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Editorial

Dear Readers,

Our current issue spots different fields of international law: Non-State Armed Groups, Universal Jurisdiction *in absentia*, Transparency in International Investment Law and Renewable Energy.

With the uprising of non-state armed groups (NSAG) in recent years the world community requires regulations and means to deal with those specific threats. While this challenge is not a new one, it remains unclear or insufficiently explored.[1]
After courses of pacification were successful it is essential to proceed with transparent investigations in front of capable courts – be it national or international ones to strengthen the compliance with international law, to protect human rights and fight impunity. The following selected articles give a renewed approach by analyzing existing and theoretical concepts and rules, thus giving an insight into current challenges the respective areas of international law are facing.

Tim Kluwen combines in his article "Universal Jurisdiction in Absentia Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity" the concepts of universal jurisdiction and the concept to prosecute international crimes in absentia before the national courts. He analyzes the legal and the normative implications and argues why it would be a desirable tool to fight impunity.

1 J. d'Aspremont 'The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility', 9 *International Organizations Law Review* (2012) 1, 15.

In "The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules" – *Ezequiel Heffes* and *Brian E. Frenkel* evaluate existing rules in dealing with NSAGs and their applicability to NSAGs that have not reached a certain threshold of organization. This article highly contributes to the ongoing studies and fosters enhanced compliance with IHL entities.

In "Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures" – *Esmé Shirlow* charts the three different forms of "transparency" in international investment law, in norm of creation, in content of substantive investment obligations and as a procedural requirement for investment arbitration proceedings. She highlights the sources of international investment law and the stakeholders which shape its development.

Tomás Restrepo presents the latest development in Renewable Energy Support Schemes in "Modification of Renewable Energy Support Schemes under the Energy Charter Treaty: Eiser and Charanne in the context of climate change" by breaking down the only two published decisions: Charanne and Eiser. In doing so he distilled the arguments of both the investors and the host states concerning modifications, enabling him to find a pragmatic approach of "less harmful measure" and proportionality in the context of climate change.

We hope our readers will find our thorough selection worthwhile to read.

At this point, we would also like to express our heartfelt gratitude to Prof. Dr. Helmut Aust, Dr. Thomas Kleinlein and Prof. Dr. Niels Petersen, who decided to step down as members of GoJIL's Scientific Advisory Board. Helmut Aust and Thomas Kleinlein were members since the very first Issue 1.1, Niels Petersen joined soon after with Issue 1.2. Without the support of the SAB, GoJIL could not conduct a double-blind-peer-review and without it, we would not be able to offer the quality we aim to achieve. We were very fortunate to work with these three remarkable scholars of international law and thank them, once again, for all their work they put into GoJIL.

The Editors

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Without the incredible support and help of the following people and institutions, we would not have been able to accomplish this project. We would like to thank:

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Universal Jurisdiction *in Absentia* Before Domestic Courts Prosecuting International Crimes: A Suitable Weapon to Fight Impunity?

Tim Kluwen*

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Abstract

This article addresses the legality and desirability of States asserting universal jurisdiction without the suspect being present on their territory when prosecuting international crimes before domestic courts. First the legality under international law of States asserting universal jurisdiction *in absentia* (or absolute universal jurisdiction) will be discussed. No comprehensive regulation in this regard appears to exist in codified international law. Based on State practice, it would seem that no customary law either fully permits or entirely prohibits States asserting absolute universal jurisdiction. Applying the *Lotus* paradigm, it could arguably be concluded that the lack of a prohibition under international law results in States being allowed to assert universal jurisdiction *in absentia* when prosecuting certain international crimes.

Having established its legality, this article will consequently approach absolute universal jurisdiction from a normative point of view, i.e. whether States *should* assert it. Although a tool in ending impunity of perpetrators of international crimes, it will be concluded that it is undesirable for States to assert absolute universal jurisdiction. Its use is likely to compromise fundamental rights of the accused and has a destabilizing effect on international relations while only suboptimally serving the goals of criminal prosecution.

A. Introduction

As the world is time and again confronted with horrible acts, the desire to prosecute perpetrators of the most heinous crimes continues to be a priority of the international community. In 1998 this led to the adoption of the *Rome Statute* and the subsequent establishment of the International Criminal Court (ICC) in 2002.[1] *The Rome Statute* has played a major role in the development of international criminal law. Not only was it the basis for establishing the ICC, it also obliged the parties to domesticate the criminalization of a number of international crimes by incorporating them into their national laws.[2] For some, however, the ICC has yet to live up to its expectations or should already be

1 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90.

2 This obligation is based on the complementarity principle derived from the preamble, Article 1 and Article 17 of the *Rome Statute*, *supra* note 1; see, e.g., The Netherlands: *Kamerstukken II 2001/02*, 28337, 3 (Memorie van Toelichting Regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven)), 2. [Explanatory Memorandum to the Dutch International Crimes Act]; G. Werle & F. Jessberger, 'International Criminal Justice is Coming Home: The New

deemed to have failed.[3] In 2016 this led to South Africa, Gambia and Burundi announcing their intention to withdraw from the *Rome Statute*,[4] while Russia decided to withdraw its signature.[5] It is hence necessary to consider alternatives to the ICC for the purpose of prosecuting alleged perpetrators of international crimes.

The alternative discussed here is absolute universal jurisdiction. It is also referred to as universal jurisdiction *in absentia* and is asserted by States prosecuting international crimes before their domestic courts. Invoking this type of jurisdiction, a State would be allowed to prosecute *any* alleged perpetrator of particular international crimes. After having shortly touched upon its definition and material scope, the first question to be considered is whether absolute universal jurisdiction is permitted under international law. Using case law from national and international courts (including the recent *Zimbabwe Torture Docket* case)[6] and publications by both scholars and practitioners, it will be established whether international law allows for prosecution based on absolute universal jurisdiction. The second question has a policy character rather than being of a legal nature - addressing whether absolute universal jurisdiction *should* be

German Code of Crimes Against International Law', 13 *Criminal Law Forum* (2002) 2, 191, 214.

3 D. Robinson, 'Inescapable Dyads: Why the International Criminal Court Cannot Win', 28 *Leiden Journal of Int. Law* (2015) 2, 323, 331; E. Kontorovich, 'Three International Courts and their Constitutional Problems', 99 *Cornell Law Review* (2014) 6, 1353, 1354; M. Ssenyonjo, 'The International Criminal Court and the Warrant of Arrest for Sudan's President Al-Bashir: A Crucial Step Towards Challenging Impunity or a Political Decision?' 78 *Nordic Journal of International Law* (2009) 3, 397, 430; K. Thynne, 'The International Criminal Court: A Failure of International Justice for Victims?', 46 *Alberta Law Review* (2009) 4, 957, 958; J. Goldsmith, 'The Self-Defeating International Criminal Court', 70 *University of Chicago Law Review* (2003) 1, 89, 90.

4 L. Williams, 'Africa Turning its Back on International Criminal Court' (2016), available at http://www.irishtimes.com/opinion/africa-turning-its-back-on-international-criminal-court-1.2915667 (last visited 20 December 2017); O. Bowcott, 'Rising Nationalism Leaves International Criminal Court at Risk' (2016), available at https://www.theguardian.com/news/2016/dec/29/rising-nationalism-leaves-international-criminal-court-at-risk (last visited 20 December 2017).

5 S. Walker & W. Bowcott, 'Russia Withdraws Signature from International Criminal Court Statute' (2016), available at https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute (last visited 20 December 2017).

6 *National Commissioner of The South African Police Service v. Southern African Human Rights Litigation Centre and Another*, (2014) Constitutional Court of South Africa, Case CCT 02/14 [Hereinafter: *Zimbabwe Torture Docket* case].

asserted from a normative point of view. By discussing both its legal basis and the policy aspects, this article hopes to provide some clarification on a perhaps slightly theoretical topic in international law. Seeing as States do however seem to assert universal jurisdiction *in absentia*, it is an endeavor worth undertaking.

B. Is Universal Jurisdiction *in Absentia* Legal Under International Law?

I. Definition and Material Scope

Genocide, crimes against humanity and war crimes are considered the most heinous crimes imaginable.[7] The nature of these crimes is so cruel that they should not only be deemed a crime against specific victims, but as crimes against humankind itself.[8] These crimes, referred to in the preamble to the *Rome Statute* as "the most serious crimes of concern to the international community as a whole",[9] should not go unpunished.[10] This argument was often put forward after the Second World War, when the allied forces prosecuted high-ranking Nazis in Nuremberg.[11] The fight against impunity has played a role in the development of international criminal law ever since, and eventually led to the establishment of the ICC – a very tangible effect of the wish to end impunity. Yet a less concrete but perhaps more profound result has been the development of the principle

7 As to why heinous crimes are here limited to genocide, crimes against humanity and war crimes. See R. Cryer, 'International Criminal Law', in Malcolm D. Evans (ed.) *International Law* (2010), 752, 764; D. Turns, 'Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium): The International Court of Justice's Failure to Take a Stand on Universal Jurisdiction', 3 *Melbourne Journal of International Law* (2002) 3, 383, 397; N. Arajarvi, 'Looking Back from Nowhere: Is There a Future for Universal Jurisdiction over International Crimes?', 16 *Tilburg Law Review* (2011) 1, 5, 7-8; C. C. Joyner, 'Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability', 59 *Law and Contemporary Problems* (1996) 4, 153, 169; K. C. Randall, 'Universal Jurisdiction under International Law', 66 *Texas Law Review* (1988) 4, 785, 829.

8 See section 3.2. below.

9 *Rome Statute of the International Criminal Court*, *supra* note 1, preamble.

10 United Nations Secretary-General, 'The Scope and Application of the Principle of Universal Jurisdiction: Report of the Secretary-General Prepared on the Basis of Comments and Observations of Governments', UN Doc. A/65/181, 2010, 4, 6.

11 M. M. El Zeidy, 'Universal Jurisdiction In Absentia: Is it a Legal Valid for Repressing Heinous Crimes?' 37 *The International Lawyer* (2003) 3, 835, 840-41; G. A. Finch, 'The Nuremberg Trial and International Law', 41 *American Journal of International Law* (1947) 1, 20, 22.

of universal jurisdiction. This concept allows States to prosecute any alleged perpetrator of international crimes.

As noted in the ICJ's *Arrest Warrant* case,[12] due to the "loose use of language",[13] universal jurisdiction is not truly universal. The concept of universal jurisdiction does not require any link between the prosecuting State and the crime with regard to the location of the crime, the nationality of the alleged perpetrator or the nationality of the victims. It does however usually require the prosecuting State to have the alleged perpetrator present on its territory.[14] Universal jurisdiction that does *not* require the prosecuting State to have the alleged perpetrator in custody is referred to as *absolute* (or *pure* or *true* or *unconditional*) universal jurisdiction or as universal jurisdiction *in absentia*.[15] This truly universal jurisdiction was defined by then President of the International Court of Justice (ICJ) Gilbert Guillaume as "jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".[16]

Before elaborating on the concept of universal jurisdiction *in absentia*, it should be clear what its material scope is. As mentioned above, the offences for which this type of jurisdiction can be asserted are the so called 'international crimes.' As this article will not dive into the discussion of what constitutes an international crime, I will join the consensus in this debate and assume that at least crimes against humanity, genocide and war crimes are accepted as such.[17]

12 *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), Judgment, ICJ Reports 2002, 3 [*Arrest Warrant* case].

13 *Ibid.*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 63, 76, para. 41 [Hereinafter 'Joint Opinion'].

14 UN Doc. A/65/181, 2010, 4, 6., *supra* note 10.

15 See, e.g., R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 3, 735, 748-749; A. Poels, 'Universal Jurisdiction in Absentia', 23 *Netherlands Human Rights Quarterly* (2005) 1, 65 [Poels, Universal Juristiction]; R. Rabinovitch, 'Universal Jurisdiction In Absentia', 28 *Fordham International Law Journal* (2005) 2, 500.

16 *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30, para. 9.

17 Some include crimes against peace (aggression) and torture, but this might be controversial. There is however little or no debate about the status of crimes against humanity, genocide and war crimes as international crimes. See *supra* note 7.

