] NZAR 420 (HC) at [13] where jurisdiction was not exercised despite New Zealand being the only forum in which the claim would “conveniently or justly” be brought. The common law does not recognize an exception to state immunity for allegations of breaches of fundamental human rights. See *X v Attorney General of New Zealand* [2017] NZHC 768.

⁵⁷ See chapter four.

⁵⁸ See 2.4.2.

⁵⁹ Fawcett, above n 30, at [2.102]. The Public Policy Doctrine allows for a flexible application of private international law, so it can adapt to the values of society. It is well established that gross infringements of human rights will invoke a public policy exception, and foreign law or judgments will not be enforced.

⁶⁰ Operates as an exception to the general rule that parties can choose foreign law to govern the contracts if it clearly contradicts the law of the forum.

⁶¹ Procedural rules are aimed at ensuring the efficiency of proceedings, such as the double actionability rule. However, the rules also raise questions regarding the allocation of resources. The availability of legal assistance can often determine whether or not a person will receive a fair trial. Article 14(3)(d) ICCPR explicitly addresses the guarantee of legal assistance in criminal proceedings. States are encouraged to provide for legal assistance in civil pursuits. However, it is not an obligation. Although, the ECtHR has found that legal assistance in civil proceedings was needed to ensure a fair trial. Additionally, Francioni, above n 11, at 13 suggests that the requirement for security costs could nullify the right to access to justice and suggests there has been a progressive obsolescence of this requirement.

⁶² Francioni, above n 11, at 3.

1.5. Access to justice as a 'right'

The status of access to justice is unclear. It can be considered as a self-standing right or as an ancillary right. If access to justice were perceived as an ancillary right then it would depend on the right sought to be enforced. Therefore, the parties would only be able to argue their right to access to justice was infringed if their claim involved a justiciable right. Alternatively, if access to justice were considered a self-standing right irrespective of the right underlying the claim, then it would not be limited to human right violations.⁶³

International human rights treaties appear to construe access to justice as a procedural right.⁶⁴ Therefore, to invoke the right of access to justice in international litigation there would need to be a violation of a fundamental norm. This interpretation has been reflected in state practice. Some states have been more willing to exercise exorbitant jurisdiction to address gross violations of international law.⁶⁵

Interpreting access to justice as a procedural right will limit prospective claims. To argue that a state was under a duty to open its courts to a claim, there would need to be a violation of international law. As touched on earlier in this chapter, there is tension between the justiciability of rights in the ICCPR and ICESCR. This distinction is likely to restrict what claims trigger the right of access to justice. For example, the right may not apply in commercial cases where there was a breach of contract between two private parties and no infringement of a right enshrined in the ICCPR. The lack of a fair trial or effective remedy would need to be clearly shown.⁶⁶ Nonetheless, it does open the door to hold TNCs accountable for human rights

⁶³ Karayanni, above n 6, at 220.

⁶⁴ Froncioni, above n 11, at 32. Also see Joseph and Castan, above n 22, at [1.24]. Articles 2-5 ICCPR, a state party cannot autonomously violate the articles governing access to justice under ICCPR unless there is a well-founded claim involving a substantive right from the covenant. In comparison, the right to be free from discrimination has been articulated not only as an ancillary guarantee of enjoyment of other rights but also a right in itself, UDHR art 7 and ICCPR art 26 ICCPR. UDHR art 8 recognises that the right to an effective remedy only in relation to “acts violating the fundamental rights granted him by the constitution and the law”.

⁶⁵ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 271-272. Nwapi argues that access to justice in civil proceedings has links to the universality principle for criminal proceedings in international law. Unless the wrong complained off attracts the attention of the international community, i.e. the violation of some fundamental norm, it is hard to see why a country would want to exercise jurisdiction in the absence of jurisdiction.

⁶⁶ See 2.4.1.

violations committed in overseas jurisdictions.⁶⁷ This is because most human rights violations can be reframed as tort or environmental wrongs, which then can be brought through civil proceedings in domestic courts.

1.6. Access to Justice as a General Principle under International Law

Despite its ambiguity, access to justice is increasingly recognised as a general principle of international law.⁶⁸ It was recently recognised as a new Millennium Sustainable Development Goal due to its importance in human development and reducing poverty.⁶⁹ This recognition of access to justice as a Development Goal suggests, “we are witnessing a major change that could have important implications” in how states comply with their international commitments.⁷⁰

The phrase ‘access to justice’ is not used in human rights instruments nor is it defined as a right.⁷¹ Nevertheless, it is widely accepted that international human rights treaties impose positive obligations on states to protect human rights.⁷² Access to justice is seen a variant of one of the oldest principles of customary international law, the principle of ‘denial of justice’.⁷³ Access to justice is wider, applying to all persons, not just foreigners.⁷⁴

⁶⁷ Nwapi “Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor”, above n 5, at 25. TNCs are ‘powerful global actors’ and there are little mechanisms set up to regulate them.

⁶⁸ Francioni, above n 11, at 42.

⁶⁹ Goal 16 of the New Millennium Sustainable Development Goals <www.un.org/sustainabledevelopment/peace-justice/>

⁷⁰ Marullo, above 47, at 10.

⁷¹ Francioni, above n 11, at 24. The phrases “effective remedy” and the right to “take proceedings before the court” are used instead of ‘access to justice’.

⁷² See Juan Jose Alvarez Rubio and Katerine Yiannibas (eds) *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge, New York, 2017).

⁷³ Louwren Rienk Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (T.M.C. Asser Press, Netherlands, 2014) at 93. Denial of justice is a principle of public international law that obliged states to provide minimum procedural standards to foreigners. However, its “exact scope was not defined”. It is questionable, whether “due to its vagueness, the doctrine of denial of justice can claim an independent role separate from...the right of access to a court in private international law”.

⁷⁴ See Jan Poulsson *Denial of Justice in International Law*, (Cambridge, Cambridge University Press 2005).

While states can be said to be under an obligation to prevent a denial of justice, what this actually means is difficult to define.⁷⁵ Alex Mills points out that this question invokes international standards of justice rather than domestic standards. It is unhelpful that these standards are “admittedly, yet to be fully and clearly articulated”.⁷⁶ Additionally, Mills acknowledges that claims as to the content and status of these standards should be “viewed cautiously”.⁷⁷ Despite these concerns, there is growing jurisprudence from bodies such as ECtHR and HRC surrounding the right to access to justice. Slowly, international standards are becoming accepted and more consistent.⁷⁸

1.7. New Zealand and the Right to Access to Justice

If access to justice can be understood as a general principle of customary international law, what does this mean for New Zealand? Unless ratified into New Zealand law, international law or treaties do not have binding force. While the right of access to justice is not defined in New Zealand law, its existence is not contested.⁷⁹ Uncertainty surrounds New Zealand’s obligations to provide access to justice in situations where New Zealand courts would not normally exercise jurisdiction, for example, when all the elements of the proceedings are foreign and New Zealand is not *forum conveniens*. This question will be considered in chapter three.

While the scope of the obligation is unclear, there are strong political, normative and legal arguments that suggest New Zealand should take a flexible and inclusive approach towards the right of access to justice. New Zealand prides itself on being a strong supporter of international human rights.⁸⁰ New Zealand’s domestic law is

⁷⁵ Poulsson writes that denial of justice cannot be reduced to a set of predictable or objective criteria. ‘Unfair’ and ‘unjust’ are ambiguous terms that are largely fact dependent.

⁷⁶ Mills “Rethinking Jurisdiction”, above n 8, at 215, also Mills *Confluence of Public and Private International Law*, above n 16, at 267.

⁷⁷ Mills *Confluence of Public and Private International Law*, above n 16, at 268.

⁷⁸ At 268.

⁷⁹ Delivering Justice for All: A Vision for New Zealand and Tribunals [2004] NZLCR 85 at 10.

⁸⁰ Geoffrey Palmer “Human Rights and the New Zealand Governments Treaty Obligations” (1999) 29 Victoria O Wellington L. Rev. 57 at 65. For example, New Zealand was a founding member of the United Nations and recently had a seat on the United Nations Security Council.

constrained by developments of international law,⁸¹ and the universalism of human rights norms gives human rights increasing prevalence.⁸²

Additionally, New Zealand is a party to the ICCPR. The ICCPR imposes an obligation on states to protect human rights at the municipal level.⁸³ The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 both state their purposes to affirm New Zealand's commitment to human rights treaties.⁸⁴ It is well established in New Zealand that the Bill of Rights applies to the common law, including the law governing disputes between private parties.⁸⁵ This is reinforced by the ICCPR providing an obligation on states to extend its rights to give an effective remedy⁸⁶ and take proceedings before a court.⁸⁷ The HRC has stated that the procedural obligations on states extend "not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities".⁸⁸ Therefore, a state may violate its obligations under human rights treaties by failure to "to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".⁸⁹

Moreover, New Zealand courts are not shy of using international law principles or human rights in their reasoning. For example, the importance of an effective remedy has been recognized in New Zealand.⁹⁰ Recently, the Supreme Court of New Zealand took a broad approach to the applicability and enforcement of human rights criteria in

⁸¹ At 57.

⁸² Andrew S Butler and Petra Butler "The Judicial use of International Human Rights Law in New Zealand" (1999) 29 VUWLawRw 173 at 190. However, the universalism of human rights is contentious, see generally Alison Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park, Ca: Sage Publications, 1990).

⁸³ Joseph and Castan, above n 22, at [1.25]. Individuals cannot utilise the individual complaints mechanisms in human right instruments until they have exhausted domestic remedies. This is a concession to state sovereignty.

⁸⁴ New Zealand Bill of Rights Act Long Title. Also see Long Title of Human Rights Act 1993, where purpose of statute is to "provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights".

⁸⁵ Murray Hunt "Human Rights Review and the Public-Private Distinction" in Grant Huscroft and Paul Rishworth (eds) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002) 73 at 74-76.

⁸⁶ ICCPR art 2.

⁸⁷ ICCPR art 9.

⁸⁸ Human Rights Committee *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004) at [8].

⁸⁹ At [8].

⁹⁰ See *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) where article 3(2) ICCPR was used to argue that there should be damages available under the New Zealand Bill of Rights Act 1990.

litigation with an international element. The Court found that the legislative scheme of the Human Rights Act 1993 and the Employment Relations Act 2000 meant that foreign law could not be invoked to allow the plaintiffs to be discriminated against on the grounds of age.⁹¹ Potentially, New Zealand courts are willing to exercise jurisdiction and apply human rights standards to prevent violations of established norms. It should be noted that New Zealand courts are not bound to follow the jurisprudence of international bodies. However, the decisions of international bodies are considered a highly persuasive authority.⁹² New Zealand remains sovereign to determine the applicability and meaning of rights that adhere to the values in New Zealand society.⁹³

1.8. Conclusion

The parameters and status of the right of access to justice under international law is contentious. This chapter has sought to show that while the boundaries of this right are undefined, it is accepted as a fundamental right. The core substance of the right can be understood as being the right to a fair trial and an effective remedy. However, human rights are a product of state sovereignty and are dependent on the state for their enforcement. A state is entitled to impose reasonable limitations on the right to access justice. What this means for the exercise of jurisdiction raises its own contentions. Additionally, access to justice can be understood as a procedural right and as a right on its own merits. It is generally understood as a procedural right, meaning this can have limitations for international litigation. Access to justice may be a fundamental right, but it is far from secure, especially in the realm of civil litigation.

⁹¹ *Brown and Sycamore v New Zealand Basing Limited* [2017] NZSC 139.

⁹² *R v Goodwin (No. 2)* [1998] 2 NZLR 385.

⁹³ Paul Rishworth “The Rule of International Law” in in Grant Huscroft and Paul Rishworth (ed) *Litigating Rights: Perspectives from Domestic and International Law* (Hart Publishing, Oxford, 2002), 267 at 276-279.

Chapter II: Access to Justice and Jurisdiction in International Law

2.1. Introduction

In order to hear a dispute, a court must have jurisdiction. Jurisdiction is essentially the threshold criterion for determining the applicability of human rights treaties.⁹⁴ Jurisdiction is an abstract concept and at times, controversial.⁹⁵ It is a concept found in private and public international law, sitting “at the heart of the international order”.⁹⁶ Despite its importance, there is limited jurisprudence surrounding the issue of jurisdiction and human rights.⁹⁷ The seemingly simple question of when a state should exercise jurisdiction is fraught with complexity and controversy.⁹⁸ International law has traditionally perceived jurisdiction as a question of the rights and powers of states. However, this perception of jurisdiction is slowly changing as international law recognises the right of an individual to access justice. If individuals have the right to access a court, what does this mean for state sovereignty and the exercise of jurisdiction?

This chapter will define the concept of jurisdiction. It will provide a brief overview of the justifications and limitations on jurisdiction. Traditionally, an exercise of jurisdiction over a dispute is considered reasonable when there is a ‘sufficient connection’ with the forum to justify recourse to that forum. In common law courts, a balance must be struck in ensuring that claimants have access to justice but that the dispute is heard in the most appropriate forum. Jurisdictional principles endeavor to limit exorbitant jurisdiction, as there is concern about encroaching on another state’s sovereignty. Increasingly, there has been recognition that there is more to the jurisdictional question of when a state can exercise jurisdiction than simply a real and substantial connection between the forum and dispute.

⁹⁴ Samantha Besson “The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and what Jurisdiction Amounts to” (2012) 25 *Leiden Journal of International Law* 857 at 860.

⁹⁵ Cedric Ryngaert *Jurisdiction in International Law* (2nd ed, Oxford, UK, 2015) at 1-2.

⁹⁶ Mills “Rethinking Jurisdiction” above n 8, at 188.

⁹⁷ Fawcett, above n 30, at [1.02].

⁹⁸ Mills *Confluence of Public and Private International Law*, above n 16, at 236 – 237.

2.2. Definition of Jurisdiction

The concept of jurisdiction encompasses many facets of the law and has multiple meanings.⁹⁹ In public international law, jurisdiction relates to the scope and limitations of power of the legislature, courts and executive.¹⁰⁰ It “regulates states’ legal competence to assert authority in matters not exclusively of domestic concern, in accordance with a recognised legal basis and subject to a standard of reasonableness”.¹⁰¹ This dissertation will focus primarily on the private international law concept of jurisdiction, the jurisdiction to adjudicate.¹⁰² However, public international law concepts are implemented through the domestic courts, meaning jurisdiction is a “multilayered legal concept”.¹⁰³ The interests of public and private international law must be balanced when determining jurisdiction.¹⁰⁴

Jurisdiction can be defined as the power to make decisions over a particular subject matter or exert control over a defendant. Adjudicatory jurisdiction in its widest sense refers to determining the competence of state courts to hear private disputes involving a foreign element.¹⁰⁵ This power or jurisdiction of a state is derived from that state’s sovereignty.¹⁰⁶ In this context, ‘state sovereignty’ can be understood as the allocation of power and responsibility within a given state,¹⁰⁷ determined by that state’s constitution.¹⁰⁸ Despite attempts to harmonise when jurisdiction can be asserted, there are no “hard and fast rules” within international law.¹⁰⁹ Generally, jurisdiction is

⁹⁹ JJ Fawcett and others *Cheshire, North & Fawcett: Private International Law* (14th ed. Oxford University Press, Oxford, 2008).

¹⁰⁰ Mills “Rethinking Jurisdiction” above n 8, at 195.

¹⁰¹ Daniel Augenstein and Nicola Jagers “Judicial Remedies: The Issue of Jurisdiction” in Juan Joes Alvarez Rubio and Katerine Yiannibas (eds) *Human Rights in Business: Removal of Barriers to Access to Justice in the European Union* (Routledge, New York, 2017) at 11.

¹⁰² ‘Adjudicative jurisdiction’ refers to the power of the court to claim jurisdiction over persons, both legal and natural persons.

¹⁰³ Ryngaert, above n 95, at 11.

¹⁰⁴ Kiestra, above n 73, at 86.

¹⁰⁵ Augenstein and Jagers, above n 100, at 11.

¹⁰⁶ John Laughland “The Crooked Timber of Reality: Sovereignty, Jurisdiction and the Confusion of Human Rights” *The Monist* (2007) 90 at 3.

¹⁰⁷ Joel P. Trachtman “Reflections on the Nature of the State: Sovereignty, Power and Responsibility” (1994) 20 *Can.-U.S. L.J.* 399.

¹⁰⁸ Loughland, above n 106, at 4.

¹⁰⁹ Ryngaert, above n 95, at 230-231.

presumed to be territorial. Traditionally, the state with the ‘strongest connection’ to the dispute will exercise jurisdiction.

2.3. Justifications of Jurisdiction

Generally, a state’s sovereignty gives it unlimited discretion on whether to exercise jurisdiction. A well-established base for jurisdiction is the territoriality principle. It remains the dominant principle in New Zealand.¹¹⁰ According to the principle, a state’s sovereignty is “exclusive and absolute” within its borders.¹¹¹ However, the territoriality principle is becoming increasingly unrealistic.¹¹² Multiple states can assert a connection over a dispute and are able to exercise their jurisdiction beyond their domestic boundaries. Other principles for jurisdiction have emerged but have received less overall acceptance.¹¹³ International law does not prioritise the basis of jurisdiction. Therefore, multiple states could exercise jurisdiction over a single dispute.¹¹⁴ Due to underlying political concerns, states impose connection requirements to hear a dispute and attempt to limit exorbitant jurisdiction.

2.3.1. *The Requirement of Connection between Forum and Dispute*

When a plaintiff seeks to serve proceedings on a defendant outside the jurisdiction, some sort of link between the forum and dispute will be required before the court will

¹¹⁰ *Wing Hung Printing Company v Saito Offshore Pty Ltd* [2011] 1 NZLR 754 at [27]: “The jurisdiction of domestic courts is essentially territorial in nature. Where the legislature permits service of proceedings in overseas jurisdictions, it is an exception to the principle of territoriality”

¹¹¹ Julian Ku and John Yoo “Globalization and Sovereignty” (2013) 20 *Berkley 3 Int’LL* at 227.

¹¹² *Abela v Braderani* [2013] UKSC 44 at [53]: service out of the jurisdiction “was originally on the notion that the service of proceedings abroad was an assertion of sovereign power over the Defendant and a corresponding interference with the sovereignty of the state in which the process was served. This is no longer a realistic view”.

¹¹³ Ryngaert, above n 95, at 101-144. In exceptional circumstances, a country’s national laws could be given extraterritorial application if it could be justified under principles of public international law. These principles include the active personality principle (a state is entitled to exercise jurisdiction over its nationals, the passive personality principle (based on the nationality of the victim), the protective principle (based on the existence of a serious threat to the state) and the universality principle (based on the nature of the crime).

¹¹⁴ At 143. For example, multiple states may establish “concurrent jurisdiction over one and the same situation on the basis of territoriality, nationality, or universality”.

assume jurisdiction.¹¹⁵ The type of connection required will differ from state to state. The connection requirement is ultimately a policy choice, stemming from the territoriality principle.¹¹⁶ This policy choice is heavily influenced by public international law principles, in particular the requirement of reasonableness. The reasonableness requirement necessitates a consideration of territorial connections such as a direct connection or foreseeable effect upon or in the territory.¹¹⁷

However, there are no firmly established rules or state practices as to what constitutes a sufficient connection.¹¹⁸ Within English law, there are connecting factors that help determine whether there is a sufficient connection and thus whether it is justifiable to exercise jurisdiction.¹¹⁹ In theory, the requirement of a strong connection seeks to prevent conflicts of jurisdiction and deter forum shopping. There can be negative conflicts of jurisdiction, where no state is willing to assert jurisdiction and positive conflicts, where more than one state has jurisdiction.¹²⁰ Positive conflicts extend to situations where due to extraordinary circumstances, there is realistically no other competent court available.¹²¹ These conflicts of jurisdiction can lead to concern around compliance with access to justice.

2.3.2. *Fears of Exorbitant Jurisdiction*

A court may exercise exorbitant jurisdiction or give its national laws exorbitant application. The term exorbitant is understood as jurisdiction that is not grounded on the traditional principles¹²² and lacks reasonableness.¹²³ The concept is difficult to

¹¹⁵ *Wing Hung*, above 110, at [30].

¹¹⁶ *Mills The Confluence of Public and Private International Law*, above n 16, at 233.

¹¹⁷ At 236.

¹¹⁸ *Kiestra*, above n 73, at 92. Additionally, there is an ongoing debate whether access to a court can be restricted to the nationality of the parties.

¹¹⁹ Lord Collins of Mapesbury and others (ed) *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, London, 2012) at 1.079-1.087. For example, these include as *lex loci delicti* (law of the place of the alleged tort), *lex situs* (law of moveable or immovable property) *lex domicilii* (law of domicile) or *lex loci contractus* (law of the country where a contract is made).

¹²⁰ *Kiestra*, above n 73, at 88.

¹²¹ At 104. Examples of extraordinary circumstances include war or a natural disaster. Refusal to exercise jurisdiction could be a denial of justice as the plaintiff is effectively left without a forum.

¹²² Lucas Roorda and Cedric Ryngaert “Business and Human Rights Litigation in Europe and Canada: The Promises of Forum of Necessity Jurisdiction” (2016) 80 *The Rabel Journal of Comparative and International Private Law* 783 at 786.

define.¹²⁴ It includes a range of terms such as ‘extraterritorial’, ‘extraordinary’¹²⁵ and ‘jurisdictionally improper fora’.¹²⁶ Exorbitant jurisdiction is where the court seized of a case does not possess, by internationally agreed standards, a sufficient connection with the dispute. This can produce “deeply rooted international skepticism”¹²⁷ and convey a sense of superiority or imperialism by the forum court.¹²⁸ Because of this, courts do not exercise extraterritorial jurisdiction lightly. Additionally, exorbitant jurisdiction could deny a party access to justice, as one party may not be able to access the forum or the lack of connection makes it unfair.¹²⁹

Conversely, in difficult circumstances, exorbitant jurisdiction can ensure access to justice. The common law has broad grounds of jurisdiction, which are often considered as exorbitant. However, simply because the jurisdiction may be asserted on exorbitant grounds, does not necessarily mean the overall assumption of jurisdiction is exorbitant. For example, two jurisdictional doctrines in the common law; *forum conveniens* and *forum non conveniens* allow a court to assess whether there is a connection with the dispute and forum and whether the exercise of jurisdiction is exorbitant.¹³⁰ Several factors are considered to determine if the forum is appropriate. Even if the forum is appropriate the courts retain the discretion to decline to exercise jurisdiction in the interests of justice. Therefore, while the base of jurisdiction may be exorbitant, the overall exercise of jurisdiction may be justified.