For the sake of clarity, the definition of universal jurisdiction *in absentia* requires a distinction to be made.[18] Some jurists, including O'Keefe[19] and Crawford,[20] do not consider universal jurisdiction *in absentia* to be a distinct head of jurisdiction, but rather as "enforcement *in absentia* of universal prescriptive jurisdiction".[21] Others, such as Cassese,[22] Guillaume[23] and Van den Wyngaert,[24] on the other hand, have assessed the legality of absolute universal jurisdiction as a separate concept - deeming it necessary to assess its lawfulness in its own right.[25] In practice too, the legality of universal jurisdiction *in absentia* has been determined separately from other jurisdictional grounds (although naturally connected to the universal principle), as evidenced by – *inter alia* - the Constitutional Court of South Africa in its 2014 judgment in the *Zimbabwe Torture Docket* case.[26] Seeing the prevalence of separate considerations of universal jurisdiction *in absentia*, this article will adhere to the latter approach and determine the legality of the concept in its own right.

A final definitional distinction relates to the inclusion or exclusion of trials *in absentia* as an element of absolute universal jurisdiction. The literature seems ambivalent in this regard.[27] In principle, the objective of (legislation allowing for) an assertion of absolute universal jurisdiction is to try the accused.[28] In practice, however, trials *in absentia* based on absolute universal jurisdiction are rare; the exercise of absolute universal jurisdiction is usually limited to elements of prosecution, such as investigations, bringing criminal charges and issuing arrest warrants.[29] Trials based on absolute universal jurisdiction do usually not take place, since the domestic legislation of many States does not allow for

18 This distinction is – inter alia – made by the *Institut de Droit International* and analysed in: C. Kreß, 'Universal Jurisdiction over International Crimes and the Institut de Droit international', 4 *Journal of International Criminal Justice* (2006) 3, 561, 576-579.

19 O'Keefe, *supra* note 15, 750.

20 J. Crawford, *Brownlie's Principles of Public International Law* (2012), 469.

21 O'Keefe, *supra* note 15, 750.

22 A. Cassese, *International Law* (2001), 261.

23 *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30.

24 *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 137.

25 O'Keefe, *supra* note 15, 749.

26 *Zimbabwe Torture Docket* case, *supra* note 6.

27 El Zeidy, *supra* note 11, 837.

28 O'Keefe, *supra* note 15, 741.

29 A. J. Colangelo, 'The New Universal Jurisdiction: In Absentia Signaling over Clearly Defined Crimes', 36 *Georgetown Journal of International Law* (2005) 2, 537, 543.

trials *in absentia*.[30] Approaching these trials as a matter of national law might therefore be the appropriate method, seeing as the legality of such trials "has little to do with bases of jurisdiction recognized under international law".[31] That is why, when discussing legality, I will interpret absolute universal jurisdiction as encompassing all steps leading up to trial, but excluding trial itself. The section on the desirability of States asserting absolute universal jurisdiction will however unequivocally include trials *in absentia* since they may well take place if the domestic law of the prosecuting State does allow for trials without the accused present. Moreover, a normative discussion requires all (potential) aspects be taken into account, warranting a discussion of trials *in absentia* as a natural consequence of States asserting absolute universal jurisdiction.

II. The Applicability of the *Lotus* Case

The practice of absolute universal jurisdiction is rather limited; Courts are not often in the position to consider the concept. So when Belgium's assertion of universal jurisdiction *in absentia* was disputed before the ICJ, many hoped the Court to provide much needed clarification on the status of international law with regard to absolute universal jurisdiction. The concept was however (in)famously not addressed by the ICJ in the 2000 *Arrest Warrant* case.[32] After the *Lotus* case of 1927,[33] the *Arrest Warrant* case would have been the perfect opportunity for the Court to rule on the concept of absolute universal jurisdiction, but it decided not to. Although the concept was not (fully) addressed by the Court, individual judges did elaborate on absolute universal jurisdiction.[34] This article will focus on three opinions which reflect different stances on the matter. President Guillaume issued a separate opinion arguing against the legality of absolute universal jurisdiction under international law, while Judge *ad hoc* Van den Wyngaert was a strong supporter in her dissenting opinion. In a joint separate opinion, Judges Higgins, Kooijmans and Buergenthal also argued in favor – be it with more

30 See, e.g., UN Doc. A/65/181, *supra* note 10, 18; C. Ryngaert, 'Universele Jurisdictie', in J.Wouters & B. Pattyn (eds.), *Misdaden tegen de mensheid: de internationale strijd tegen straffeloosheid* (2006), 141, 143.

31 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 80, para. 56.

32 See, e.g., Rabinovitch, *supra* note 15, 503; Turns, *supra* note 7, 386; J. Wouters and H. Panken, 'Waar naartoe met de Genocidewet?', *Working Paper Katholieke Universiteit Leuven, Instituut voor Internationaal Recht*, 2002/30, 18.

33 *S.S. Lotus* case (*France v. Turkey*), PCIJ Series A, No. 10 (1927) [*S.S. Lotus* case].

34 I. F. Dekker & N. J. Schrijver, ´Congo v. België´, 84 *Ars Aequi KwartaalSignaal* (2002) 4545, 4546.

reservations than Van den Wyngaert. These opinions feature prominently in the debate on the legality (and desirability) of States asserting universal jurisdiction *in absentia*. Considering President Guillaume's stance on the applicability of the *Lotus* case, his opinion will be addressed in more detail below. The other opinions will feature throughout the sections to come.

The lack of a general treaty on universal jurisdiction and little jurisprudence complicates the research on this matter.[35] The accepted sources of international law[36] are limited in number and cannot be interpreted unequivocally with regard to universal jurisdiction *in absentia* - which confirms the need for further research. Chronologically, the 1927 *Lotus* case is the natural starting point in assessing the law on absolute universal jurisdiction. This dispute between Turkey and France, brought before the Permanent Court of International Justice provides a framework or paradigm for assessing other sources. This framework is mainly derived from the following paragraph, which I will cite in full seeing as the applicability of this case to (absolute) universal jurisdiction or international criminal law in general remains a topic of debate:[37]

> "It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable."[38]

35 Rabinovitch, *supra* note 15, 506.
36 *Statute of the International Court of Justice*, 26 June 1945, 33 UNTS 993, Article 38.
37 See, e.g., Kreß, *supra* note 18, 571-572.
38 *S.S. Lotus* case, *supra* note 33, 19.

From this paragraph it follows that States asserting universal jurisdiction *in absentia* would thus be allowed to do so unless there is a rule prohibiting the practice. As mentioned above, not everyone seems to agree with this interpretation of the Court's words in this judgment, notably among them former ICJ President Guillaume. In his separate opinion, Guillaume agrees that the Court leaves open the possibility of absolute universal jurisdiction, but only "given the sparse treaty law at that time".[39] In this day and age, however, the development in international (criminal) law has made it clear that absolute universal jurisdiction has not at any point been desired, he argues.[40] To substantiate this claim he lists a great number of treaties that have incorporated the principle of *aut dedere aut judicare*, to demonstrate the significance of a suspect being present on a State's territory as a condition for prosecution. Furthermore, Guillaume adds, the practical consequences in terms of relations between States would be "total judicial chaos".[41]

Guillaume makes a valid point with regard to the practical concerns inherent to absolute universal jurisdiction – more on this in the third part of this paper. The legal argument put forward - his idea of universal jurisdiction *in absentia* being incompatible with (the development of) international law, is however hardly compelling.

If anything, absolute universal jurisdiction fits well within the development of international (criminal) law.[42] The fight against impunity, as articulated in – *inter alia* – the *Rome Statute*,[43] has been a priority of the international community for many years now.[44] In a 2010 report by the United Nations Secretary-General on the concept of universal jurisdiction, governments reaffirmed that "one of the major achievements in international law in recent decades had been the shared understanding that there should be no impunity for serious crimes".[45] States asserting universal jurisdiction (*in absentia*) would

39 *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 44, para. 15.

40 *Ibid.*

41 *Ibid.*

42 Poels, *Universal Juristiction*, *supra* note 15, 78.

43 *Rome Statute of the International Criminal Court*, *supra* note 1, Preamble.

44 Kreß, *supra* note 18, 574.

45 UN Doc. A/65/181, 2010, 4, *supra* note 10, This report provides an indication of the standpoint of a significant number of governments on the issue of universal jurisdiction. The report states that it 'has been prepared pursuant to General Assembly resolution 64/117, by which the Assembly requested the Secretary-General to prepare a report on the scope and application of the principle of universal jurisdiction, on the basis of information and observations from Member States.' The following governments submitted a response: Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, the Plurinational State

only contribute to ending impunity. And although Guillaume is right to point out that international (criminal) treaties overwhelmingly embrace the principle of *aut dedere aut judicare* rather than forms of universal jurisdiction, the latter has not been ruled out either. Guillaume's objections to the applicability of the Court's interpretation of the law in the *Lotus* case hence fail to convince.

Although Guillaume's arguments fail to convince, it should once more be noted that the relevance of the *Lotus* case to (absolute) universal jurisdiction is indeed disputed. Kreß, for example, when discussing the 2005 Resolution of the *Institut de Droit International* (IDI) on universal jurisdiction, observes a consensus among the members of the *IDI*'s 17th Commission with regard to the irrelevance of the "classic *Lotus* presumption" for universal jurisdiction.[46] At the same time, however, Kreß does notice Judges Higgins, Kooijmans, Buergenthal and Van den Wyngaert invoking the *Lotus* case when arguing for the possibility of States asserting universal jurisdiction *in absentia*.[47] Moreover, these judges are not alone in their interpretation of the *Lotus* case: as recently as 2014, the South-African Constitutional Court referred to the reasoning in the *Lotus* case while addressing (absolute) universal jurisdiction.[48]

Considering the abovementioned, this article will deem the *Lotus* paradigm relevant in assessing the legality of universal jurisdiction *in absentia* – while at the same time recognizing the discussion with regard to this assumption. So in line with the *Lotus* paradigm, States asserting universal jurisdiction *in absentia* would be allowed to do so under international law where a prohibitive rule does not seem to exist.[49] Since the existence of a permissive rule would however be preferable, both a prohibitive as well as a permissive rule of international law will be considered.

of Bolivia, Bulgaria, Cameroon, Chile, China, Costa Rica, Cuba, Cyprus, the Czech Republic, Denmark, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Iraq, Israel, Italy, Kenya, Kuwait, Lebanon, Malaysia, Malta, Mauritius, the Netherlands, New Zealand, Norway, Peru, Portugal, the Republic of Korea, Rwanda, Slovenia, South Africa, Sweden, Switzerland, Tunisia and the United States of America.

46 Kreß, *supra* note 18, 571-572.

47 *Ibid.*

48 *Zimbabwe Torture Docket* case, *supra* note 6, para. 26.

49 Rabinovitch, *supra* note 15, 505, The Israeli Court in the *Eichmann* case came to the same conclusion by applying the *Lotus* paradigm, see Arajarvi, *supra* note 7, 12.

III. Conventional Law

A positive rule of international law is required to be derived from one of the sources of international law as enumerated in Article 38 of the ICJ Statute.[50] Considering the position of conventional law in the article, a treaty or convention on universal jurisdiction (*in absentia*) would be desired. Such a treaty, as mentioned before, does not exist.[51] Nonetheless, multiple international treaties address the topic of jurisdiction of domestic courts with regard to international crimes. A great number of these treaties require the prosecuting State to be linked to the crime.[52] There are however treaties that do not require a nexus. The *Geneva Conventions* are the prime example of treaties that – be it implicitly – allow for States to assert universal jurisdiction *in absentia*.[53] Article 146 of the *IV Geneva Convention*, for instance, allows States to prosecute for crimes committed abroad, while not requiring the presence of the offender on its territory.[54] The customary law status of the Geneva Conventions reinforces this possibility for States to assert absolute universal jurisdiction – regarding war crimes that is. No treaty, however, seems to *explicitly* provide for absolute universal jurisdiction.

Whilst not expressly allowing for universal jurisdiction *in absentia*, international criminal law treaties often respect a principle of complementarity. The *1984 Convention against Torture*, for example, allows (or requires) its State parties in Article 5 to assert jurisdiction if there is a nexus based on location of the crime or offender on its territory, nationality of the offender or nationality of the victims.[55] These nexus requirements do however "not exclude any criminal jurisdiction exercised in accordance with internal law", according to the last paragraph of the same article.[56] Sienho Yee, when discussing universal jurisdiction, is correct when he considers it a bridge too far to conclude that the convention therefore supports the assertion of universal jurisdiction: "Such a meaning would have required affirmative support in the text of the treaty

50 *Statute of the International Court of Justice*, *supra* note 36.

51 Kreß, *supra* note 18, 562.

52 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 76, para. 41; Rabinovitch, *supra* note 15, 506.

53 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 77, para. 46.