¹²³ Kiestra, above n 73, at 90.

¹²⁴ Trachtman, above n 107. Extraterritorial refers to a relationship people have with territory. However this is not a coherent concept as one person may have multiple relationships with different territories. This is one reason why national boundaries are increasingly disregarded and extraterritorial is increasingly difficult to define.

¹²⁵ *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 (“*The Spiliada*”) at 481. Lord Goff described the term ‘exorbitant’ as old fashioned and carrying negative overtones, preferring the term ‘extraordinary’ basis of jurisdiction.

¹²⁶ Fawcett, above n 30, at [6.05].

¹²⁷ Ryngaert, above n 95, at 192.

¹²⁸ At 229.

¹²⁹ Fawcett, above n 30, at [6.05].

¹³⁰ While very similar, the doctrines of *forum conveniens* and *forum non conveniens* are conceptually distinct. *Forum conveniens* is used in determining whether jurisdiction of the forum court exists. In comparison, *forum non conveniens* is invoked once jurisdiction has been established, but the court nonetheless declines to exercise its jurisdiction. Therefore, when seeking a stay of proceedings under *forum non conveniens*, the defendant is accepting that the court has jurisdiction while under *forum conveniens* the defendant is challenging that jurisdiction exists. The principles of these doctrines will be explored in depth in chapter four.

2.4. Jurisdiction as a Duty on States

There is tension between state sovereignty and the enforcement of human rights. International law generally limits the exercise of jurisdiction in an attempt to mitigate jurisdictional conflicts. State jurisdiction effectively operates as a “normative trigger” for the enforcement of human rights and duties.¹³¹ Human rights treaties do not necessarily restrict the scope a state’s jurisdiction to a territorial connection.¹³² For example, the HRC considers that the power and control of a state can establish a jurisdictional link.¹³³

Despite the emergence of international treaties emphasising human rights, it is difficult to justify states having a duty to individuals to exercise jurisdiction. Cedric Ryngaert argues that the right has not yet crystallised as a norm of international law. Instead, it remains an ethical concept aspiring to international law status.¹³⁴ Attempting to argue that states are under an obligation to exercise jurisdiction when they lack traditional grounds of jurisdiction quickly develops into a murky argument of state sovereignty.

However, if the exercise of jurisdiction was considered a duty or an obligation under international law, then jurisdiction would no longer rest purely on the discretion of a state.¹³⁵ For example, despite not specifically mentioning a transnational right of access to justice, article 6(1) ECHR has been cited as imposing an obligation to exercise jurisdiction to prevent a denial of justice. Mills advocates that the meaning of jurisdiction can be adapted to include a “mixture of discretionary, mandatory and prohibitive elements”.¹³⁶ This conception of jurisdiction would enable an argument

¹³¹ Besson, above n 94, at 865.

¹³² Hugh King “The Extraterritorial Human Rights Obligations of States” (2009) *Human Rights Law Review* 521 at 522. King argues that where a state has lawful competence to act in relation to a person under international law principles of jurisdiction, that person is within the state’s jurisdiction for human rights purposes.

¹³³ Human Rights Committee *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004): “a state party must respect and ensure the rights laid down in the [ICCPR] to anyone within [its] power or effective control... even if not situated within the territorial of the state party... and regardless of the circumstances in which such power or effective control was obtained”.

¹³⁴ Ryngaert, above n 95, at 162.

¹³⁵ Mills “Rethinking Jurisdiction”, above n 8, at 209.

¹³⁶ At 213.

that states are under a duty to exercise jurisdiction when there is a risk that the right to access to justice may be infringed.¹³⁷ While an appealing argument, the current approach suggests that jurisdiction duty on states owed to individuals. Rynaert points out international law does not universally recognise the rights of individuals to justify the exercise of jurisdiction. Furthermore, any such duty would be confronted with different standards within private international law and international human rights law and comity concerns.

2.4.1. Difficulty in Proving no Fair Trial Abroad

Importantly, simply because a court denies access to a litigant does not necessarily mean there has been a denial of justice. As explored in chapter one, a litigant does not have an unfettered right to choose a forum. Rather a denial of justice will occur where there is no other forum to hear the dispute or where the litigant will not receive a fair trial or an effective remedy in the alternative forum. In the “relatively rare situations”¹³⁸ where there is no alternative forum abroad and the court refuses to hear the claim, the right to access justice will be engaged.¹³⁹

Contentions are created when a plaintiff claims that a fair trial or an effective remedy will not be received in the alternative forum and thus the right to access justice would be breached. It is incredibly difficult to determine the validity of such claims. After all, there is a distinction between not receiving a fair trial and where a foreign court would declare the claim inadmissible or dismiss it on its merits. Courts are also wary of forum shopping for higher damages or more liberal procedural rules. There is a “clear tension” between human rights concerns in obtaining a fair trial, and the concept of international judicial comity.¹⁴⁰

¹³⁷ However, what constitutes an effective remedy is difficult to define. See chapter four for a discussion on how *forum non conveniens* lacks a definition of an effective remedy and the subsequent consequences of this.

¹³⁸ Fawcett, above n 30, at [6.68].

¹³⁹ In this situation, a forum court refusing to hear a claim where there is no other forum available would likely breach the right to access justice. However, as noted in chapter one, this right is derived from customary international law. Generally, customary international law lacks effective enforcement mechanisms and would likely mean that if a breach of this right could be established, it would have little legal effect.

¹⁴⁰ Andrew Bell “Human Rights and Transnational Litigation” in Stephen Bottomley and David Kinley (ed) *Commercial Law and Human Rights* (Dartmouth Publishing, Hampshire, 2002) 115 at 115-116.

In the common law, private international law requires a high standard of proof that substantive justice will not be achieved in the foreign forum.¹⁴¹ Cogent evidence is required, mainly for comity concerns.¹⁴² Allegations of corruption or the absence of a fair trial invite “tricky assessments” of the functioning of foreign legal systems.¹⁴³ It could “very easily amount to an unacceptable supervision of the integrity of the judicial system of a foreign sovereign”.¹⁴⁴ Statements that attack the credibility of another jurisdiction’s legal system can destroy inter-judicial cooperation between the courts in international law and harm diplomatic relations. Rather it has been suggested that any such statements should be left to the political branches of government. Therefore, courts are generally unwilling to find that there has been a breach of international standards of what constitutes access to justice.¹⁴⁵ If the reluctance to exercise jurisdiction and the requirement for a high standard of proof are due to comity concerns, how justifiable is this?

2.4.2. Comity as a Restraint on Jurisdiction

A major reason why courts are reluctant to exercise exorbitant jurisdiction is due to comity concerns. Comity is an ambiguous term, consisting of “very elastic content”.¹⁴⁶ It is a completely discretionary element of jurisdictional restraint.¹⁴⁷ It connotes both courtesy and reciprocity, while also used as a synonym for the rules of private international law.¹⁴⁸ Generally, comity upholds mutual respect between states and recognises public international law concerns, such as respecting territorial jurisdiction¹⁴⁹ and at times, defending a globalised market.¹⁵⁰ Comity discourages any

¹⁴¹ *Limit (No 3) Ltd v PDV Insurance co* [2005] EWCA Civ, [2005] 1 CLC 515 [63] – [66].

¹⁴² *AK Investments CJSC v Kyrgyz Mobil Tel Ltd* [2011] UPKC 7, at [97].

¹⁴³ Roorda and Ryngaert, above n 122, at 796.

¹⁴⁴ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 250.

¹⁴⁵ Mills *Confluence of Public and Private International Law*, above n 16.

¹⁴⁶ Dicey, above n 119, at 1.008.

¹⁴⁷ Ryngaert, above n 95, at 147.

¹⁴⁸ Dicey, above n 119, at 1.008.

¹⁴⁹ At 1.009.

¹⁵⁰ Joel R. Paul “The Transformation of International Comity” (2008) 71 *Law and Contemporary Problems* 19 at 37-38.

comparison with, or inquiry into, the substance of another state's juridical system. Comity is considered a legitimate restriction on the right of access to a court.¹⁵¹

How justifiable is comity as a restraint on the exercise of jurisdiction? Cedric Ryngaert notes that in principle, "comity may ensure that the exercise of jurisdiction remains reasonable and accords due regard to the sovereignty of other states".¹⁵² However, when exorbitant jurisdiction is exercised, the lack of protests by other states suggests there is little impact.¹⁵³ Ambiguity surrounds the purpose of comity and it is twisted to adapt to new situations to prevent the controversial exercise of court jurisdiction. Should the courts attempt to engage in balancing the interests of competing forums? This issue has traditionally belonged to the political sphere of government. However, it has been argued that comity contradicts the rule of law and evades predictability as courts decline to exercise the jurisdiction given to them by legislature.¹⁵⁴ While some restrictions due to political concerns may be justifiable, comity needs to have a narrower scope rather than being used to dismiss tricky cases where access to justice concerns arise.¹⁵⁵

Despite these arguments, comity remains a restriction on accessing the court that is readily invoked by courts. Andrew Bell argues that a court is likely to refuse to pass judgment that adversely reflects on a foreign court purely on human rights grounds, "especially in circumstances where diplomatic ties remain in place".¹⁵⁶ Comity requires more than "uncertainty" to justify judicial determination that condemns a foreign legal system as unfair.¹⁵⁷ Courts are conscious of the need to be careful of judicial imperialism and imposing western values and ideas on foreign legal systems.¹⁵⁸ While the scope of comity should be narrowed, it remains a powerful restriction on the exercise of jurisdiction.

¹⁵¹ Fawcett, above n 30, at [6.300].

¹⁵² Ryngaert, above n 95, at 148.

¹⁵³ Kiestra, above n 73, at 93.

¹⁵⁴ See Lousie Weinberg "Against Comity" (1991) 80 Geo. L. J. 53 at 54.

¹⁵⁵ Ubertaini, above n 51, at 362. Suggests that state sovereignty and immunity may be one of the only reasonable restrictions.

¹⁵⁶ Bell, above n 140, at 133.

¹⁵⁷ *Van Breda v Village Resorts* [2010] ONCA 84, 98 OR (3d) 721 at [147].

¹⁵⁸ Fawcett, above n 30, at [2.106].

2.5. Conflicting Views of ‘Justice’ in International Law

There are inconsistent approaches to justice in international law. Private international law has its own conception of ‘justice’, distinguishable from human rights jurisprudence. In fact, the meaning of ‘justice’ in the context of private international law is not always obvious.¹⁵⁹ It is “systematic justice”, concerning the appropriate allocation of regulatory authority between legal systems rather than the regulation of private rights themselves.¹⁶⁰ For example, a common law court may conclude that there would be no injustice abroad under consideration of private international principles and decline to exercise jurisdiction under a *forum non conveniens* analysis, while the criteria under a human rights treaty may have been breached.¹⁶¹

Human rights have had little impact on the development of English private international law rules. Some English courts have rejected the role of the ECHR when exercising jurisdiction. Instead, the main justification for private international law is that it “implements the reasonable and legitimate expectations of the parties to a transaction or an occurrence”.¹⁶² English law is not necessarily concerned with ensuring access to justice, but rather justice in individual cases.¹⁶³ This chapter has sought to illustrate how the predictability sought by private parties is juggled against the interests of foreign forums when deciding whether or not to exercise jurisdiction. It is arguable that predictability is achieved when states comply with their international commitments to guarantee access to justice.¹⁶⁴ Importantly, different conceptions of justice exist in private international law and international human rights law.