54 *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 174-175, para. 59; *Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287.

55 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Article 5, paras. 1, 5.

56 *Ibid.*, para 3.

itself."[57] Likewise, however, lack of a prohibition would mean that universal jurisdiction is to be ruled out. If the internal law of a State party allows for universal jurisdiction *in absentia* to be asserted, the Torture Convention in no way impedes this.[58] The 'method' of not creating a basis for States to prosecute offenders *in absentia* for the crimes relevant to the treaty, while leaving the option to do so open is a concept that Judge Van den Wyngaert argues is present in a host of conventions relating to international crimes.[59]

Conventional international law does thus neither permit nor prohibit absolute universal jurisdiction to be asserted. Its lawfulness is therefore to be sought in international customary law – as agreed upon by the *IDI* in its 2005 Resolution on universal jurisdiction.[60]

IV. Customary Law

The dearth of conventional law on universal jurisdiction *in absentia* is all but surprising. It is only logical for a possible legal basis to be found in customary international law since it, inherent to the universality of the concept, would apply to all States, and very few treaties – if any – have been signed and ratified by all States.[61] Even so, the importance of customary law is not evident from custom itself since State practice with regard to absolute universal jurisdiction is rather limited. The advantage of limited State practice does however make it possible to provide a relatively thorough assessment here.

When assessing custom it is essential to keep in mind that it requires both an "established, widespread, and consistent practice […] of States",[62] as well as *opinio juris*.[63] The latter requirement, as confirmed in the *Lotus* case,[64] often plays a decisive role – as it will here. I will now first address the absence of a permissive rule, after which the lack of a prohibitive rule will be discussed.

57 S. Yee, 'Universal Jurisdiction: Concept, Logic, and Reality', 10 *Chinese Journal of International Law* (2011) 3, 503, 518.

58 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 74, para. 38.

59 *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert 175-176, para. 61.

60 Kreß, *supra* note 18, 566.

61 Colangelo, *supra* note 29, 564.

62 H. Thirlway, 'The Sources of International Law', in M. D. Evans (ed.) *International Law* (2010), 95, 102.

63 *Ibid.*

64 *S.S. Lotus* case, *supra* note 33, 28.

1. Absence of a Permissive Rule

A permissive rule being preferable, it should be assessed whether there is consistent State practice and *opinio juris* with regard to States asserting universal jurisdiction *in absentia*. Since there is no codified rule of international law, national law is essential here as it usually forms the legal basis for national prosecuting authorities to act upon.

A State that has had controversial legislation in this regard is Belgium.[65] As a result, it became a prominent actor in the State practice of absolute universal jurisdiction; illustrated by its role in the ICJ's *Arrest Warrant* case.[66] The – now retracted – legislation on which the arrest warrant was based, was one of the most (if not *the* most) far-reaching criminal jurisdiction laws in the world.[67] With its present day legislation on universal jurisdiction, Belgium joins many States that only allow for a more restricted, conditional universal jurisdiction (i.e. with a nexus requirement in place). In their joint separate opinion to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal list Australia, France, Germany and the United Kingdom as States that have (had) forms of universal jurisdiction in their laws.[68] When States codify crimes as result of a treaty to which they are party, they often have to decide on the type of jurisdiction. The Netherlands, for example, when criminalizing the crimes of the *Rome Statute* in its national law,[69] choose for a conditional universal jurisdiction which requires either the victim(s) or defendant to be Dutch or for the crime to have been committed on Dutch territory.[70] As mentioned, a majority of States[71] assumes this type of jurisdiction in international crimes laws rather than an

65 Belgium: *La loi relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux protocoles 1 et II du 8 juin 1977, additionnels a ces conventions* (16 June 1993), amended by *La loi relative à la repression des violations graves de droit international humanitaire* (10 February 1999); R. B. Baker, 'Universal Jurisdiction and the Case of Belgium: A Critical Assessment', 16 *ILSA Journal of International & Comparative Law* (2009) 1, 141, 142.

66 It was Belgian investigating Judge Vandermeersch of the *Brussels Tribunal de première instance* who issued the arrest warrant which led to the dispute between Belgium and the Democratic Republic of the Congo before the ICJ. See D. Vandermeersch, 'Prosecuting International Crimes in Belgium' 3 *Journal of International Criminal Justice* (2005) 2, 400.

67 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 69, para. 20.

68 *Ibid.*, 69-70, paras. 20-24.

69 As it saw itself obliged to do. See *Kamerstukken II 2001/02*, 28337, *supra* note 2, 2.

70 *Ibid.*, 17.

71 Rabinovitch, *supra* note 15, 507.

unconditional universal jurisdiction.[72] Nonetheless, Belgium is not the only State that has allowed or still allows for the latter type of jurisdiction to be asserted.[73]

New Zealand is one of the States that did opt for an absolute universal jurisdiction when translating the crimes of the *Rome Statute* into national law.[74] The *International Crimes and International Criminal Court Act 2000* allows New Zealand to prosecute a suspect of international crimes: "whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence".[75] Although jurisdiction can thus be asserted in prosecuting an international crime lacking any link with New Zealand, this will not lead to a trial as long as the alleged perpetrator is not present, as New Zealand's domestic laws prohibit trials *in absentia*.[76]

Germany did the same in codifying the crimes in the *Rome Statute*.[77] The *Völkerstrafgesetzbuch* (Code of Crimes against International Law) is similar to New Zealand's law as it explicitly States that no link to Germany whatsoever is required for the German State to prosecute offenders of crimes against international law: "*Dieses Gesetz gilt für alle in ihm bezeichneten Straftaten gegen das Völkerrecht, für die in ihm bezeichneten Verbrechen auch dann, wenn die Tat im Ausland begangen wurde und keinen Bezug zum Inland aufweist*."[78] The accused need therefore not to be present for the German State to assert universal

72 *Arrest Warrant* case, *supra* note 12, Dissenting Opinion Judge *ad hoc* Van den Wyngaert, 171-173, para. 55.

73 *Ibid.*

74 See Poels, *Universal Juristiction*, *supra* note 15, 75.

75 New Zealand: *International Crimes and International Criminal Court Act 2000*, (24 May 2000) Section 8(1) (c), iii.

76 J. Hay, 'Implementing the ICC Statute in New Zealand', 2 *Journal of International Criminal Justice* (2004) 1, 191, 196. It should also be noted that, as of 2010, no prosecutions based on the legislation providing for universal jurisdiction have been authorized by the Attorney-General: see UN Doc. A/65/181 (2010), *supra* note 10.

77 G. Werle & F. Jessberger, 'International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law', 13 *Criminal Law Forum* (2002) 2, 191, 192.

78 Germany: *Völkerstrafgesetzbuch* (26 June 2002), Section 1, Part 1 (BGBl. I S. 2254), para. 1. Translation: 'This Law shall apply to all criminal offences against international law designated under this Law, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany.' (emphasis added) It has to be noted that Section 153f of the German *Strafprozeßordnung* [Code of Criminal Procedure] provides the prosecutor grounds not to prosecute crimes that would fall under Section 1, Part 1 of the 'Völkerstrafgesetzbuch'. These grounds are invoked often – it is uncertain whether there has actually been a case on the basis of absolute universal

jurisdiction, but, as in New Zealand, German criminal law does not allow for trials *in absentia*.[79]

Another State that had a similar provision in its legislation was Spain. Its *Ley Orgánica del Poder Judicial* (Judicial Power Organization Act) of 1985,[80] the basis for the well-known *Pinochet* case that will feature later, granted the Spanish authorities the power to prosecute any offender of international crimes.[81] Due to judgments by the highest national Courts in Spain, the jurisdiction is no longer absolutely universal as there are now conditions in place that first have to be met.[82] Next to Germany, New Zealand and Spain there are other States that allow or have allowed universal jurisdiction *in absentia* to be asserted, including Switzerland, Israel and Senegal.[83]

Based on national legislation, there are known and less known individual criminal cases in which the prosecuting State based its competence on universal jurisdiction and that are therefore relevant when assessing State practice. I will briefly elaborate on a number of cases that are illustrative of the ambivalent case law with regard to the *in absentia* assertion of universal jurisdiction.

The first case to be addressed features a well-known suspect: the former president of Chile Augusto Pinochet, who was arrested in London in 1998 at the request of Spain. The relevant aspect for the purpose of this article is the basis on which Pinochet was arrested. The Criminal Division of the Spanish National Court allowed the arrest warrant to be based on universal jurisdiction while Pinochet was not present on Spanish territory.[84] The former Chilean ruler's arrest was thus the enforcement of Spain asserting universal jurisdiction without the defendant present on its territory. The British eventually, however, choose not to

jurisdiction. It is however clear that German law would allow for it. See Human Rights Watch, 'The Legal Framework for Universal Jurisdiction in Germany' (2014).

79 Germany: *Strafprozeßordnung* (7 April 1987) (BGBl. IS. 1074, 1319), Section 230-231 [Code of Criminal Procedure].

80 Spain: *Ley Orgánica del Poder Judicial* 'No. 6/1985' (1 July 1985) (Official Gazette No. 157 of 2 July 1985) [Judicial Power Organization Act].

81 Permanent Representation of the Kingdom of Spain to the United Nations, 'The Scope and Application of the Principle of Universal Jurisdiction', Response of the Kingdom of Spain to Agenda Item 84 of the Sixth Committee 66th Session of the UNGA for the Secretary-General's Report 'The scope and application of the principle of universal jurisdiction'; UN Doc. A/65/181 (2010), *supra* note 10, 4.

82 *Ibid.*, 7.

83 Poels, *Universal Juristiction*, *supra* note 15, 75.

84 The arrest warrant could have been based on the passive nationality principle since victims included Spanish nationals. Nonetheless, the Court decided to rely on the universality principle instead. See Rabinovitch, *supra* note 15, 515.

extradite Pinochet on medical grounds and allowed him to go back to Chile.[85] Since Spanish Criminal Procedure does not allow for trials *in absentia*,[86] the prosecution was not pursued any further. Due to the reputation of the accused, this case has become a well-known instance of criminal enforcement based on absolute universal jurisdiction. Pinochet is however not the only high-profile suspect in a case addressing universal jurisdiction *in absentia*.

In the Netherlands, the principle of universal jurisdiction played a decisive role in the 2001 *Bouterse* judgment of the *Hoge Raad* (Supreme Court).[87] The defendant, the then-serving democratically elected president of Suriname, was prosecuted for murder and torture[88] - the latter being considered an international crime under Dutch law. The *Hoge Raad* judged the State to lack jurisdiction, since national law required the suspect to be present on Dutch territory. It should however be noted that the unlawfulness of the assumed jurisdiction was based on national law; [89] the *Hoge Raad* refrained from making any findings regarding the unlawfulness of universal jurisdiction *in absentia* under international law.[90]

This approach is not uncommon: three years before the *Bouterse* judgment the Prosecutor-General of Denmark reached a similar conclusion on the legality of absolute universal jurisdiction. Being requested to prosecute former Chilean President Pinochet – subject of many judicial decisions - the Prosecutor-General concluded Denmark to lack jurisdiction as a result of Pinochet not being present on Danish territory. Like the *Hoge Raad*, he came to the decision by invoking the Danish Criminal Code rather than international law.[91]

Similarly, the French *Code de Procedure Pénale* provides for universal jurisdiction to be asserted by the State, under de condition that the suspect is present on French territory.[92] Under this jurisdiction, Ely Ould Dah was convicted

85 C. Nicholls, 'Reflections on Pinochet', 41 *Virginia Journal of International Law* (2001) 1, 140, 144.

86 N. Roht-Arriaza, 'The Pinochet Precedent and Universal Jurisdiction', 35 *New England Law Review* (2001) 2, 311, 312; C. A. E. Bakker, 'Universal Jurisdiction of Spanish Courts over Genocide in Tibet: Can It Work', 4 *Journal of International Criminal Justice* (2006) 3, 595, 600.

87 HR 23-10-2001, ECLI:NL:HR:2001:AD4727; ECLI:NL:PHR:2001:AD4727.

88 L. Zegveld, 'The Bouterse case', 32 *Netherlands Yearbook of International Law* (2001) 97, 98.

89 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 70, para. 23.

90 J. Stigen, 'The Right or Non-Right of States to Prosecute Core International Crimes under the Title of Universal Jurisdiction', 10 *Baltic Yearbook of International Law* (2010) 95, 117.