¹⁵⁹ Mills *Confluence of Public and Private International Law*, above n 16, at 16-20.

¹⁶⁰ At 16-20. Argues that private international law embraces ‘justice pluralism’, a principle of tolerance and mutual recognition of equally valid legal cultures.

¹⁶¹ Fawcett, above n 30, at [6.305]. Also, see chapter four for further discussion on this point.

¹⁶² Dicey, above n 119, at 1-005.

¹⁶³ Fawcett, above n 30, at [6.82]. This point is also explored further in chapter four.

¹⁶⁴ Marullo, above 47, at 13-14. Suggested that states should not be allowed to distort the legitimate expectations of its citizens that arise from their states signing international agreements.

2.6. Conclusion

Jurisdictional rules are a core element of civil procedure. Civil procedure controls access to our courts and these decisions reflect wider societal values. In the majority of cases, the rules will point to the most appropriate forum. However, these rules do not always meet the dictates of justice. This chapter has highlighted the court's concerns when determining when to exercise jurisdiction. In controversial cases where it is unclear whether a fair trial or an effective remedy would be achieved in a foreign forum, the court can cite comity to decline jurisdiction. This chapter touched on the justifiability issues of comity as a restraint on jurisdiction. Why does a principle, which rests on shaky justifications and its merits arguable, have so much power to prevent the exercise of jurisdiction? This chapter illustrated that it is unlikely that states are under a duty to exercise jurisdiction where there is no apparent connection between the forum and the dispute. The conceptions of justice under private international law do not necessarily align with the right to access justice. Despite the strong arguments that states are not under an obligation to open their courts to international private proceedings, *forum necessitatis* is being cited as a response to such an obligation.

Chapter III: Enabling the Exercise of Jurisdiction and Access to Justice: the Doctrine of Forum Necessitatis

3.1. Introduction

The enforcement of legal rights depends on the ability to access to justice. Accessing a court is the first hurdle for a litigant in an international dispute. However, what happens when the traditional rules of the forum do not permit jurisdiction? Perhaps a plaintiff has signed an employment contract which points to a forum other than New Zealand and this forum permits discrimination. Alternatively, a plaintiff suffered an injury or financial loss due to the fault of a company or person overseas.¹⁶⁵ Upon coming back to New Zealand, they seek justice. All elements of the dispute point to the alternative forum as the most appropriate to hear the claim. Yet, the plaintiff argues that without New Zealand hearing the dispute, a denial of justice would occur. Can a New Zealand court hear the claim in these circumstances?

This question of exercising jurisdiction despite a lack of sufficient connection has seen the emergence of *forum necessitatis*.¹⁶⁶ It can arise in both negative and positive conflicts of jurisdiction. This chapter will provide a brief summary of the elements of *forum necessitatis*. The doctrine has not escaped controversy and questions surrounding the scope of the doctrine highlight the distinction between access to justice as a procedural right or independent right. Furthermore, it has been assumed that the flexibility and discretion inherent in the common law negates the need for the doctrine.¹⁶⁷ However, this assumption is rebuttable as Ontario, a common law province in Canada has adopted the doctrine.¹⁶⁸ This chapter will compare arguments

¹⁶⁵ Note that if the personal injury occurred outside of New Zealand, the plaintiff will be precluded from bringing a claim for compensatory damage under section 317(1) of the Accident Compensation Act 2001 if the injury is covered under the Act. However, the plaintiff may still seek exemplary damages. See *McGougan and Dingle v Depuy International Limited* [2016] NZHC 2511 at [124] – [125].

¹⁶⁶ The doctrine is predominately used in civil law jurisdictions however is available in some common law jurisdictions. There is also an argument that the doctrine has origins in common law. See *Mullane v Central Hanover Bank & Trust Co* 339 US 306 (1950). Also see Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 215 – 216.

¹⁶⁷ Fawcett, above n 30, at [6.82].

¹⁶⁸ Other Canadian provinces have adopted the doctrine. However, this dissertation will focus on Ontario as a comparison to New Zealand.

surrounding the doctrine in Canada and England to New Zealand. It will suggest that there is scope for a *forum necessitatis* doctrine in New Zealand law and that a restrictive approach to the doctrine is likely to be preferred by the New Zealand courts.

3.2. The Recognition of the Need for a Residual Base of Jurisdiction

Forum necessitatis is “relatively new globally, [and is] fast gaining academic, legislative and judicial acceptance”.¹⁶⁹ It operates as a residual form of jurisdiction, allowing a state to exert jurisdiction in exceptional circumstances where there is no traditional connection with forum and dispute. The doctrine has been implemented in multiple legal systems in numerous forms¹⁷⁰ but because of its exceptional nature, it has rarely been invoked.¹⁷¹ Furthermore, it remains relatively controversial as it encroaches on another state’s possible exercise of jurisdiction and justifies exorbitant jurisdiction.¹⁷²

Despite the contentions that surround *forum necessitatis*, its emerging popularity illustrates that a denial of justice from lack of jurisdiction is a growing concern. A situation where there is no available alternative court and the forum court denies jurisdiction cannot be ruled out.¹⁷³ In this dissertation, ‘available’ in this context means that the alternative forum meets the requirements of access to justice, i.e. a fair trial or an effective remedy. The potential for a denial of justice has led to several states enacting “necessity as an autonomous ground of jurisdiction”.¹⁷⁴

¹⁶⁹ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 212.

¹⁷⁰ For example, *forum necessitatis* is recognised in Argentina, Austria, Belgium, Mexico, the Netherlands and Uruguay, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain, Turkey and Switzerland.

¹⁷¹ Roorda and Ryngaert, above n 122, at 788.

¹⁷² The United States Supreme Court in *Helicopteros Nacionales de Colombia, SA v Hall* 466 US 408 (1984) at 419 declined to formally adopt the doctrine, holding that necessity jurisdiction may be a “potentially far-reaching modification of existing law”. Also, see Roorda and Ryngaert, above n 119, at 787-788. Member States possibly opposed the European Commission’s proposal for a *forum necessitatis* provision in the recast of the Brussels I Regulation due to political rather than legal concerns. The obligatory nature of the proposal was rejected rather than the principle itself.

¹⁷³ Arnaud Nuyts *Study on Residual Jurisdiction (Review of the Member States’ Rules concerning the “Residual Jurisdiction” of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations)* General Report 64 (2007) at [83].

¹⁷⁴ At [83].

3.3. The Elements of *Forum Necessitatis*

There is no universal rule or conception of *forum necessitatis*. Each state has taken its own approach to determining when and in what circumstances exorbitant jurisdiction will be granted to prevent a denial of justice. There are two dominant elements of *forum necessitatis*. Firstly, a requirement of some form of connection with the domestic forum and secondly, that there would ultimately be a denial of justice if jurisdiction was not exercised.¹⁷⁵

3.3.1. *The Requirement of a Connection with the Forum*

The right to access justice is not absolute. Most states that have a *forum necessitatis* provision require some degree of connection with the forum. This prevents forum shopping and an influx of litigation. However, the degree of connection is not consistently defined. The majority of states with a *forum necessitatis* rule require a connecting factor. What is considered a reasonable connection is not defined. Terms and concepts include ‘sufficient connection’¹⁷⁶ ‘close connections’, ‘adequate relation’ or ‘strong linking factor’.¹⁷⁷ In some countries, the requirement of a connection with the forum is not applied stringently. In others, it is applied strictly. Alternatively, the need for a connection can be removed entirely. For example, in the Netherlands, situations of absolute impossibility of bringing a claim in an alternative forum require no connection with the Netherlands.¹⁷⁸

The connection requirement is a proximity constraint and provides a degree of flexibility to the courts.¹⁷⁹ However, because the provision is for situations where the state lacks jurisdiction under traditional rules, the connection needs to be less than what would traditionally be seen as reasonable. This brings it into tension with the real and substantial connection and the standard of reasonable jurisdiction under

¹⁷⁵ Nwapi “Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor” above n 5, at 34.

¹⁷⁶ Civil Code of Quebec RSQ 1991, c 64, a 3136.

¹⁷⁷ Nuyts, above n 173, at [85].

¹⁷⁸ Dutch Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering) 2002, art 9 (NL).

¹⁷⁹ Roorda and Ryngaert, above n 122, at, at 796-797. Also see Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 211.

public international law. However, state practice has shown that the “technical argument of lack of jurisdiction has not prevented the finding of a denial of justice”.¹⁸⁰ In fact, the connection requirement attempts to avoid comity concerns.

3.3.2. *The Requirement of an Obstacle to Obtain Justice Abroad*

Forum necessitatis applies in exceptional situations. This is generally understood to be when it is impossible to bring proceedings abroad, both practically and legally.¹⁸¹ For analytical purposes, it will be considered as purely legal impossibility while practical impossibility will be considered under reasonableness.¹⁸²

(a) Legal Impossibility to Bring Proceedings Abroad

Legal impossibility occurs when the claim is non-justiciable in the forum that would otherwise have jurisdiction.¹⁸³ It encompasses situations where a court has annulled a clause choosing the forum, where there is a legal obstacle to accessing the foreign court, where no fair trial could be obtained abroad, where there is a legal immunity protecting the defendant from liability,¹⁸⁴ where the foreign court has already dismissed the claim for lack of jurisdiction¹⁸⁵ or potentially where the judgment is unenforceable in the foreign court.¹⁸⁶ Factual and legal impossibility may overlap and has been the subject of international debate.¹⁸⁷

¹⁸⁰ Francioni, above n 11, at 12.

¹⁸¹ Nuyts, above n 173, at [84].

¹⁸² Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 246.

¹⁸³ Roorda and Ryngaert, above n 122, at 795.

¹⁸⁴ These are subject to the limitations explored in chapter two.

¹⁸⁵ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 37. Nwapi points out that if the court’s jurisdiction is discretionary, it will need to have the opportunity to exercise its jurisdiction before it is considered a legal impossibility or unreasonable.

¹⁸⁶ Nuyts, above n 173, at [84]-[85]. However, lack of enforceability of judgments brings in arguments of what is an “effective remedy”?

¹⁸⁷ Roorda and Ryngaert, above n 122, at 796. The distinction is important, as in the Netherlands, where jurisdiction can be exercised if there is absolute impossibility.

(b) The Reasonableness of Requiring Proceedings Abroad

There is no universally accepted interpretation of what constitutes unreasonableness in bringing a proceeding abroad. It is generally understood as non-legal or practical difficulties in bringing the suit in the foreign forum. The difficulties faced by the plaintiff are “so onerous” that it is unreasonable to require the plaintiff to bring the action in the foreign forum.¹⁸⁸

Commonly, litigation that poses a danger to the parties would be considered unreasonable. For example, if the natural forum is at war or in a conflict zone, affected by natural disasters or there is fear of persecution or torture in the foreign forum.¹⁸⁹ More controversial circumstances of unreasonableness include where there is a defect in the foreign proceedings such as delay in the administration of justice, a corrupt judiciary, an ideological imperative, where a specific remedy is sought and the financial limitations of the parties.¹⁹⁰ Generally, a restrictive approach has been taken in employing *forum necessitatis*,¹⁹¹ meaning unreasonableness has a high standard.¹⁹²

3.3.4 Conclusion on Forum Necessitatis

Forum necessitatis is a narrow doctrine that seeks to prevent a denial of justice. While there is confusion over the exact scope of the doctrine, its principles are well established. The doctrine tries to avoid questions of convenience or suitability of the forum, focusing on whether access to justice will be obtained.¹⁹³

¹⁸⁸ Nwapi “Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor”, above n 5, at 36.

¹⁸⁹ Roorda and Ryngaert, above n 122, at 796.

¹⁹⁰ Nuyts, above n 173, at [83].

¹⁹¹ Roorda and Ryngaert, above n 122, at 797.

¹⁹² Canadian courts have taken a high standard as to what constitutes ‘unreasonableness’, see generally *West Van Inc. v Daisley* [2014] 119 OR (3D); 318 299; *Mitchell v Jeckovich* [2013] ONSC 7494 (doctrine of necessity held not to apply to expiration of a limitation period in foreign forum), *Anvil Mining Ltd v Canadian Association Against Impunity*, 2012 QCCA 117 (inability to find legal counsel in Australia did not meet the impossibility requirement) compared to *Obeji v Kilani* [2011] ONSC 1636 (doctrine was successfully invoked as defendants were a ‘flight risk’). However, other jurisdictions have preferred lower standards. For example, Belgium courts have considered the costs of litigation being disproportionate to the remedy as unreasonable. Arguably, this approach even lowers the standard of a fair trial as set by the ECHR, creating a further concern for forum shopping. See Nuyts, above n 173.

¹⁹³ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 273.

Arnaud Nuyts has suggested that *forum necessitatis* is a “general principle of public international law”.¹⁹⁴ This statement appears “to be somewhat exaggerated”.¹⁹⁵ Yet, recognition of the doctrine is growing. In the European Union, some national reporters noted that while there is no current practice of the doctrine in their country, in theory a plaintiff would not be deprived of their right to access a court if it is necessary to vindicate their rights.¹⁹⁶ Moreover, *forum necessitatis* is generally applied in a “uniformed way” creating acceptable exercise of jurisdiction based on human rights standards.¹⁹⁷ The wide scope of the doctrine “suggests a concern with access to justice going beyond that of a lack of jurisdiction in any state”.¹⁹⁸

In assessing the merits of the doctrine, most authors assume that it will be invoked in the context of a human rights violation. Under this approach, *forum necessitatis* perceives access to justice as a procedural right. The fundamental nature of access to justice can suggest that *forum necessitatis* should “always be interpreted in an extensive way”.¹⁹⁹ In some states, a liberal approach to *forum necessitatis* has been taken, encompassing all civil and commercial disputes that risk a denial of justice.²⁰⁰ However, state practice indicates that most jurisdictions perceive the doctrine as upholding a procedural right to protect victims of human rights violations. This means that a wide approach encompassing all civil and commercial litigation could create serious tension and may offend comity, as jurisdiction would be considered exorbitant.

3.4. *Forum Necessitatis* in the Common Law

If access to justice is a general principle under international law and compliance is achieved through *forum necessitatis*, why has the doctrine not been explicitly

¹⁹⁴ Nuyts, above n 173, at [83]. Also see Ubertazzi above n 51, at 395 – 8. At 404-405, Ubertazzi suggests that the doctrine of *forum necessitatis* should always be adopted, even within the framework of international conventions.

¹⁹⁵ Roorda and Ryngaert, above n 122, at 786. But they note that the principles upon which the doctrine is based are well established at 789.

¹⁹⁶ At 786.

¹⁹⁷ At 786. Of course, it depends on the respective state’s application of the doctrine.

¹⁹⁸ Fawcett, above n 30, at [6.73].

¹⁹⁹ Ubertazzi, above n 51, at 391-2. This would mean that duplication of proceedings and disproportional financial interests in the case should be considered.

²⁰⁰ At 388.

recognised in England or New Zealand? One suggestion has been the inherent discretion and flexibility in the common law.²⁰¹ However, the arguments raised in England illustrate that narrow grounds of service and the application of *forum conveniens* can raise access to justice concerns. In Canada, *forum necessitatis* was recognised to ensure the meaning of a real and substantial connection was not twisted to include exorbitant situations. These arguments can help inform the discussion of *forum necessitatis* in New Zealand.

3.4.1. England

There are two main arguments why England should have a *forum necessitatis* provision to ensure its compliance with access to justice.²⁰² The first is the risk of there being no service out of the jurisdiction. The second is that the plaintiff would be unable to establish that England is the most appropriate forum.²⁰³

Dicey, Morris & Collins on the Conflict of Laws Dicey describes “service of process [as] the foundation the court’s jurisdiction”.²⁰⁴ For a plaintiff to serve proceedings on a defendant who is outside the jurisdiction, they must do so under a ground of service of the court.²⁰⁵ However, if the claim does not fall within an established ground of service, the court will have no legitimate basis on which to hear the claim. Therefore, a denial of justice could occur if there was no alternative forum abroad and England had no justifiable ground of service.²⁰⁶ An example of this is the often-cited case of *Oppenheimer v Louis Rosenthal (Oppenheimer)*.²⁰⁷ Despite Germany being the more appropriate forum, the Jewish identity of the plaintiff created concerns that a fair trial would not be received in Nazi Germany and a stay was denied on public policy grounds. Importantly, in *Oppenheimer* the breach of contract leading to the dispute

²⁰¹ At 384. Also, Nuyts, above n 173, at [86].

²⁰² This argument is generally made in the context of article 6(1) ECHR to which England is a signatory state.

²⁰³ Fawcett, above n 30, at [6.112] – [6.113].

²⁰⁴ Dicey, above n 119, at 11.102.

²⁰⁵ In England, service out of the jurisdiction is governed by Civil Procedure Rules 1998 (CPR). A claimant in England must seek the court’s permission to serve a defendant outside of the jurisdiction, unless they submit to the court’s jurisdiction. CPR 6.36. Permission will only be granted where the claim falls within certain categories (Practice Direction 6B.3.1.), has a reasonable prospect of success and England is the proper place to bring the claim. For principles to be applied see *Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited* [2011] UKPC 7, [2012] 1 WLR 1804 at [71].

²⁰⁶ Fawcett, above n 30, at [6.111] - [6.112] and [6.86] – [6.87].

²⁰⁷ *Oppenheimer v Louis Rosenthal* [1937] 1 ALL ER 23 (CA).

occurred in England. Had it occurred in Germany, England would have had no grounds of jurisdiction to hear the case, despite the risk of a fair trial to the plaintiff.²⁰⁸ Therefore, this technical loophole could breach the right to access a court.

Secondly, a denial of access to justice could occur in the exercise of judicial discretion. Once a ground of service has been established, English courts retain the discretion not to exercise jurisdiction under the doctrine of *forum conveniens*. The doctrine seeks to find the most appropriate forum. *Forum conveniens* “is not concerned with the jurisdictional question of whether the court has a connection with, or interest in the dispute (or the strongest connection or interest), but with ensuring in terms of efficiency and justice that proceedings occur in the *forum conveniens*”.²⁰⁹ In the majority of cases, *forum conveniens* will operate like a *forum necessitatis* provision. For example, if there is no alternative forum or justice will not be achieved, the court will exercise jurisdiction.²¹⁰ In contrast to *forum necessitatis*, *forum conveniens* is not grounded on a human rights conception of justice. Therefore, the standard of the trial such as the delay or the adequacy of the remedy may not be fundamental to determining whether or not England is indeed the most appropriate forum. This point will be further elaborated in chapter four under the discussion of *forum non conveniens*. However, for current purposes, these arguments have been used to advocate for the adoption of a *forum necessitatis* provision in England.

3.4.2. Canada

When a court can assume jurisdiction over a dispute that has international elements has been heavily debated in Canada. Of particular interest to this discussion is the decision of the Canadian Supreme Court in *Van Breda v Village Resorts (Van Breda)* on what constitutes a “real and substantial connection” in the province of Ontario.²¹¹ How a real and substantial connection was construed would ultimately determine

²⁰⁸ Fawcett, above n 30, at [6.111] - [6.112] and [6.86] – [6.87].

²⁰⁹ Fentiman, above 42, at [13.11].

²¹⁰ *AK Investments CJSC v Kyrgyz Mobil* [2011] UKPC 7 at [6]: “but the practical reality of the matter is that if the KFG Companies are confined to their remedies against the Appellants in Kyrgyzstan they will not in fact be able to pursue any of their claims there. Consequently, though this is in form a case about the appropriate forum, in reality it is a case in which, if the Isle of Man is not the appropriate forum, the KFG Companies will have no practical remedy at all”.

²¹¹ *Van Breda v Village Resorts* [2012] SCC 17.

from whom and in what circumstances a plaintiff could seek relief in a Canadian court. While the phrase is a legal norm, it has a “gauzy level of generality” giving it a sense of unpredictability associated with judicial discretion.²¹²

In a unanimous decision, written by the civil law judge LeBel J,²¹³ the Court prioritised predictability and certainty over “abstract concerns for order, efficiency or fairness”.²¹⁴ To LeBel J, the real and substantial connection test gave judges “almost pure and individualised judicial discretion” in determining whether a connection existed.²¹⁵ To overcome this, a claimant would either have to point to a presumptive connecting factor or convince the court that a connecting factor should exist in the circumstances based on objective considerations.²¹⁶ Justice LeBel reasoned that these connecting factors would reduce litigation, as parties would have a judicial test to establish a connection.²¹⁷ Any adaptability and malleability in the real and substantial connection test was removed.²¹⁸

Justice Sharpe in the Ontario Court of Appeal in *Van Breda v Village Resorts*²¹⁹ acknowledged the existence of *forum necessitatis* in an “arguably promiscuous obiter”.²²⁰ The Supreme Court did not make a decision on the doctrine, as it was not directly relevant to the decision. However, Sharpe JA noted that the real and substantial test should not be distorted to prevent denials of justice. Instead, in one succinct paragraph he provided for a residual base of jurisdiction:²²¹

²¹² Vaughan Black “Simplifying Court Jurisdiction in Canada” (2012) 8 Journal of Private international Law 411 at 420.

²¹³ At 417. Black suggests that it is significant that a civil law judge from Quebec delivered the judgment. In Quebec, private international law is codified, helping to explain elements of the Court’s reasoning.

²¹⁴ *Van Breda*, above n 211, at [82].

²¹⁵ *Van Breda*, above n 211, judicial discretion was mentioned several times at [30], [35], [51], [70] and [75].

²¹⁶ The presumptive connecting factors mentioned by the Court were the defendant being domiciled or resident in the province, the defendant carrying on business in the province, the tort was committed in the province and a contract connected with the dispute was made in the province.

²¹⁷ Note that there were constitutional concerns underlying this argument that do not apply to New Zealand. For more information on the constitutional concerns see Nawpi “Necessary Look at Necessity”, above n 5, at 233-242.

²¹⁸ Black, above n 212, at 440.

²¹⁹ *Van Breda*, above n 156.

²²⁰ Black, above n 212, at 416.

²²¹ *Van Breda*, above n 157, at [100].

The forum of necessity doctrine recognised that there will be exceptional cases where, despite the absence of a real and substantial connection, the need to ensure access to justice will justify the assumption of jurisdiction. The forum of necessity doctrine does not redefine the real and substantial connection to embrace “forum of last resort” cases; it operates as an exception to the real and substantial connection test. Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction. In my view, the overriding concern for access to justice that motivates the assumption of jurisdiction despite inadequate connection with the forum should be accommodated by explicit recognition of the forum of necessity exception, rather than distorting the real and substantial connection test.