91 UN Doc. A/65/181 (2010), *supra* note 10, 22-23.

92 France: *Code de procédure pénale*, (19 February 2016), Article 689-1 [Criminal Procedure Code].

for torture committed in Mauritania without any link to France.[93] Interestingly, Ould Dah was convicted *in absentia*. This was possible since the law only requires the suspect to be present at the time the judicial investigation is opened. In this case, Ould Dah was present at the beginning of the investigations, but was consequently free to leave France.[94] It is worth noting that Ould Dah appealed to the European Court of Human Rights. Invoking article 7 of the European Convention on Human Rights,[95] he argued that he "could not have foreseen that French law would override Mauritanian law".[96] The Court concluded that France's prosecution of Ould Dah did not violate article 7 of the Convention,[97] allowing the State to apply its laws to a non-national for acts committed abroad without French citizens among the victims.

The last domestic judgment addressing the legality of absolute universal jurisdiction to be discussed here is the landmark *Zimbabwe Torture Docket* case in South Africa.[98] On 30 October 2014, the Constitutional Court unanimously ruled the State to have the *duty* to investigate acts of torture committed in Zimbabwe by Zimbabweans against their own nationals.[99] The Court reached this conclusion by – *inter alia* – assessing the legality of absolute universal jurisdiction.

The judges held that torture, war crimes, genocide and other international crimes "require states, even in the absence of binding international treaty law, to suppress such conduct".[100] Relying largely on the *Lotus* paradigm[101] and academic writings, the Court deemed presence of the suspect(s) in South Africa irrelevant. It was found not to be required for an investigation, since no international law rule imposing that requirement seemed to exist.[102] Hence, the Court held that "the exercise of universal jurisdiction, for purposes of the investigation of an

93 See Stigen, *supra* note 90, 117.

94 Human Rights Watch, 'The Legal Framework for Universal Jurisdiction in France' (2014), 2.

95 1950 *European Convention on Human Rights*, Article 7, 213 UNTS 221.

96 UN Doc. A/65/181 (2010), *supra* note 10, 22-23.

97 M. Gavouneli, 'Introductory Note to the European Court of Human Rights Decision: Ould Dah v. France', 48 *International Legal Materials* (2009) 4, 869, 869.

98 *Zimbabwe Torture Docket* case, *supra* note 6.

99 M. J. Ventura, 'The Duty to Investigate Zimbabwe Crimes Against Humanity (Torture) Allegations: The Constitutional Court of South Africa Speaks on Universal Jurisdiction and the ICC Act', 13 *Journal of International Criminal Justice* (2015) 4, 861, 862.

100 *Zimbabwe Torture Docket* case, *supra* note 6 para. 37.

101 Ventura, *supra* note 99, 876.

102 *Zimbabwe Torture Docket* case, *supra* note 6, para. 47.

international crime committed outside our territory, may occur in the absence of a suspect without offending our Constitution or international law."[103]

Very progressively, the Court subsequently invoked Paragraph 6 of the Preamble of the *Rome Statute*[104] in combination with the constitution and domestic law to establish a (restricted)[105] duty of the South African State to investigate international crimes.[106] The Court thus *obliged* the State to assert universal jurisdiction *in absentia*, making the *Zimbabwe Torture Docket* case seemingly one of a kind. It will be interesting to see to what extent this landmark case signifies a development in the acceptance of universal jurisdiction *in absentia* or whether it will remain unique.

It should be noted that the Constitutional Court limits the exercise of absolute universal jurisdiction to conducting investigations. As mentioned in the introduction and evidenced by the cases discussed above, it usually is national legislation prohibiting trials *in absentia* that leads to a limited interpretation of universal jurisdiction *in absentia*. South Africa is no exception here, as it is the State's constitution that does not allow for trials in absentia.[107]

The brief discussion of the cases above illustrates the status of absolute universal jurisdiction in case law: some States allow it unequivocally – with South Africa exceptionally obliging its assertion, while others require different sorts of conditions to be met. From the case law in general it is difficult to derive a rule allowing absolute universal jurisdiction to be asserted. This is due to a lack of both practice and *opinio juris* of States (not) asserting universal jurisdiction *in absentia*. It should therefore be concluded that a permissive rule of international customary law that allows for States to assert universal jurisdiction *in absentia* to prosecute international crimes does not seem to exist.[108] Hence, one should assess the existence of a prohibitive rule to come to a final conclusion its legality.

2. Absence of a Prohibitive Rule

To formulate a prohibitive rule of international law, it is once again necessary to identify both a consistent State practice and *opinio juris*. More concretely; the

103 *Ibid.*

104 *Rome Statute*, *supra* note 1, Preamble Paragraph 6, text: 'Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes'.

105 *Zimbabwe Torture Docket* case, *supra* note 6, paras. 61-64.

106 Ventura, *supra* note 99, 870.

107 *Zimbabwe Torture Docket* case, *supra* note 6, para. 43.

108 Rabinovitch, *supra* note 15, 516.

question that needs to be answered is whether there is an established, consistent and widespread practice of States[109] *not* asserting universal jurisdiction when the suspect is not present on their territory. To establish *opinio juris* the reason for States not doing so should lie with the perceived illegality of such an assertion under international law.[110]

As mentioned before, a great number of States require the offender to be present on their territory for universal jurisdiction to be asserted. Judge Van den Wyngaert notes this as well in her dissenting opinion to the *Arrest Warrant* case but argues that "this is not necessarily the expression of an *opinio juris* to the effect that this is a requirement under international law".[111] Judges Higgins, Kooijmans and Buergenthal come to a similar finding in their separate opinion.[112] The same should also be concluded from case law such as the decision in the *Bouterse* case. So although there is a practice of States not asserting absolute universal jurisdiction, no *opinio juris* can be established since States have not acknowledged refraining from asserting this type of jurisdiction because of its perceived illegality under international law.

In literature too, the existence of a prohibitive rule has been difficult to prove. The Princeton Principles,[113] for instance, consider absolute universal jurisdiction to be not prohibited under international law. Their definition of universal jurisdiction *in absentia* does not require "any […] connection to the State exercising such [i.e. criminal universal] jurisdiction".[114] The reason for not including a territorial link was partly to "avoid stifling the evolution of universal jurisdiction".[115] The separate opinion in the *Arrest Warrant* case concludes that "the only prohibitive rule (repeated by the Permanent Court in the *Lotus* case) is that criminal jurisdiction should not be exercised, without permission, within the territory of another State".[116] States asserting absolute universal jurisdiction *in absentia* do not violate this rule.

109 Thirlway, *supra* note 62, 102.

110 *Arrest Warrant* case, *supra* note 12, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, 173-174, para. 56.

111 *Ibid.*, 171-173, para. 55.

112 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 77, para. 45.

113 The Princeton Principles are a set of principles on universal jurisdiction developed in a joint effort of eminent legal scholars that has been discussed in the UNGA. See S. Macedo (ed.), *Universal Jurisdiction National Courts and the Prosecution of Serious Crimes Under International Law* (2006).

114 Macedo, *supra* note 113, Principle 1.

115 *Ibid.*, 43.

116 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 80, para. 53.

V. Preliminary Conclusion on Legality

International law does not impede States asserting universal jurisdiction *in absentia* when prosecuting international crimes.[117] It is generally accepted that the legal basis for this practice should be sought in international customary law, since no conventional law either permitting or prohibiting States asserting universal jurisdiction *in absentia* seems to exist. On the one hand, State practice appears ambivalent; many States have legislation that does not allow for prosecuting authorities to assert absolute universal jurisdiction, while the laws of other States do allow it – or, in the case of South Africa, oblige it under certain conditions. On the other hand, no custom can be established since an *opinio juris* for both a permissive and a prohibitive rule seems to be lacking. Yet considering the applicability of the *Lotus* paradigm – where one should keep in mind that the officer on watch of the Lotus was not prosecuted *in absentia*, a State is entitled to prescribe jurisdiction as long as it does not exercise this jurisdiction on the territory of another State and as long as there is no rule of international law prohibiting this. Hence, States asserting absolute universal jurisdiction when prosecuting international crimes do not violate international law. Although – as mentioned earlier – as a matter of domestic law, the legality is still likely to stand when the assertion leads to a trial *in absentia* if a State does not violate the right to a fair trial.[118] Moreover, universal jurisdiction *in absentia* fits well within the development of international (criminal) law and its desire to end impunity. It should however be acknowledged that the absence of a permissive rule will likely lead to a "continuing debate" on universal jurisdiction *in absentia*.[119]

C. Should States Assert Universal Jurisdiction *in Absentia*?

I. Introduction

In the previous part it was established that international law allows States to assert universal jurisdiction *in absentia*. The primary reason for States to invoke this type of jurisdiction is to end impunity. In this part I will shortly elaborate on the rationale behind absolute universal jurisdiction, after which

117 I.e. genocide, war crimes and crimes against humanity – as defined in Section 2.1. See Poels, *Universal Juristiction*, *supra* note 15, 77.

118 See, e.g., Rabinovitch, *supra* note 15, 526-528; Poels, *Universal Juristiction*, *supra* note 15, 81-82; El Zeidy, *supra* note 11, 837.

119 UN Doc. A/65/181 (2010), *supra* note 10.

three arguments against States asserting universal jurisdiction *in absentia* will be considered as well as possible safeguards to mitigate these objections.[120] When approaching absolute universal jurisdiction from a normative rather than a legal point of view it has to be noted that the literature on this topic is rather scarce. Universal jurisdiction as it is commonly interpreted, i.e. with the requirement that the offender is in the custody of the prosecuting State, is however elaborately discussed among scholars. These writings, both supportive and disapproving, can be applied to absolute universal jurisdiction without much difficulty.

II. The Rationale Behind Universal Jurisdiction in Absentia

The assertion of universal jurisdiction *in absentia* can function as a weapon in the fight against impunity: where other States are reluctant or international criminal tribunals fail to act, a State can prosecute on the basis of universal jurisdiction,[121] even when the suspect is not present on its territory. As mentioned before, the heinous nature of the crimes affect humankind and therefore the international community as a whole[122] – an argument developed centuries ago by Grotius.[123] Hence, every member of this community has a legitimate interest in the repression of international crimes;[124] the gravity of these crimes transcends borders. The Court in the ICTY's *Tadic* case eloquently provides a philosophical justification[125] that could be read as a rationale for absolute universal jurisdiction:

> "It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity."[126]

120 As suggested in *Arrest Warrant* case , Joint Opinion, *supra* note 12, 81-82, para. 59.

121 Poels, *Universal Juristiction*, *supra* note 15, 79.

122 M. Cherif Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice,' 42 *Virginia Journal of International Law* (2001) 1, 81, 98-99.

123 H. Grotius, *De Jure Belli Ac Pacis* (1925), 504; Rabinovitch, *supra* note 15, 516; Cherif Bassiouni, *supra* note 122, 88.

124 V. Lowe and C. Staker, 'Jurisdiction', in Malcolm D. Evans (ed.), *International Law* (2010), 313, 326.

125 El Zeidy, *supra* note 11, 844.

126 *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-T, T. Ch. II, 2 October 1995.

The use of absolute universal jurisdiction *in absentia* is thus justified as an effective tool in the international fight against impunity. An assessment of the practical aspects of States asserting absolute universal jurisdiction will however demonstrate the flaws inherent in the concept.

III. Difficulties of Universal Jurisdiction *in Absentia* in Practice

The argument in favor of States asserting universal jurisdiction *in absentia* is compelling, but the counterarguments are at least equally convincing. Even if asserted with the best of intentions, (absolute) universal jurisdiction "can be used imprudently, creating unnecessary frictions between States, potential abuses of legal processes, and undue harassment of individuals prosecuted or pursued for prosecution".[127] With many such objections being raised in literature, I will restrict myself here to three fundamental difficulties related to the practice of universal jurisdiction *in absentia*. It is argued that such assertions (i) only lead to partial fulfilment of the goals of criminal law, (ii) are likely to compromise the fundamental rights of the accused and (iii) may destabilize interstate relations.