While stringently construed, subsequent cases have acknowledged the doctrine in Canadian law.²²² Interestingly, Sharpe JA recognised that the real and substantial connection test was insufficient to meet the needs of justice. Instead, a separate ground of jurisdiction was required to ensure predictability and certainty in international litigation.

This approach to a real and substantial connection and England’s concerns on the grounds of jurisdiction can be compared to New Zealand’s jurisdictional rules.

3.4.3. *New Zealand*

New Zealand’s rules for governing service out of the jurisdiction in commercial and civil proceedings are found in the High Court Rules. There are two rules that determine when service on an overseas defendant can be validly served, rule 6.27 and rule 6.28.²²³ Under both rules, the High Court retains the discretion to exercise jurisdiction.²²⁴ This discretion is not exercised lightly.²²⁵

²²² *Forsythe v Westfall* [2015] ONCA 810 at [55]: “the doctrine is reserved for exceptional cases such as where there has been a break down in diplomatic or commercial relations with the foreign state or where the plaintiff would be exposed to a risk of serious physical harm if the matter was litigated in the foreign court”. Also see, *West Van*, above n 191, at [41]: “the doctrine of necessity is unlikely to be successfully invoked on what is in essence a private commercial matter on the basis of inability to obtain counsel”.

²²³ An overseas defendant can also submit to the jurisdiction of a New Zealand court under High Court Rule, r 6.7. If the defendant is present in New Zealand, even if just temporarily, then jurisdiction can be exercised as of right. Presence in New Zealand includes a company incorporated or registered and

In summary, rule 6.27 provides grounds of jurisdiction when a defendant may be served out of New Zealand without the leave of the court. It essentially simplifies the procedure of serving proceedings overseas if there is strong connecting factor to New Zealand.²²⁶ When a proceeding is not allowed under rule 6.27, the plaintiff may seek the leave of the court under rule 6.28. There are four conditions that need to be satisfied in order for the court to grant jurisdiction under rule 6.28(5):

- (a) The claim has a real and substantial connection with New Zealand and
- (b) There is a serious issue to be tried on the merits and
- (c) New Zealand is the appropriate forum for the trial and
- (d) Any other relevant circumstances that support an assumption of jurisdiction

The question for this chapter is whether 6.28(5) can act as a *forum necessitatis* provision and thus enable access to justice in exceptional circumstances that come before New Zealand courts. Arguably, the interpretation of a real and substantial test (6.28(5)(a)) and when New Zealand is the appropriate forum for the trial (6.28(5)(c)) create the most danger of a possible denial of justice.²²⁷ Each of these provisions will be explored in turn.

(a) The Real and Substantial Connection

There are two possible interpretations to the real and substantial connection.²²⁸ Either the connection is wide and encompasses every situation not covered by rule 6.27, or

carrying out business in New Zealand, see sections 37 and s 332 of the Companies Act 1993. Notably, jurisdiction cannot be exercised as of right if the defendant has been enticed into the jurisdiction fraudulently in order to effect service. See *Johnson v Taylor Bros & Co* [1920] AC 144 at 153.

²²⁴ High Court Rules, r 6.29.

²²⁵ See *Société Générale de Paris v Dreyfus Brothers* (1885) 29 Ch 239. *Harris v Commerce Commission* [2009] NZCA 84, (2009) 12 TCLR 379 at [57] – [61].

²²⁶ *McGechan on Procedure* (online ed) at [HR 6.27.01].

²²⁷ The other two provisions do not raise much concern. The requirement for a serious issue requiring a sufficiently strong factual basis prevents frivolous litigation, however, the standard is not high as discovery has not taken place. While 6.28(5)(d) acknowledges the assumption of jurisdiction ultimately involves an evaluation of a range of considerations, which are fact dependent and it would be undesirable to constrain it. *Wing Hung*, above 110, at [37], [47].

²²⁸ *McGechan*, above n 226, at [HR6.28.01] notes that the language of ‘real and substantial connection’ appears to be derived from *The Abidin Daver* [1984] AC 398, [1984] 1 ALL ER 40 (HL) at 415, cited in *The Spiliada*, above n 125, at 477-478.

the connection is narrowly construed similar to Canada's interpretation in *Van Breda*. For the following reasons, this dissertation asserts that the latter approach be adopted.

It has been submitted that the real and substantial test does not require a strong connection. *McGechan on Procedure* proposes that the "real and substantial connection with New Zealand will be satisfied if the applicant can show that the claim has some connection with New Zealand, that it is not fleeting or peripheral".²²⁹ Case law has suggested that to ensure practical effect, rule 6.28 should be read to cover every proceeding not covered by 6.27.²³⁰ Additionally, England lacks a provision that is equivalent to rule 6.28(5)(a) in its Civil Procedural Rules (CPR). In England, leave of the court is required on established grounds of jurisdiction, meaning it lacks the flexibility that the real and substantial test could provide. The other elements of rule 6.28(5)²³¹ and the requirement to provide an affidavit indicating the desirability for the court to assume jurisdiction,²³² could act as filters of frivolous or vexatious litigation.

However, there are "potential difficulties" with this interpretation.²³³ The grounds of jurisdiction under rule 6.27 establish a relatively high bar to effect service. In contrast, rule 6.28 lacks any reference to categories to ensure territorial connections. As explored in chapter two, exercising jurisdiction extraterritorially on unreasonable grounds creates concerns within international law. Rules 6.27 and 6.28 have been described as being "mutually exclusive".²³⁴ Yet, while rule 6.27 can provide useful illustrations as to what amounts to a sufficient connection, the court has noted that claimants bringing a claim under rule 6.28 do not need to bring the claim under rule 6.27.²³⁵ So what does rule 6.28 apply to? Perhaps, rule 6.28 should only apply when the applicability of rule 6.27 is uncertain rather than in situations where there is clearly no connection to New Zealand, other than the mere existence of the plaintiff.

²²⁹ At [HR6.28.02].

²³⁰ This reasoning was derived from *Cockburn v Kinzie Industries Inc* (1988) 1 PRNZ 243 (HC) at 8: "I do not think that it was intended to refer to proceedings in which the court already has jurisdiction. If it were, there would be little point to it. I think it clear that it was intended to enable the court to assume jurisdiction in every kind of case which it is otherwise competent to deal with."

²³¹ 6.28(5)(b), 6.28(5)(d).

²³² High Court Rules, r 6.28(4).

²³³ *Fang v Jiang*, above n 56, at [11]. However the court failed to define what these difficulties were.

²³⁴ *McGechan*, above n 226, at [HR6.27.06].

²³⁵ *Wing Hung*, above 110, at [48].

New Zealand has not yet been asked to act as a forum of necessity so the interpretation of real and substantial connection in this context is yet to be seen. This dissertation advocates that the interests of predictability and certainty in international litigation require a consistent interpretation of real and substantial connection. This would suggest that a relatively strong connection resembling the connecting factors in rule 6.27 would be required to satisfy the real and substantial connection test. The mere presence of the plaintiff in New Zealand should not amount to a real and sufficient connection. It is significant that this was seen as an exorbitant ground of jurisdiction in the Netherlands and was abolished in favour of a *forum necessitatis* rule. For these reasons, it is submitted that the real and substantial connection requirement under rule 6.28(5)(a) does not act as a *forum necessitatis* provision.

(b) Forum conveniens/appropriate forum

In situations where the real and substantial connection is satisfied, rule 6.28(5)(c) requires New Zealand to be the most appropriate or most suitable forum for the trial, i.e. *forum conveniens*. Essentially, New Zealand must be the forum “in which the case can be suitably tried for the interests of all the parties for the ends of justice”.²³⁶ As illustrated in the discussion on England’s jurisdictional rules, where a court is asked to exercise its discretionary powers, concerns over access to justice arise. In situations where there is clearly no alternative forum, New Zealand is assumed to be *forum conveniens*.²³⁷ However, due to the arguments outlined above²³⁸ and explored further in chapter four, New Zealand should consider adopting a human rights concept into the application of *forum conveniens* to prevent a potential denial of justice.

(c) Should New Zealand adopt a forum necessitatis provision?

This dissertation takes the view that New Zealand should adopt a *forum necessitatis* rule to act as a supplementary forum of jurisdiction to prevent a possible denial of justice in situations lacking a strong connection with New Zealand. This would

²³⁶ *The Spiliada*, above n 125, at 476.

²³⁷ *Apple Computer Inc v Apple Corps SA* (1990) 3 PRNZ 78 (HC).

²³⁸ See 3.4.1.

prevent a distortion of the real and substantial connection test. Additionally, litigants would be aware of the existence of a residual form of jurisdiction designed to prevent a denial of justice based on human rights standards rather than private law principles.

A New Zealand version of a *forum necessitatis* provision could be modeled on the adoption of the doctrine in other states. Furthermore, removing a *forum conveniens* analysis will focus the court's attention on ensuring access to justice rather than finding the appropriate forum.²³⁹ After all, under a *forum necessitatis* rule, the plaintiff concedes the lack of jurisdiction of the forum court, acknowledging that there is either no alternative forum or the alternative forum is unreasonable. It is suggested that New Zealand could adopt a rule such as:

Where a court lacks jurisdiction under rules 6.27 and 6.28, a court may exercise jurisdiction where the dispute has a sufficient connection with New Zealand, and where proceedings would be impossible or could not reasonably be required to be instituted outside of New Zealand.

This chapter illustrated that the exact scope of 'unreasonable' or a 'sufficient connection' is unclear. New Zealand courts would have sufficient flexibility in exploring how to interpret the provision while prospective parties would be aware of the doctrine's existence. New Zealand courts could look at the extensive case law and academic literature on how *forum necessitatis* should be interpreted. Additionally, a New Zealand court could adopt a *forum necessitatis* rule through the common law, similar to Ontario.

If we consider the scenarios outlined in the beginning of this chapter, would this *forum necessitatis* provision enable the exercise of jurisdiction? It is submitted that the answer depends on whether New Zealand courts take an extensive or restrictive approach to the doctrine. If access to justice is seen as procedural, then only in cases where there is a risk that a human right may be violated will *forum necessitatis* be invoked. Therefore, an employment dispute risking discrimination in a foreign forum may warrant the doctrine assuming it did not fall under traditional grounds of

²³⁹ However note that this does not remove the argument that that *forum conveniens* should have an interpretation consistent with human right standards.

jurisdiction. However, if the dispute is civil and commercial and there is no risk to a fundamental human right, the courts may be justified in not exercising this exceptional ground of jurisdiction. Under this approach, a contractual dispute or personal injury may have to take the risk of being declined under rule 6.28.²⁴⁰ While this dissertation has sought to show that access to justice is both an independent right and an ancillary one, it is likely that New Zealand courts will take a restrictive approach to limit exorbitant jurisdiction and alleviate comity concerns. Although, the growing acceptance of *forum necessitatis* means that comity concerns may fade.²⁴¹ If the courts adopted the doctrine, it would likely be adopted incrementally through the common law.

3.5. Conclusion

This chapter has shown that *forum necessitatis* exists to prevent a denial of justice and provide access to the courts. It has two justifiable restraints, proximity and a reasonableness requirement to prevent unfounded exorbitant jurisdiction. It provides a residual base of jurisdiction to prevent exceptional circumstances from falling between the cracks of procedural law. While the nature of the doctrine has been narrowly interpreted and is still being debated, it merges principles of public and private international law together to ensure compliance with human rights standards.