1. Suboptimal Fulfilment of the Objectives of Criminal Law

A first argument to oppose the assertion of universal jurisdiction *in absentia* at the domestic level relates to the criminal law function of States asserting it. Arguably, the aims of criminal law (e.g. reconciliation and prevention)[128] cannot be satisfactorily fulfilled if prosecution takes place too far away from the community that was most directly harmed.[129] Kissinger phrases this objection plainly: "Should any outside group dissatisfied with the reconciliation procedures of, say, South Africa be free to challenge them in their own national courts or those of third countries?"[130] With this rhetorical question Kissinger touches a raw nerve, as prosecution could – paradoxically – be an impediment to justice. Since (absolute) universal jurisdiction is asserted for international crimes, such prosecution deals with crimes that have had a significant impact on the State in which they have been committed. If hostilities have ended by the time the trial starts, these States may be going through a process of transitional justice

127 Cherif Bassiouni, *supra* note 122, 82.
128 J. de Hullu, *Materieel Strafrecht* (2015), 5-14.
129 G. P. Fletcher, 'Against Universal Jurisdiction', 1 *Journal of International Criminal Justice* (2003) 3, 580, 583.
130 H. A. Kissinger, 'The Pitfalls of Universal Jurisdiction', 80 *Foreign Affairs* (2001) 4, 86, 91.

to which prosecution might form a barrier.[131] During South Africa's process of transitional justice, for example, amnesties were conditionally granted to offenders who testified before the Truth and Reconciliation Commission.[132] If a third State had then started prosecuting offenders and, as Kissinger notes,[133] "substituting the magistrate's own judgment for the reconciliation procedure of even incontestably democratic societies where alleged violations of human rights have occurred", this would have been counterproductive.

Another essential element of criminal law is to have the offender convicted for all her/his unlawful deeds,[134] which is difficult to achieve when the proceedings take place in a State (far) away from the location of the crime and without the defendant present. As argued by States at the UN, the territorial State is "often best placed to obtain evidence, secure witnesses, enforce sentences, and deliver the 'justice message' to the accused, victims and affected communities".[135] The success of the proceedings is prone to be jeopardized due to the unfamiliarity of those involved with the peculiarities and specifics of the crimes and the situation in the State where the crimes were committed. It may also be unlikely that, for instance, witnesses are aware of the criminal procedure in the prosecuting State if the defendant is not even in custody there.[136] In the administration of evidence, too, there will be all sorts of obstacles owing to language, location of goods and people, culture, etc.[137] Many people might prefer a flawed prosecution over impunity; I cannot disagree with this. Means of achieving justice other than criminal prosecution should nevertheless not be disregarded. Moreover, in light of the objections that will be raised in the following sections, the mere partial fulfilment of the objectives of criminal law should at least be considered a suboptimal starting point.

131 M. Freeman, 'Transitional Justice: Fundamental Goals and Unavoidable Complications', 28 *Manitoba Law Journal* (2000) 1, 113.

132 See, e.g., P. van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission', 52 *Journal of International Affairs* (1999) 2, 647.

133 Kissinger, *supra* note 130.

134 de Hullu, *supra* note 128.

135 UN Doc. A/65/181 (2010), *supra* note 10, 4.

136 Poels, *Universal Juristiction*, *supra* note 15, 83.

137 Vandermeersch, *supra* note 66, 410; Rabinovitch, *supra* note 15, 529.

2. Compromising the Rights of the Accused

The second objection to absolute universal jurisdiction, passionately debated in academic literature,[138] relates to the fundamental rights of the accused that might be undermined if States do actually exercise absolute universal jurisdiction.[139] As Fletcher rightly points out, the defendant should be at the center of any criminal proceeding.[140] In international criminal law, however, the victim has become central.[141] This development comes at the expense of the rights of the accused.

Where compromising the rights of the accused is seen as a shortfall of international criminal law in general,[142] it is especially troublesome with regard to universal jurisdiction. The low threshold for States to assume jurisdiction might result in undesired situations. These could *inter alia* include prosecution in a State with an underdeveloped judicial system or lead to 'show trials' to escape an *aut dedere aut judicare* obligation. Yet with States asserting *absolute* universal jurisdiction, the risk of an accused not receiving a fair trial, for instance due to complications with regard to the defendant's right of defense, is even more present.[143]

The presence of an accused at her/his own trial is valued so highly that multiple authoritative international law instruments require that "all alleged perpetrators and accused be given the rights to appear in person before the courts".[144] The value of this right has been confirmed in many individual cases; from *Hopt v. Utah*[145] before the United States Supreme Court in 1884 to *Colozza v. Italy*[146] at the European Court of Human Rights in 1985. In the latter case the defendant's presence was deemed so fundamental to his rights that the Court

138 Fletcher, *supra* note 129, 580; A. Eser, 'For Universal Jurisdiction: Against Fletcher's Antagonism', 39 *Tulsa Law Review* (2004) 4, 955.

139 See Fletcher, *supra* note 129, 580.

140 *Ibid.*

141 *Ibid.*, 582.

142 *Ibid.*

143 See, e.g., M. Proulx, 'The Presence of the Accused at Trial', 25 *Criminal Law Quarterly* (1982-1983) 2, 179; J.A. Strazzella, 'The Concept of Presence in the Law', *ACTA Universitatis Lucian Blaga* (2010) 1, 211, 213-16.

144 See, e.g. *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222; *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 17; Poels, *Universal Juristiction*, *supra* note 15, 73.

145 *Hopt v. Utah*, 110 U.S. 574 (1884), 579.

146 *Colozza v. Italy*: ECtHR Application No. 9024/80, Judgment of 12 February 1985, 11, para. 29.

decided that a defendant who has become aware of proceedings against him, has a right to obtain a "fresh determination of the merits of the charge".[147] In a strict legal sense a State does not infringe on a defendant's rights when it asserts absolute universal jurisdiction as they do not prohibit the accused to be present (on the contrary, they might very much welcome it if the accused voluntarily shows up). In practice, however, this right might be compromised because the accused might not be aware of her/his prosecution in a third State and hence be unable to assert this right.

Another more specific right of the accused that might be compromised if a State asserts universal jurisdiction *in absentia* is the principle of *ne bis in idem*. This principle, known to the vast majority of legal systems – be it in slightly different forms[148] – protects the accused against new trials for the same facts. Although supporting universal jurisdiction, Eser acknowledges the risk of *ne bis in idem* violations.[149] He notes that international instruments usually[150] only oblige their State parties to prevent a second prosecution within their own national jurisdiction.[151] Eser refers to Article 14(7) *International Covenant on Civil and Political Rights* and Article 4 of Protocol No. 7 of the *European Convention on Human Rights* as prominent examples of provisions that only prohibit *ne bis in idem* violations in the same country.[152] This 'lacuna in international law'[153] results in many transnational violations of the *ne bis in idem* principle.[154]

The United States, for example, principally ignore foreign convictions or proceedings completely while other States ignore *ne bis in idem* when the suspect is accused of committing international crimes[155] or only take past proceedings

147 *Ibid.*

148 Fletcher, *supra* note 129, 581; G. Conway, 'Ne Bis in Idem in International Law', 3 *International Criminal Law Review* (2003) 3, 217, 218.

149 Eser, *supra* note 138, 964.

150 The European Union is an exception. See Article 50 of the *Charter of Fundamental Rights of the European Union* (2000/C 364/01); See also A. Poels, 'A Need for Transnational Non Bis in Idem Protection in International Human Rights Law,' 23 *Netherlands Quarterly of Human Rights* (2005) 3, 329, 336 [Poels, Ne Bis in Idem].

151 Eser, *supra* note 138, 964.

152 *Ibid.*

153 Poels, *Ne Bis in Idem*, *supra* note 150, 339.

154 *Ibid.,* See also J. A. E. Vervaele, 'Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU,' 9 *Utrecht Law Review* (2013) 4, 211; R. Echle, 'The Passive Personality Principle and the General Principle of Ne Bis In Idem', 9 *Utrecht Law Review* (2013) 4, 56, 64; Poels, *Ne Bis in Idem supra*, note 150.

155 UN Doc. A/65/181 (2010), *supra* note 10, 19.

into consideration when determining the sentencing.[156] And even if States in their national laws prohibit new proceedings for a fact already adjudicated in a foreign court,[157] it might be difficult for the State prosecuting on the basis of absolute universal jurisdiction to always be aware of previous trials. Not respecting foreign judgments will likely result in less impunity,[158] but this should not be at the cost of such fundamental rights of the defendant.

3. Destabilizing International Relations

The third argument against absolute universal jurisdiction is the probable destabilization and juridification of international relations. With juridification of international relations I understand what Kissinger describes as "the movement […] to submit international politics to judicial procedures".[159] With international politics becoming more juridical, the juridical will be increasingly political. States could (threaten to) use universal jurisdiction as a political tool or could be perceived as doing so in their relations with other States.[160] This is confirmed by Belgium experiencing a *politicization of the law* as a result of their absolute universal jurisdiction legislation.[161] This politicization, Judge Guillaume argues, could lead to "total judicial chaos".[162]

Even if not resulting in total chaos, States asserting universal jurisdiction will likely face a reaction from the national State of the suspect or the State that harbors the suspect on its territory. This is indeed what happened in the *Ould Dah* case mentioned before. The French conviction of Ould Dah, a Mauritanian national, for committing torture, led to a serious deterioration of the relations between France and Mauritania.[163] The measures Mauritania took to retaliate against France included the expulsion of French (aid) workers and military trainees. Military cooperation between France and other African countries was also disturbed.[164] This naturally was a setback for France trying to stabilize different situations in Africa and to prevent the sort of acts for which Ould Dah

156 Eser, *supra* note 138, 965; See also Echle, *supra* note 154.
157 See, e.g., Netherlands, *Wetboek van Strafrecht*, Article 68(2) [Dutch Criminal Code].
158 de Hullu, *supra* note 128, 540-541.
159 Kissinger, *supra* note 130.
160 M. Langer, 'The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes', 105 *The American Journal of International Law* (2011) 1, 1, 28.
161 UN Doc. A/65/181 (2010), *supra* note 10, 22.
162 *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 44, para 15.
163 Langer, *supra* note 160, 21.
164 *Ibid.*

was prosecuted.[165] So although French authorities probably prosecuted Ely Ould Dah with the best of intentions, the result might have been counterproductive.

Mauritania's reaction is likely to be illustrative of the interaction between States that will result from States asserting absolute universal jurisdiction. Debatably, asserting universal jurisdiction *in absentia* could also be beneficial to interstate relations as such assertions would signal a dispute that could subsequently be resolved in a diplomatic manner.[166] I think this however highly unlikely, because it assumes that States are willing to discuss these assertions or to negotiate a solution, while the example of Mauritania demonstrates the more probable reaction – one of agitation and anger.

The relationship between France and Mauritania has not been the only relationship pressured under the (possible) assertion of universal jurisdiction. Belgium's absolute universal jurisdiction laws undermined its relations with several States.[167] Pressure from the United States, among others, threatening to move the NATO Headquarters out of Brussels, eventually led to Belgium amending its legislation.[168] Spain experienced similar pressure to adjust its legislation, with China demanding "immediate and effective measures to avoid possible obstacles and damages to the bilateral relations between China and Spain".[169] This statement was issued as a result of a Spanish investigation into sitting Chinese cabinet ministers.[170]

The neo-colonialist argument that is familiar in critiques of the ICC is another aspect of the risk that absolute universal jurisdiction poses to inter-state relations. As evidenced by the case law mentioned in this paper, it is often Western (-European) States that assert (absolute) universal jurisdiction.[171] The accused, on the other hand, are usually nationals of non-Western States.[172] This may be explained by reference to the more developed judicial system in Western States, enabling them to pursue complicated cases such as the prosecution of international crimes. Furthermore, developing States are often dependent on Western aid and hence not in the position to initiate proceedings against

165 *Ibid.*
166 Colangelo, *supra* note 29, 566.
167 Rabinovitch, *supra* note 15, 524.
168 Vandermeersch, *supra* note 66, 403; Yee, *supra* note 57, 510; Baker *supra* note 65, 155; Langer, *supra* note 160, 30; Stigen, *supra* note 90, 111.
169 *Ibid.*
170 Langer, *supra* note 160, 38.
171 See the cases mentioned in section 2.4.1. and Langer, *supra* note 160, 47.
172 Rabinovitch, *supra* note 15, 522.

nationals of a Western State.[173] Those who wish to refute this allegation of neo-colonialism might argue that the accused are often nationals from developing States because international crimes are more common in these States. Yet one only has to think of the military missions in which Western States were involved during the last decade (e.g. Iraq, Afghanistan) to understand that suspects of international crimes might be of Western origin as well. This also appears from the list of people Belgian magistrates were asked (and refused) to indict on the basis of universal jurisdiction, which included incumbent heads of State or government of *Western* States, such as US President George Bush Sr. and Israeli Prime Minister Ariel Sharon.[174] The practice of universal jurisdiction has hence led some commentators to suggest that universal jurisdiction would be imposing Western values on developing States.[175]

If not a neo-colonialist instrument, the practice of absolute universal jurisdiction should at least be deemed generally inconsistent and arbitrary.[176] Comments to this effect were voiced by governments in the UN Secretary-General's report on universal jurisdiction. It was noted that "universal jurisdiction may be invoked selectively, on the basis of political motivations, to target particular individuals and […] thus prone to abuse".[177] In the words of Guillaume: "[universal jurisdiction *in absentia*] encourage[s] the arbitrary, for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community'".[178]

Consequently, there clearly is a tension between friendly interstate relations and the battle against impunity. The difficulty is that friendly interstate relations are desired, as they might facilitate the prevention of acts that too often go unpunished. The negative effect that the assertion of absolute universal jurisdiction could have on international relations is therefore a factor that has to be taken into account.

173 *Ibid.*, 523.
174 Vandermeersch, *supra* note 66, 408.
175 Rabinovitch, *supra* note 15, 522.
176 D. Hoover, 'Universal Jurisdiction Not So Universal: Time to Delegate to the International Criminal Court', 8 *Eyes on the ICC* (2011-2012) 1, 73, 95.
177 UN Doc. A/65/181 (2010), *supra* note 10, 24.
178 *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, at 44, para. 15.

IV. The Lack of Effective Safeguards to Mitigate the Objections

Supporters of universal jurisdiction (*in absentia*) are aware of the objections against it. In their joint separate opinion relative to the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal propose four safeguards that are "absolutely essential to prevent abuse" to mitigate these objections.[179] These conditions are that (1) the asserting State must respect immunities, (2) before asserting absolute universal jurisdiction, the prosecuting State should request the national State to instate proceedings first, (3) the prosecutor or investigating judge should be independent from the government and, (4) for the sake of friendly interstate relations, there must be special circumstances justifying the assertion of absolute universal jurisdiction.[180] This section will argue that these conditions are inadequate in mitigating the abovementioned objections.

The first dilemma is the non-binding character of the safeguards. Of all proposed conditions, only condition (1) that calls upon prosecuting States to respect immunities is a rule under international law – as confirmed in the *Arrest Warrant* case. The other safeguards, on the contrary, are far from established rules, hence risking being ignored. But their optional or voluntary nature is not the only aspect that renders the proposed safeguards unconvincing, as will be demonstrated below.

Safeguard (2), for example, requires a State contemplating asserting universal jurisdiction *in absentia* to "first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned".[181] This condition would be easy to comply with seeing as prosecution by States that do have a more direct link to the crime or criminal is exactly what is lacking. This safeguard is therefore more descriptive of the situation than it is a condition. Moreover, it is debatable to what extent this condition would mitigate possible *ne bis in idem* violations. This fundamental right of an accused is still likely to be infringed upon with the proposed limited interaction between the State considering prosecution and the national State. A more elaborate notification system between States contemplating absolute universal jurisdiction should be in place to prevent prosecution based on universal jurisdiction by multiple States at the same time.

Condition (3) of the Joint Opinion requires the prosecutor or investigating judge to be "without links to or control by the government of that State". The

179 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 81-82, para. 59.
180 *Ibid.*
181 *Ibid.*

complete independence of prosecuting authorities is, however, not generally accepted as very common; there oftentimes is some relation to the executive branch.[182] This is especially true for States where the prosecution is institutionally part of the executive branch rather than being a body of the judiciary. In the Netherlands, for example, the Minister of Security and Justice has instructive powers in individual criminal cases. Indeed, in some States the prosecutor expressly requires an order or authorization from superiors to prosecute a criminal offence committed abroad. These States include Finland, Cameroon, the Czech Republic, Germany, Australia, New Zealand, Israel and Norway.[183] Moreover, some States allow for *actio popularis* – the initiation of criminal proceedings by private persons. It is hence unrealistic to expect a prosecutor to have the freedom to take such a politically sensitive decision, which the assertion of absolute universal jurisdiction is likely to be, in complete independence. This renders prosecutions based on absolute universal jurisdiction prone to be used as a political tool.

Despite the objections against politics influencing the prosecutor's decisions, political involvement may sometimes be precisely what is required to prevent a destabilization of international relations. If the prosecutor is completely independent, governments would be unable to control a prosecution that would undermine their relations with the State(s) involved, with all its associated consequences. The impasse between on the one hand the desire for an independent prosecutor and on the other hand the possibility for States to take their international relations into account is illustrative of the tension between the juridical and the political that is inherent to absolute universal jurisdiction.

The last condition (4) requires special circumstances to sustain the "desired equilibrium between the battle against impunity and the promotion of good interstate relations".[184] Such a circumstance would, for example, be a request for prosecution by individuals related to the victims.[185] Circumstances like these will however usually occur, since the option of absolute universal jurisdiction is only pursued when States more closely linked to the crime fail to prosecute. Moreover, the determination of 'special circumstances' is likely to be subjective and thus easily complied with.

Finally, in addition to the critique above, it should be noted that the Joint Opinion does not consider a number of objections. No safeguard, for instance,

182 UN Doc. A/65/181 (2010), *supra* note 10, 17.
183 *Ibid.*
184 *Arrest Warrant* case, *supra* note 12, Joint Opinion, 81-82, para. 59.
185 *Ibid.*

is proposed with regard to the possible interference of the prosecuting third State with local justice efforts in the State where the crime was committed. Furthermore, the proposed set of conditions fails to address the arbitrary application of absolute universal jurisdiction resulting from the dominance of developed States with an advanced judicial system capable of prosecuting complicated international crimes. So next to the debated effectiveness of the proposed conditions, the list of safeguards seems inconclusive and therefore unlikely to prevent the abuse rightly feared for in the Separate Opinion.

V. Preliminary Conclusion on Desirability

The international community justly considers the fight against impunity of perpetrators of international crimes a priority. Universal jurisdiction *in absentia* would be a powerful weapon in this battle, but the (potential) risks inherent to its use are just too high. Compromising the fundamental rights of the accused and destabilizing international relations for a suboptimal result with regard to the aims of criminal law are impossible to accept. Unfortunately, the safeguards proposed by Judges Higgins, Kooijmans and Buergenthal do not prevent these undesired consequences. So although the fight against impunity is a noble one, absolute universal jurisdiction should not be used as a weapon.

D. Conclusion

This article discussed the concept of universal jurisdiction *in absentia* or absolute universal jurisdiction when prosecuting international crimes from both a legal and a normative point of view. First, absolute universal jurisdiction was defined as universal jurisdiction that does not require the prosecuting State to have the alleged perpetrator in custody or, in the words of Judge Guillaume as "jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question".[186] Applying the *Lotus* paradigm that allows States to assert criminal jurisdiction as long as international law does not prohibit this, the legality of universal jurisdiction *in absentia* was assessed using both conventional and customary international law. No rule of conventional law permitting or prohibiting the assertion of absolute universal jurisdiction seemed to exist. The same was subsequently concluded with regard to customary law, as the limited State practice seemed to lack the required *opinio juris* for both a permissive and a

[186] *Arrest Warrant* case, *supra* note 12, Separate Opinion of President Guillaume, 30, para. 9.

prohibitive rule. It was consequently established that international law does not prohibit States from asserting universal jurisdiction *in absentia* when prosecuting international crimes before domestic courts – with the lack of a clear permissive rule likely resulting in further discussion.

This finding is, however, a purely legal one. Whether States *should* or *should not* assert absolute universal jurisdiction is a normative question that was addressed in the third part of this article. Policy-wise, absolute universal jurisdiction is asserted as an instrument in the fight against impunity. Since it allows all States to prosecute alleged perpetrators of international crimes, the likelihood of such a criminal to live an unconcerned and free life is lowered. States asserting universal jurisdiction *in absentia* will however have undesired consequences. Three major objections have been discussed. Firstly, the aims of criminal law, such as full accountability and reconciliation, will be difficult to achieve if prosecution takes place in a State that has no link whatsoever to the crime. Secondly, absolute universal jurisdiction is likely to compromise fundamental rights of the accused, such as the *ne bis in idem* principle. Thirdly, the destabilizing effect on international relations could lead to assertions of absolute universal jurisdiction eventually being counterproductive. The gravity of these consequences render the following conclusion inevitable: although not prohibited under international law, it is undesirable for States to assert universal jurisdiction *in absentia* before domestic courts when prosecuting international crimes – disqualifying it as an alternative to the ICC in the fight against impunity.

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The International Responsibility of Non-State Armed Groups: In Search of the Applicable Rules

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Abstract

In the last few decades, the role of non-state armed groups has become an essential topic of analysis and discussion to better understand international humanitarian law dynamics. While their increasing importance is uncontroversial, their place and regulation in specific areas of international law still remains unclear or insufficiently explored. Chief among these is the possible non-state armed groups' international responsibility. Although it is undisputed that some of these entities breach their international law obligations, others seemingly engage with certain rules on the topic. This article addresses some legal consequences of such scenarios. Taking into account the principle of equality of belligerents in non-international armed conflicts, two issues are dealt with: i) the existence of "non-state" organs that could trigger the attribution of violations of international rules to non-state armed groups; ii) possible reparations owed by these non-state entities for their breaches during armed conflicts.

A. Introduction

In the last few years, non-state armed groups (NSAGs) have become an essential topic of analysis and discussion in order to better understand international humanitarian law (IHL) dynamics. Although certain commentators still consider contemporary public international law to be predominantly State-oriented,[1] it is undeniable that over the last three decades a variety of different NSAGs have played important roles within the international realm.[2] They have emerged to challenge and progressively change the State-centric system of international law, generating many discussions and complex debates – many of which are yet to

1 On the state-centrism of international law, J. Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors', in J. Petman & J. Klabbers (eds), *Nordic Cosmopolitanism. Essays in International Law for Martti Koskenniemi* (2003), 351, 354-357; B. K., Woodward, *Global Civil Society in International Lawmaking and Global Governance. Theory and Practice* (2010), 2; and H. Thirlway, *The Sources of International Law* (2014), 16-17.

2 E. Heffes, 'Generating Respect for International Humanitarian Law. The Establishment of Courts by Organized Non-State Armed Groups in Light of the Principle of Equality of Belligerents', in T. Gill (ed.), 18 *Yearbook of International Humanitarian Law* (2015), 181, 181.

be settled.[3] While their increasing importance is uncontroversial, their place and regulation in specific areas of international law, such as in human rights law[4] or with respect to their use of force,[5] remains unclear or insufficiently explored.[6]

In the IHL sphere, however, it seems to be undisputed that in the context of non-international armed conflicts (NIACs) they have equal obligations to those of States,[7] as recognized by Common Article 3 (CA3)[8] of the *Geneva Conventions* of 1949 (*GC*s)[9] and the 1977 *Additional Protocol II* (*AP II*)[10] to the *GC*s. These provisions are of particular relevance because they allow the identification of a direct relationship between IHL rules and the parties to

3 A. Clapham, 'Focusing on Armed Non-State Actors' in A. Clapham & P. Gaeta (eds), *The Oxford Handbook of International Law of Armed Conflict* (2015), 766, 769 [Clapham, Focusing on Armed Non-State Actors].

4 Different authors have recently challenged the role of NSAGs in the sphere of international human rights law. See, for instance, D. Murray, *Human Rights Obligations of Non-State Armed Groups* (2016); and K. Mastorodimos, *Armed Non-State Actors in International Humanitarian Law and Human Rights* (2016).

5 Among many others, see N. Tsagourias, 'Non-State Actors in International Peace and Security. Non-State Actors and the Use of Force', in J. d'Aspremont (ed.), *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011), 326; and K. Trapp, 'Can Non-State Actors Mount an Armed Attack?', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015), 679.

6 It shall be noted, however, that this paper will focus on IHL. Although the role of NSAGs with respect to international human rights law and the use of force have recently gained some momentum, they are beyond the scope of this article, and therefore will not be explored.

7 J. Pejić, 'The Protective Scope of Common Article 3: More Than Meets the Eye' 93 *International Review of the Red Cross* (2011) 881, 189, 197-198; L. Moir, *The Law of Internal Armed Conflict* (2002), 52-58; J. Somer, 'Jungle Justice. Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict', 89 *International Review of the Red Cross* (2007) 867, 655, 661; and A.-M. La Rosa & C. Wuerzner, 'Armed Groups, Sanctions and the Implementation of International Humanitarian Law', 90 *International Review of the Red Cross* (2008) 870, 327, 327-329.