This chapter has highlighted that the common law may need to include a *forum necessitatis* provision. Arguments have been made in England and accepted in Canada, in particular Ontario, to adopt the doctrine. This dissertation has submitted the interpretation of New Zealand's High Court Rules will depend on whether or not a *forum necessitatis* provision is required. A New Zealand version of *forum necessitatis* may be narrowly construed due to political international pressures and New Zealand's traditional territorial approach to determining jurisdiction. The previous chapters have illustrated that New Zealand is under no strong legal obligation to adopt a *forum necessitatis* provision. However, due to New Zealand's commitment to human rights

²⁴⁰ This assumes that the plaintiff cannot establish that the right to a fair trial or an effective remedy would be breached and then this would not be a violation of international law.

²⁴¹ Nwapi "A Necessary Look at Necessity Jurisdiction", above n 5, at 271.

and the importance of clarity in procedural rules, New Zealand may adopt the rule to ensure compliance with the right to access justice.

Chapter IV: Declining Jurisdiction and Access to Justice: the Doctrine of Forum non Conveniens

4.1. Introduction

The doctrine of *forum non conveniens* raises its own concerns about access to justice. Once jurisdiction is established, common law courts retain the discretion to exercise or decline jurisdiction in the interests of justice. It can do so on the basis that the court is not the most appropriate forum to hear the dispute, i.e. the court is *forum non conveniens*. The doctrine essentially denies access to a court. The question for this dissertation is how does this sit with the right to access justice?

This chapter will briefly consider the two stages to the *forum non conveniens* inquiry. The doctrine has been criticised for not responding to the realities of modern day litigation as the current interpretation of *forum non conveniens* principles can clash with the right of access to justice. To overcome this, a more consistent human rights approach should be adopted in the interpretation of the doctrine. While judicial discretion is considered beneficial in ensuring justice in individual cases, it can also be disadvantageous if the doctrine lacks justifiable standards. This argument expands the concerns surrounding *forum conveniens* principles that were examined under the *forum necessitatis* analysis.

4.2. *Forum non Conveniens*

The doctrine of *forum non conveniens* seeks to determine whether it is reasonable for the courts to hear the dispute once jurisdiction is established. The question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction.²⁴² Lord Goff of Chievely outlined the principles of *forum non conveniens* in *Spiliada Maritime Corp v Cansulex Ltd (The Spiliada)*.²⁴³

²⁴² *The Spiliada*, above n 125, at 474.

²⁴³ At 476. Notably, this was not the first articulation of *forum non conveniens*, however, it is seen as the leading case for the modern doctrine.

The basic principle is that a stay will only be granted on the ground of *forum non conveniens* where the court is satisfied that there is some other available forum having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice

It should be noted that the doctrine operates differently in various legal systems.²⁴⁴ *The Spiliada* was followed in New Zealand “without any obvious difference”.²⁴⁵ In determining whether New Zealand is the most appropriate forum, New Zealand courts continue to be guided by the English authorities.²⁴⁶ There are two stages to the inquiry: determining the appropriate forum and the interests of justice.

4.2.1. *The Appropriate Forum*

The first stage of the inquiry considers whether there is “some other forum which is clearly more appropriate for the trial of the action”.²⁴⁷ The burden rests on the defendant to establish that there is a forum clearly more appropriate or ‘natural forum’. The ‘natural forum’ is the forum with which the action has the “most real and substantial connection”.²⁴⁸

It is a largely fact based assessment of the connecting factors between the forum and the dispute. These include, but are not limited too, factors affecting the convenience or expense (such as availability of witnesses), the law governing the transaction, whether there is a jurisdictional agreement, parallel proceedings, the places where the parties respectively reside or carry on business, or whether the plaintiff has a legitimate personal or juridical advantage in the proceedings being heard in the domestic forum.²⁴⁹ Typical advantages include higher damages, more complete procedure of discovery, power to award interest or the forum having a more generous

²⁴⁴ See generally JJ Fawcett *Declining Jurisdiction in Private International Law: Reports to the XIVth Congress of the International Academy of Comparative Law, Athens, August 1994* (Clarendon Press, Oxford, 1995).

²⁴⁵ At 12.

²⁴⁶ *Wing Hung*, above n 110, at [30].

²⁴⁷ *The Spiliada*, above n 125, at 477.

²⁴⁸ At 478.

²⁴⁹ At 477-8.

limitation period. As a general rule, if the court is satisfied that substantial justice will be done in the alternative forum, then a plaintiff being deprived of such an advantage is not decisive.²⁵⁰ The weight of each factor will vary depending on the case.

If the first stage of the inquiry leads the courts to conclude that there is another available forum that prima facie is the more appropriate forum for the trial of action, the court will not exercise jurisdiction unless the plaintiff can prove that justice will not be achieved. Therefore, having an alternative forum abroad is considered an independent precondition before declining jurisdiction under *forum non conveniens*.²⁵¹

4.2.2. The Justice Test

Under the second stage of the inquiry, the burden shifts to the plaintiff to establish that the “interests of justice” require that a stay should not be granted.²⁵² The court will consider all the circumstances, including going beyond the connecting factors for other jurisdictions.²⁵³ The focus for the court is whether the plaintiff will obtain justice in the foreign jurisdiction. Generally “the plaintiff must take a foreign forum as he finds it, even if it is in some respects less advantageous to him than the English forum... it is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused”.²⁵⁴ In *The Spiliada*, Lord Goff acknowledged that it would depend on what practical justice demands in individual cases.²⁵⁵ The courts have recognised that ideological and political bias, an inefficient judiciary, excessive delay of court proceedings and unavailability of appropriate remedies may support allegations that “even-handed justice” may not be done in the alternative forum.²⁵⁶ However cogent evidence is required to make this assertion.

²⁵⁰ At 482.

²⁵¹ Nwapi “A Necessary Look at Necessity Jurisdiction”, above n 5, at 38. Nwapi suggested that the doctrine of *forum non conveniens* could be invoked if there was another jurisdiction that might exercise its discretion under *forum necessitatis*. However, there is no case law on this point.

²⁵² *Spiliada*, above n 125, at 478.

²⁵³ At 478.

²⁵⁴ *Lubbe v Cape plc* [2000] 1 WLR 1545.

²⁵⁵ *The Spiliada*, above n 125, 483-4.

²⁵⁶ *The Abidin Daver*, above n 227.

Of course, by making these assertions the plaintiff is being placed in an “invidious position” as the plaintiff runs the risk of the case being heard in a forum that he has criticised if the stay will be granted.²⁵⁷ Andrew Bell writes that the justice test is the most obvious context where human rights considerations may be covered in the operation of the principles of private international law.²⁵⁸ For example, in *Connelly v RTZ Corporation*, the lack of legal aid in the more appropriate forum and its availability in England was the deciding factor in England exercising jurisdiction.²⁵⁹ The Court even explicitly mentioned England’s international obligations under the ECHR and ICCPR.

There are problems in discerning when substantial justice will not be received in the alternative forum. For example, critics of *Connelly v RTZ Corporation* have warned that the case came dangerously close to engaging in an “impermissible comparison of general features of the foreign forum’s judicial and court systems”.²⁶⁰ Furthermore, generally the lack of financial assistance in the appropriate forum is not a decisive factor in showing injustice. Rather the limited financial power would force the plaintiffs to give up litigation in that particular case.²⁶¹ It is difficult to distinguish between the pure judicial advantages and the requirements of justice that are due to judicial advantages in the forum.²⁶² *Forum non conveniens* is decided by weighing up objective factors. However, judicial discretion means that sometimes the most important factors do not carry the most weight.

4.3. Does *Forum non Conveniens* Conflict with the Right of Access to Justice?

Forum non conveniens is a flexible and sophisticated doctrine that seeks to find the forum in the interests of justice for both parties. In most cases, *forum non conveniens* will stay proceedings for legitimate and justified reasons that do not raise access to justice concerns. Simply denying a claimant to be heard in the forum does not

²⁵⁷ Bell, above n 140, at 120-121.

²⁵⁸ At 121.

²⁵⁹ *Connelly v RTZ Corporation* [1997] 4 ALL ER 335.

²⁶⁰ Bell, above n 140, at 126.

²⁶¹ *Connelly v RTZ Corporation*, above n 259, at 873-874.

²⁶² Zheng Sophia Tang *Electronic Consumer Contracts in the Conflict of Laws* (2nd Edition, Hart Publishing, North America, 2009) at 110.

necessarily constitute a denial of justice, as it depends on the quality of the alternative forum.²⁶³ After all, the doctrine rests on the assumption there is an alternative forum.²⁶⁴ Michael Goldhaber described the difference between *forum necessitatis* and *forum non conveniens* as follows:²⁶⁵

The forum of necessity doctrine allows a court to hear a claim, even when the standard tests for jurisdiction are not fully satisfied, if there is no other forum where the plaintiff could reasonably seek relief. It is thus the mirror image of *forum non conveniens*, which allows defendants to establish that a court should not hear a claim, despite the tests for jurisdiction being met, based on a range of discretionary factors. While the doctrines operate on similar principles, *forum non conveniens* gives defendants an extra chance to kill a case, whereas *forum of necessity* gives plaintiffs an extra chance to save it.

The backbone to both doctrines is the principle of fairness. However, *forum non conveniens* is heavily discretionary and is not necessarily consistent. In borderline cases, it is plausible that *forum non conveniens* can lead to a denial of justice. This discussion will focus on two areas of criticism, both of which heavily rely on judicial discretion: the delay of litigation and the outright denial of access to a court.

4.3.1. Delay of Litigation

The use of the doctrine could be a litigation strategy in itself. Litigation is a costly ordeal and the danger of wearing a plaintiff's purse strings thin through lengthy litigation has been acknowledged. Lord Neuberger has referred to a "real danger that if a hearing is an expensive and time-consuming exercise, it will be used by the richer party to wear down a poorer party, or by a party with a weak case to prevent, or to at least discourage, a party with a strong case from enforcing its rights".²⁶⁶ *Forum non conveniens* can "hold back speedy resolution of disputes by keeping claimants locked

²⁶³ Fawcett, above n 30, at [6.128].

²⁶⁴ For analytical purposes, it is presumed that the New Zealand would not be the most natural forum for the dispute under the first limb of the *forum non conveniens* test. Otherwise, the proceedings would simply commence as normal.

²⁶⁵ Michael D. Goldhaber "Corporate Human Rights Litigation In Non-U.S. Courts: A Comparative Scorecard" UC Irvine Law Review 127 at 135.

²⁶⁶ *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 AC 337 at [82] – [83].

into a process that focuses on determining the proper forum for the action”.²⁶⁷ The doctrine has not adapted well to modern litigation. Commercial transactions on the Internet or the structure of TNCs make it very difficult to determine the most suitable forum.²⁶⁸ Furthermore, corporations are able to pick connecting factors that point to their choice of forum by controlling how the transaction or circumstances arise.²⁶⁹

While *forum non conveniens* attempts to strike a balance between forum shopping and respecting a plaintiff’s choice of venue, it can be used as a method of harassment or deterrent of litigation. The doctrine has been criticised as a tool to avoid corporate accountability for human rights violations committed in developing countries by TNCs. The alternative forum may offer little punitive award or no alternative remedy.²⁷⁰ Because the doctrine effectively stays the proceedings in favour of another more appropriate forum, it is assumed the litigation will be held there. However, it ignores any impracticality that the plaintiff may face.²⁷¹ Therefore, a defendant can use the doctrine to ensure that litigation is heard in courts with lower awards of damages than what would be available in England or New Zealand, or to make the litigation costs disproportionate to what would be received.