8 Moir, *ibid.*, 30-88; Pejić, *ibid.*, 197-198.

9 *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

10 *Protocol Additional to the Geneva Conventions* of 12 August 1949, and relating to the *Protection of Victims of Non-International Armed Conflicts* (*Second Protocol*), 8 June 1977, 1125 UNTS 609.

NIACs, including non-state armed groups. This relationship is the same for all parties and it does not vary if the conflict is between States and groups or exclusively between the latter.

Interestingly, although with respect to IHL NSAGs might be on equal footing with States' armed forces, parties to the conflict are not equal, and possible consequences for their violations to their international obligations have been addressed differently. In this respect, all existing international courts and tribunals with jurisdiction over its violations only allow claims against States and individuals.[11] While some of them will be able to solve legal disputes between States, others focus their attention on the criminal responsibility of individuals. Thus, to put it in simple terms, although NSAGs are expected to comply with certain rules, their breach would not entail any legal consequence for the group. Every effective legal regime, however, implies that there must be certain consequences for the violation of the rules "[...] it seeks to promote."[12] In a world in which different non-state actors are constantly evolving at the national and international levels, these systems of individual and State responsibility imply that *a priori* NSAGs' international responsibility seems far from real. Considering that their actions are normally illegal from a State law perspective, their engagement with humanitarian rules is often dismissed or even rejected. Some commentators, indeed, insist that publicly dealing with these non-state entities could legitimize their goals and aims. As Cismas has correctly suggested with respect to their subjectivity, "legitimation may indeed take place; however, one needs to understand and emphasize that the resulting legitimation is that of the actor as rights-holder and duty bearer, not of its goals and conduct".[13]

By taking into account the principle of equality of belligerents for the creation of customary rules, this article attempts to show that, contrary to conventional thinking that NSAGs are violent and disrespectful of any given legal regime, some groups are not only aware of international law,[14] but even sometimes adopt measures embracing their possible international responsibility. Addressing these as positive steps may serve as a powerful incentive to change

11 Clapham, *supra* note 3, 771; L. Condorelli & C. Kress, 'The Rules of Attribution: General Considerations' in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), 221, 233-234.

12 A. Bellal, 'Establishing the Direct Responsibility of Non-State Armed Groups for Violations of International Norms: Issues of Attribution' in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non–State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (2015), 304.

13 I. Cismas, *Religious Actors and International Law* (2014), 75.

14 H. Jo, *Compliant Rebels. Rebel Groups and International Law in World Politics* (2015), 48.

behavior by both NSAGs and States. As Sivakumaran has recently explained, "[the] key point is that armed groups should have some sort of role in the creation, translation and enforcement of humanitarian norms in order to foster a sense of ownership and therefore improve levels of compliance."[15]

B. Some Preliminary Definitions: What is a Non-State Armed Group?

"Relatively little is known about [...] ['non-state armed groups'] [...]" in the international realm.[16] International law, neither defines what they are nor includes the notion of these entities as parties to armed conflicts. This can be explained by the reluctance of States to address the mere existence of NSAGs. Some specific treaty provisions, however, do refer to certain conditions that should be fulfilled by an entity in order to be considered as a non-state armed group. CA3 and *AP II* refer to non-state entities when defining their scope of application. While the former is addressed to "[...] each Party to the conflict [...]" of a non-international character, *AP II*, as expressed in its Article 1 (1) is intended to be applied only in NIACs that take place between the armed forces of a State and "[...] dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

Several organizations and international tribunals have attempted to tackle this issue in order to elucidate which groups are bound by IHL. Geneva Call, a non-governmental organization engaging with NSAGs to increase their respect of humanitarian rules, uses instead the term "armed non-state actors". It refers to "[...] organized armed entities that are primarily motivated by political goals, operate outside effective state control, and lack legal capacity to become

15 S. Sivakumaran, 'Implementing Humanitarian Norms Through Non-State Armed Groups', in H. Krieger (ed.) *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 125, 145-146 [Sivakumaran, Implementing Humanitarian Norms]. The notion of ownership is being used in this article to cover the capacity and willingness of NSAGs "[...] to set, and/or take responsibility for the respect of, norms intended to protect civilians as well as other humanitarian norms applicable in armed conflict". See in this sense Geneva Academy of International Humanitarian Law and Human Rights, *Rules of Engagement. Protecting Civilians through Dialogue with Armed Non-State Actors* (2011), 6, fn. 11.

16 S. Sivakumaran, *The Law of Non-International Armed Conflict* (2012), 3 [Sivakumaran, Law of NIAC].

party to relevant international treaties."[17] According to this organization, this includes "[...] armed groups, *de facto* governing authorities, national liberation movements, and non- or partially internationally recognized states."[18]

The International Committee of the Red Cross (ICRC), in its Interpretative Guidance on the notion of direct participation of hostilities under IHL, has explained that:

> "Organized armed groups belonging to a non-State party to an armed conflict include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a State's armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as armed forces."[19]

Certainly, it is clear that NIACs covered by CA3 imply the participation of at least one non-state armed group,[20] but the conditions set forth in that provision deserve further analysis. The ICTY has understood since its *Tadić* decision that these actors should have a minimum degree of organization.[21] The relevance of this element is also evidenced in decisions by the International

17 P. Bongard & J. Somer, 'Monitoring Armed Non-State Actor Compliance With Humanitarian Norms. A Look at International Mechanisms and the Geneva Call *Deed of Commitment*', 93 *International Review of the Red Cross* (2011) 883, 673, 674, fn 3.

18 *Ibid.*

19 ICRC, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), 31-32.

20 The ICTY has affirmed in this sense that there is a NIAC in the sense of CA3 "whenever there is […] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State". *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, IT-94-1-T, T.Ch. II, 10 August 1995, para. 70.

21 *Ibid.* See also *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Opinion and Judgment, IT-94-1, 7 May 1997, 193-194, para. 562; *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Muliu*, Judgment, IT-03-66-T, 30 November 2005, 18-41, paras. 46-102; *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment, IT-04-82, 10 July 2008, 89-92, paras. 197-203; Moir, *supra* note 7, 34-52.

Criminal Tribunal for Rwanda and by the International Criminal Court.[22] A list of non-exhaustive factors that should be taken into account in that regard has been defined by the ICTY in the *Boškoski* decision: i) the existence of a command structure; ii) the military (operational) capacity of the armed group; iii) its logistical capacity; iv) the existence of an internal disciplinary system and the ability to implement IHL; and v) its ability to speak with one voice.[23] Of course, not all factors need to be fulfilled and they are not a definitive list, but they do provide useful practical guidance.[24]

The lack of a unified terminology has led to the use of many different terms to refer to non-state entities involved in NIACs: "armed groups", "non-state organized armed groups", "armed non-state actors", "armed opposition groups", etc. While sometimes that depends on the international rules under analysis, as may be the case of *AP II*, others are related to the specific features of NSAGs that need to be stressed. In any case, all of those terms seem to comprise entities that: i) are illegal under domestic law; ii) are not part of governmental armed forces; iii) are mainly created to use armed violence; and iv) unlike governments, they will most likely cease to exist after the end of an armed conflict, either because they triumph in their struggle, eliminating the need to fight, or because they are defeated and disbanded.[25] The last two elements stress the intrinsic relation between the notion of NIAC and the notion of NSAG, since the latter cannot exist without the former.[26] Murray, however, presents one decisive factor in

22 *Prosecutor v. Akayesu*, Judgment, ICTR-96-4-T, 2 September 1998, 155, para. 620; *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04–01/06–803-tEN, 29 January 2007, 79, para. 233.

23 *Boškoski and Tarčulovski*, *supra* note 21, 89-92, paras. 197-203. Most of them, however, were drafted before in *Limaj, supra* note 21, paras 46, 94-102.

24 Cf. *Boškoski and Tarčulovski, supra* note 21, para. 193.

25 E. Heffes, 'The Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law. Challenging the State-Centric System of International Law', 4 *Journal of International Humanitarian Legal Studies* (2013) 1, 81, 91 [Heffes, Responsibility of Armed Opposition Groups]. There, the author affirms that armed opposition groups no longer exist after the end of an armed conflict, "whether because they result victorious or because they are dissolved". See also M. Sassòli, 'Two Fascinating Questions. Are all Subjects of a Legal Order Bound by the Same Customary Law and can Armed Groups Exist in the Absence of Armed Conflict?', available at http://www.ejiltalk.org/book-discussion-daragh-murrays-human-rights-obligations-of-non-state-armed-groups-3/ (last visited 20 December 2017) [Sassòli, Fascinating Questions], where Sassòli also argues against the existence of NSAGs in the absence of armed conflicts.

26 On the link between the definition of NIACs and the elements that determine the existence of an NSAG, see M. Schmitt, 'The Status of Opposition Fighters in a Non-International Armed Conflict', 88 *International Law Studies. US Naval War College* (2012), 119.

determining their legal personality as duty bearer: the presence of a responsible command.[27] According to him, there must be "[...] an organisational structure capable of ensuring internal discipline, and thus capable of ensuring the group's fulfilment of any obligation arising under international law".[28]

Yet, Murray's position still leaves a margin of uncertainty. Indeed, it is possible to find a wide variety of entities in terms of size, command and control capabilities, *modi operandi*, goals, and so on, also fulfilling the criterion of responsible command. For instance, while some NSAGs have strong individual leaders, such as Joseph Kony in the Lord's Resistance Army (Uganda), Foday Sankoh in the Revolutionary United Front (RUF) in Sierra Leone, or John Garang in the Sudan People's Liberation Movement/Army (SPLM/A) in Sudan, others may be more dispersed and decentralized.[29]

C. The International Obligations of Non-State Armed Groups: Why are They Bound by IHL?

As a party to NIACs either regulated only by CA3, or also by *AP II*, the IHL obligations of NSAGs seem to be clear. Accepting that they can potentially be internationally responsible for the violation of these rules, however, raises the question as to why they are bound by them in the first place.[30] Addressing this issue will allow us to present a framework aimed at generating greater levels of compliance.[31]

27 Murray, *supra* note 4, 75-77.

28 *Ibid.*, 75.

29 Jo, *supra* note 14, 39.

30 E. Heffes, M. Kotlik & B. Frenkel, 'Addressing Armed Opposition Groups through Security Council Resolutions: A New Paradigm?', in F. Lachenmann, T. J. Röder & R. Wolfrum (eds), 18 *Max Planck Yearbook of United Nations Law* (2014), 32, 52-60; A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), 271-316; and Sivakumaran, *Law of NIAC, supra* note 16, 236-246.

31 Some issues related to the reasons why NSAGs are bound by IHL have been partially explored in Heffes, *supra* note 2, 184-188.

I. Contemporary Explanations of NSAGs' Obligation to Comply with IHL

When it comes to NSAGs, there is a general agreement regarding their obligation to comply with IHL and there is no significant distinction between their international duties under IHL and those of States.[32] The reasons why NSAGs are bound by IHL, however, lie beyond merely accepting the existence of their obligations. Different views have been proposed in this sense.[33] While some of them take into account their consent, others are based on their relationship with States.

Two traditional theories suggest that NSAGs are bound by IHL independently from their consent to these obligations. On the one hand, the argument of effective sovereignty, focuses on armed groups' territorial link to a State party to the *GC*s. It was pointed out in the Commentary to *GC* I that they are bound by the international obligations of previous administrations, in a similar way that successive governments are due to their claims to represent the country, or part of it.[34] On the other hand, the domestic legislative jurisdiction argument is the most commonly suggested and it is based on the State's capacity to legislate for all its nationals.[35] As explained in the Commentary to *GC* II, "[...] in most national legislations; by the fact of ratification, an international Convention becomes part of law and is therefore binding upon all the individuals of that country".[36]

These positions raise, at least *a priori*, some challenges that are difficult to address. With respect to the effective sovereignty over the territory argument, it derives NSAGs' rights and obligations exclusively from those already agreed upon by the State party to the conflict. Moreover, it is only applicable to the

32 La Rosa & Wuerzner, *supra* note 7, 327-329.

33 On the different theories, see the ICRC new commentary on CA3, para 507, available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#_Toc465169878 (last visited 21 December 2017).

34 J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1952), 51.

35 Moir, *supra* note 7, 53-54; A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocols on Non-International Armed Conflicts', 30 *International and Comparative Law Quarterly* (1981) 2, 416, 429.