Under a *forum non conveniens* inquiry, the mere fact that a party may be deprived of an advantage in the forum is not a decisive reason to prevent a stay. Private international law is concerned with respecting party autonomy and giving effect to the parties’ intentions. The fairness of the bargains is not considered. Rather, the focus is on the regulation of these bargains. Because of this, the weight of certain factors remains unclear, such as obtaining an effective remedy in the foreign forum under a *forum non conveniens* analysis. Perhaps the rules of civil procedure should provide a

²⁶⁷ Eroglu above n 49, at 118.

²⁶⁸ At 119.

²⁶⁹ Tang, above n 262, at 112.

²⁷⁰ Eroglu above n 49, at 104. This highlights the lack of discussion on what constitutes an effective remedy when assessing jurisdiction. An often-cited example is the Bhopal Gas Plant Disaster which occurred in India. Despite the Indian Government’s assertion that India’s legal system lacked the “procedural capacity to provide an effective remedy to the plaintiffs”, the application of the doctrine of *forum non conveniens* saw India being deemed the appropriate forum. The dispute was eventually settled for far less than what would have been received in an American Court. Also see Joel Paul “Comity in International Law” (1991) 32 Harv Int’l L. J 1 at 70 – 73.

²⁷¹ Skinner, above n 43, at 24. Statistics suggest that ninety nine percent of cases dismissed on *forum non conveniens* grounds in the United States are never refilled.

“degree of material justice to the parties”.²⁷² While party autonomy is fundamental, it should reflect the inequality between modern parties.²⁷³ Globalisation means that more individuals will be facing TNCs. Judicial discretion should be utilised to prevent weaker parties from being exploited and to ensure compliance with access to justice.

4.3.2. Denial of Access to a Court

If a stay on the grounds of *forum non conveniens* is granted, access to the forum court is denied. To ensure that the right to access a court is being complied with, the alternative forum should provide a fair trial and an effective remedy. If it fails to do so, then the case should not be stayed as justice will not be obtained in the foreign forum.

However, English private international law rules are not informed by human rights standards as to what constitutes a fair trial or effective remedy. Lack of compliance with human rights does not have primacy in determining whether or not an English court should exercise jurisdiction. It is assumed that private international law principles adequately address these concerns.²⁷⁴ However, *forum non conveniens* has been criticised as it “gives too much discretion to courts [and] there is little clarity in its application”.²⁷⁵ Richard Fenitman points out “conceptual problems arise when assessing whether a claimant would be denied access to justice”.²⁷⁶

The court takes an objective approach when assessing the ‘interests of justice’. There is no objective yardstick as to what constitutes ‘injustice’ under *forum non conveniens*, despite the doctrine being aimed at meeting the interests of the parties and the ends of justice. In fact, the concept of injustice in private international law does not necessary include the international law concept of a fair trial or effective remedy.²⁷⁷ For example, a delay of proceedings for six to ten years was seen as unjust

²⁷² Tang, above n 262, at 4.

²⁷³ At 9.

²⁷⁴ Fawcett, above n 30, at [6.139]. In *Lubbe v Cape Plc*, above n 251, at 1561 the Court dismissed the human rights argument, “I do not think that article 6 supports any conclusion which is not already reached on application of the *Spiliada* principles”.

²⁷⁵ Eroglu above n 49, at 104.

²⁷⁶ Fenitman, above 42, at [13.75].

²⁷⁷ Fawcett, above n 30, at [6.140].

as witnesses would not remember,²⁷⁸ while in another case, a delay of the similar time was not held to be unjust.²⁷⁹ An English court could conclude that there is no injustice in a private international law sense while it would be highly likely not to amount to a fair trial under human rights law. It is unclear what weight that lack of an effective remedy or a human rights concern would have and whether it would be seen as a proportionate restriction on the right to access a court.²⁸⁰ It is incredibly difficult to establish when a denial of justice will occur under a *forum non conveniens* analysis.²⁸¹

4.3.2 Conclusion on Forum non Conveniens

The discretion inherent in common law jurisdictions can undermine predictability and certainty and can create a denial of justice. The concern of private international law is implementing the reasonable and legitimate expectations of the parties.²⁸² However, this technical approach ignores some of the realities of modern day litigation and the power imbalance between the parties. The private international law standard is narrow and fails to incorporate the wider public law human rights standard. Therefore, there is a strong argument that to mitigate these concerns an approach consistent with human rights could be adopted.

4.4. A Human Rights Consistent Approach

Under New Zealand High Court Rules the principles of *forum non conveniens* are found in establishing jurisdiction,²⁸³ protesting jurisdiction²⁸⁴ and seeking a stay or dismissal of proceedings.²⁸⁵ An examination of *forum non conveniens* clearly shows that the lack of objective human rights standards can risk a denial of justice. To overcome this, James Fawcett in *Human Rights in Private International Law*, has

²⁷⁸ *The Vishva Ajay* [1989] 2 Lloyd's Rep 558.

²⁷⁹ *Radhakrishna Hospitality Service Private Ltd v EIH Ltd* [1999] 2 Lloyd's Rep 249; *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269.

²⁸⁰ Fawcett, above n 30, at [6.148].

²⁸¹ Eroglu above n 49, at 113.

²⁸² Dicey, above n 119, at 1.005.

²⁸³ High Court Rules, r 6.28(5)(c).

²⁸⁴ High Court Rules, r 5.49.

²⁸⁵ High Court Rules, r 6.29(3).

advocated for a hybrid human rights/private international law approach.²⁸⁶ This approach has two steps:

- (1) Identify the human rights problem: the adoption of human rights standards
- (2) Use private international law principles to solve the identified problem

This approach seeks to adopt human rights standards into private international law principles without drastically changing the current legislative framework for establishing jurisdiction. For determining whether or not there is a risk to a human right, a New Zealand court could turn to international authorities of the ECtHR and HRC. Therefore, human rights jurisprudence would have primacy in determining a risk to a fair trial.²⁸⁷ Fawcett points out that this would create an objective yardstick and would most likely avoid potential problems with comity. The human rights approach will help the court ascertain whether there is a risk of breaching the international law right of access to justice

If a human right problem is identified, then private international law principles are invoked and ensure that jurisdiction is exercised.²⁸⁸ The principles of private international law should be used to decline to stay or dismiss the proceedings in the interests of justice. It is hard to argue that New Zealand is under an obligation due to the activities of a foreign state failing to provide an adequate forum.²⁸⁹ It is also tricky to determine whether a stay would be compatible with human rights law.²⁹⁰ Instead, these problems can be overcome by utilising the flexibility inherent in *forum conveniens*. Under *The Spiliada* principles, the interests of justice demand the trial to be heard in New Zealand if a fair trial or an effective remedy could not be obtained in the foreign forum. Adoption of this approach would create more consistency and harmony in international litigation and bring New Zealand into line with international standards.

²⁸⁶ Fawcett, above n 30, at [6.158].

²⁸⁷ At [6.160].

²⁸⁸ At [6.162] - [6.163].

²⁸⁹ At [6.161].

²⁹⁰ At [6.161] - [6.163].

This approach will not drastically change the application of *forum non conveniens*. It may ensure that more claimants are not denied justice or individuals forced to litigate in foreign forums against huge TNCs, trying to cut costs or reduce the payout they need to pay. Assuming that human rights jurisprudence is subsumed into the private international law concept of injustice, there may be a difference. For example, borderline cases of an inordinate delay may fall within the definition of injustice. It may also introduce new factors not previously considered under *forum non conveniens*, such as the remedy or barriers to accessing the court. It may lower the bar of evidence required. However, it is unlikely to change the standard of cogent evidence required to establish a fair trial will not be received.

4.5. Conclusion

New Zealand's jurisdictional rules have been credited with being extremely flexible and incorporating judicial discretion. However, there is uncertainty and inconsistency surrounding what constitutes injustice or lack of a fair trial. It is harder to establish injustice under a private law approach than it is under the international standards of ICCPR and ECHR. This dissertation submits that a human rights consistent approach should be adopted when interpreting New Zealand's High Court Rules. The doctrine of *forum non conveniens* can incorporate human rights standards when assessing whether a fair trial or a form of injustice will occur. Furthermore, as *forum necessitatis* provisions become more accepted, international standards will also become more prominent, meaning issues of comity may be avoided or become less weighty. Forum-shopping concerns would be avoided, as the exceptional circumstances or the threat of a human rights violation would prevent the exercise of jurisdiction turning into a free for all.

Conclusion

Access to justice is the cornerstone of international litigation. Without established procedures and rules, litigants would be unable to assert their rights for wrongs committed against them. However, civil procedure also prevents courts from being overburdened and exploited. States are able to impose reasonable limitations on who can access their courts. This dissertation defined the right of access to justice as requiring a fair trial and an effective remedy. The right is applicable to all, as the ability to access a court is fundamental to modern liberal democracies. Yet, the right is subject to reasonable limitations. Furthermore, the right has been generally interpreted as being procedural and confined within established jurisdictional rules.

However, the rise of transnational concerns such as human rights and technological changes is challenging the traditional territorial sovereignty enjoyed by states. The boundaries of private and public law are beginning to merge and interrelate more heavily than before. The right to access justice is a clear example of this. The international community has begun to recognise that states should be under an obligation to exercise jurisdiction in exceptional circumstances. The presence of human rights as global benchmarks is becoming increasingly hard to ignore and pressure to incorporate them into domestic law is growing. Access to justice currently exists as a general principle of international law. With increasing acknowledgement of the right to access justice, this general principle may start to impose more stringent obligations and duties on states to open their courts.

This dissertation has made two recommendations for the development of New Zealand law in ensuring access to justice. It has argued that to ensure consistency and stability in the rules that govern the exercise of jurisdiction beyond New Zealand's borders, a *forum necessitatis* provision should be explicitly adopted. This can be achieved in either statute or through case law, this dissertation advocated for the latter. Additionally, to further liberalise the doctrine of *forum non conveniens*, an approach consistent with human rights should be adopted. This does not require any substantive legislative change and could help in the determination of borderline cases.

New Zealand has a strong reputation in the field of upholding human rights and this dissertation has suggested two approaches to strengthen this position. The global community has not yet reached a consensus to harmonise the exercise of jurisdiction to deter forum shopping or vexatious litigation. However, individual states can slowly chip away at the dangers of unfettered party autonomy. What is a reasonable exercise of jurisdiction and comity needs to be considered carefully in the changing global environment to ensure that the needs of individual parties and the interests of justice are being met.

This dissertation has touched the surface on the issue of jurisdiction in international law. While a recognised right of access to justice still remains to be clearly articulated in international jurisprudence, the definition of jurisdiction is changing, as the principle of territoriality no longer provides straightforward answers. Currently, the majority of states see the exercise of the right to access justice as limited to infringements of human rights of a civil and political nature or where there is clearly a diplomatic breakdown with a foreign state. However, there is scope for these ideas and principles to extend to general civil and commercial litigation. Ensuring access to justice should be a practical reality, not just an aspiration.

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