36 J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1960), 34.

extent that the non-state armed group itself purports to represent the State, which is not always the case. Regarding the domestic legislative jurisdiction argument, it only focuses on the link between national legislation and those members of NSAGs, challenging the status of rebels not only under domestic law but also under international law *vis-à-vis* the government, third States and the international community.[37] Both arguments, in short, entail at least two practical problems for IHL implementation. Firstly, NSAGs that might be committed to observe humanitarian rules are unlikely to have any commitment to domestic national legislation.[38] In this sense, to what extent is it possible to attain their compliance with rules imposed by their "enemies"? And secondly, these theories do not explain certain situations, such as when NSAGs, while having effective control over a territory, do not claim to represent the State.[39] Certainly, these issues affect why NSAGs feel obliged to follow any given rule.

There are also theories that actually recognize the direct relation between IHL and armed groups, highlighting the importance of their expressions of willingness to follow international law. It has been suggested in this sense that NSAGs are bound to IHL by virtue of the customary status of its content,[40] which has been further explored by Somer who affirms that "[...] in order for insurgents to be bound by a customary rule, their practice would need to be taken into account."[41] The ICTY in the *Tadić* jurisdiction decision and the UN Commission of Enquiry's Report on Darfur have actually supported the view that NSAGs already participate in the formation of customary IHL.[42] Sassòli has affirmed in this sense that:

37 Cassese, *supra* note 35, 429-430.

38 Moir, *supra* note 7, 54; and Cassese, *supra* note 35, 429-430.

39 For further critiques, see J-M. Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law' in *Proceedings of the Bruges Colloquium: Relevance of International Humanitarian Law to Non-State Actors* (2002), 123-137; cf. J. d'Aspremont & J. De Hemptinne, *Droit international humanitaire* (2012), 98-99.

40 Somer, *supra* note 7, 661; A. Bellal, G. Giacca & S. Casey-Maslen, 'International Law and Armed Non-State Actors in Afghanistan', 93 *International Review of the Red Cross* (2011) 881, 47, 53-56.

41 Somer, *supra* note 7, 661-662; E. Heffes & M. Kotlik, 'Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry Into the Governing Legal Regime', 96 *International Review of the Red Cross* (2015) 895-896, 1195, for an analysis on special agreements concluded in NIACs as sources of IHL.

42 See *Prosecutor v. Dusko Tadić a/k/a "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, 51, paras 107-108; *Letter from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2005/60 , 31 January 2005, Annex.

> "In my view, customary IHL of non-international armed conflicts must already now be derived from both State and non-State armed actors' practice and opinio juris in such conflicts. […] [Customary] law is based on the behavior of the subjects of a rule, in the form of acts and omissions, or in the form of statements, mutual accusations and justifications for their own behavior. Non-State actors would logically be subject to customary law they contribute to creating."[43]

Although this still remains a minority view,[44] it is proposed that there is a good case to argue that NSAGs already participate in the formation of customary rules, which can be deduced by taking into account their public statements in the form of unilateral declarations, special agreements and codes of conduct. These sources serve the purpose of having NSAGs affirming their commitment to apply a set of international rules.[45] Only reviewing those expressions of willingness will make it possible to appreciate armed groups' practices and *opinio iuris*. In this sense, from a NSAG's perspective an opportunity to participate in law-making processes can serve as a powerful incentive to change behavior.[46]

Certainly, including NSAGs in the development of customary international rules will have to face different challenges, such as selecting armed groups[47] capable of doing it, monitoring and interpreting their actions to ascertain the existence of *consuetudo* and *opinio iuris*, and weighing it along with those of States and other armed groups, amongst many others. Furthermore, Ryngaert explains that if arguing in favor of NSAGs' participation in the norm-creation process,

> "[...] one should also be willing to accept the consequence that the content of the customary rules thus formed may not, as a matter of course, be a humanitarian's dream. Armed opposition groups [...] are not known for their respect of IHL. Indeed, quite the contrary

43 M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* (2010) 5, 21-22 [Sassòli, Taking Armed Groups Seriously].

44 Somer, *supra* note 7, 662; and Heffes & Kotlik, *supra* note 41, 1203.

45 O. Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups. Small Arms Survey* (2012).

46 Jo, *supra* note 14, 256.

47 For a proposal on NSAGs' criteria to be engaged, *Ibid*., 260-264.

> is true. Accordingly, including non-state actors in the process of customary law formation may lead to regression [...]."[48]

Indeed, there is evidence that several NSAGs do not actually respect international norms. Wood has argued in this sense that violence intentionally directed against civilians "[...] is a short-term strategy that helps insurgents to recoup lost human and material resources".[49] However, it is also possible to find that certain NSAGs are abiding by those rules. Jo has argued that

> "[rebels] with secessionist aims are one of the best candidates for compliant rebels. Groups that rely on international supporters that care about their human rights records also abide by humanitarian rules and refrain from civilian abuse. [...] [As] the M23 case illustrates, some rebel groups consciously care about international law and conduct diplomacy about their human rights records."[50]

Indeed, she proposes three hypotheses that are worth noting. Firstly, that NSAGs with political wings are more likely to comply with international norms. According to her, this would be even stronger if this branch had a firm control over the group's military section. Secondly, that NSAGs with secessionist aims are more likely to comply with international law. Since these non-state entities can establish social relations with civilians because of family or ethnic ties, the expectation is that groups with social relations are more likely to refrain from violence against civilians. Thirdly, Jo argues that NSAGs that rely on foreign sponsors with a human rights approach are more likely to comply with international law. Those non-state entities that open themselves to organizations such as the ICRC or Geneva Call, according to her, are more likely to make commitments to international law, and therefore positively modify their behaviors.[51]

48 C. Ryngaert, 'Non-state Actors in International Humanitarian Law', in J. d'Aspremont (ed.) *Participants in the International Legal System. Multiple Perspectives on Non-State Actors in International Law* (2011), 284, 289.

49 R. M. Wood, 'Understanding Strategic Motives for Violence Against Civilians During Civil Conflict', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 13, 15.

50 Jo, *supra* note 14, 144.

51 *Ibid*., 110-111.

There is actually some evidence indicating that when NSAGs have had a role in the drafting of rules, greater levels of compliance were achieved.[52] For instance, at the beginning of 2017 more than forty children left NSAGs operating in the Democratic Republic of Congo after engaging with Geneva Call on the ban of child soldiers.[53] Also, non-state armed groups' commitments can have an impact on other actors. Sivakumaran in this line has affirmed that "[...] [commitments] by one group may later be used as a model by other groups."[54]

Non-state armed groups' respectful actions might also have an impact on the governmental side. As Schneckener and Hofmann have explained with respect to Geneva Call:

> "[...] [NSAGs] decisions to abstain from using landmines have in the past facilitated the accession of States to the 1997 Ottawa Treaty, as social pressure on the State government built up once a local non-State armed actor had signed the Deed of Commitment. This happened in Sudan after the signature of the Sudan People's Liberation Movement/Army (SPLA/M) and in Iraq after the accession of the Kurdistan Democratic Party (KDP) and regional governments led by the Patriotic Union of Kurdistan (PUK)."[55]

As Martin Barber has affirmed elsewhere when referring to the SPLM/A – the military branch of the SPLM/M –, "[it] is clear from conversations with senior officials of the Government, that they would not have felt able to ratify the Treaty, if the SPLM/A had not already made a formal commitment to observe its provisions in the territory under its control."[56]

52 *Ibid.*, 256.

53 Geneva Call, *DR Congo: Child Soldiers Leave Armed Groups Following Geneva Call's Awareness-Raising Efforts*, available at https://genevacall.org/dr-congo-child-soldiers-leave-armed-actors-following-geneva-calls-awareness-raising-efforts/ (last visited 21 December 2017).

54 Sivakumaran, *Implementing Humanitarian Norms, supra* note 15, 131.

55 U. Schneckener & C. Hofmann, 'The Power of Persuasion. The Role of International Non-Governmental Organizations in Engaging Armed Groups', in H. Krieger *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 79, 102.

56 Anki Sjöberg, *Armed Non-State Actors and Landmine*. Vol. 1: *A Global Report Profiling NSAs and Their Use, Acquisition, Production, Transfer and Stockpiling of Landmines*, Geneva Call and the Program for the Study of International Organization(s), 2005, 1,

Geneva Call has had a similar impact in other armed conflicts. In Burundi, for instance, the fact that the CNDD-FDD had already committed to the Deed of Commitment banning anti-personnel mines

> "[...] facilitated the acceptance and implementation of the [Mine Ban] Treaty when the movement came to power in 2005. In Iraq, officials of the KDP and PUK, two signatory groups that became members of the national authorities after the fall of the Saddam Hussein's regime in 2003, encouraged the government to join the Mine Ban Treaty."[57]

To some extent, advancing on the behaviors of NSAGs requires an *ex post facto* analysis with respect to the specific instances of NSAGs' participation. Although it would exceed the scope of this paper to examine the full content of customary IHL, some basic aspects should be mentioned. Firstly, it is well established that the provisions of CA3 are considered basic humanitarian rules applicable in any armed conflict.[58] Therefore, it can be argued that the obligations contained therein cannot be in any way diminished by the practices of armed groups or States. This could be, for example, the outcome that the international community faces concerning the action of Daesh and Al Nusrah Front. In a similar sense, the SPLM's understanding of persons who may be targeted included individuals who were

> "[...] directly or indirectly cooperating with the autocratic regime in Khartoum in order to sustain and consolidate its rule and to undermine the objectives and efforts of the People's Revolution [...] [and individuals] who propagate or advocate ideas, ideologies or philosophies or organize societies and organizations inside the country or abroad, that tend to uphold or perpetuate the oppression

available at http://www.ruig-gian.org/research/outputs/outputb049.html?ID=76 (last visited 21 December 2017).

57 Geneva Call, *Engaging Armed Non-State Actors In a Landmine Ban. The Geneva Call Progress Report 2000-2007*, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/raport.pdf (last visited 21 December 2017).

58 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, ICJ Reports 1986, 14, 113-114, para. 218.

> of the people or their exploitation by the Khartoum regime or by any other system of similar nature."[59]

As it can be seen, this could be contrary to IHL standards, as set in CA3 (1), when it refers to "[...] [persons] taking no active part in the hostilities [...]" who cannot be the target of certain acts as listed therein.

Secondly, it will have to struggle with the most difficult barrier: the erosion of the idea of States as the only international law-maker entity.[60] Yet, one cannot ignore the value of NSAGs' public expressions of willingness in order to deal with IHL effectiveness issues. As Sivakumaran has claimed, "[only] by understanding what the parties think of the rules, why they comply with them, and why they do not, can the law be better tailored to meet the specificities of non-international armed conflicts".[61]

II. Generating Respect for IHL and the Principle of Equality of Belligerents

The principle of equality of belligerents affirms that all the parties to an armed conflict have the same rights and obligations, regardless of their cause.[62] It is implied in CA3, which directly addresses "each party" to a NIAC, and by Article 1 (1) of *AP II*. In the case of non-state armed groups, their obligation to comply with those provisions remains despite any domestic legislation criminalizing their use of force against the State.[63]

Based on this principle, it is proposed that not only should all parties to the conflict be bound by IHL to the same extent but also for the same legal

[59] SPLM/A, *Penal and Disciplinary Laws*, 4 July 1984, Section 29, § 1c Report on SPLM/A Practice, 1998, Chapter 1,2, available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cha_chapter1_rule1_sectionb (last visited 21 December 2017); J.-M. Hanckerts & L. Doswald Beck, *Customary International Humanitarian Law*, Vol. II Practice, Part 1 (2005), 126-127.

[60] Several very interesting and even ground-breaking answers to some of these issues are proposed in Sassòli, *Taking Armed Groups Seriously*, *supra* note 43, 10-14.

[61] Sivakumaran, *Law of NIAC, supra* note 16, 4.

[62] Cf. Somer, *supra* note 7, 663-664; and generally C. Greenwood, 'The Relationship Between ius ad bellum and ius in bello', 9 *International Law Studies* (1983) 4, 221.

[63] M. Sassòli, 'Ius Ad Bellum and Ius in Bello – The Separation between the Legality of the Use of Force and Humanitarian Rules to be Respected in Warfare: Crucial or Outdated?', in M. Schmitt & J. Pejić, *International law and Armed Conflict: Exploring the Faultlines* (2007), 241, 256 [Sassòli, Ius ad bellum].

reasons. This is because the contrary would entail the subordination of NSAGs' rights and obligations to those previously accepted by States and would affect their equal status. In this sense, IHL has greater possibilities to be respected if every party to a conflict has a certain level of ownership of its rules, and with regards to NSAGs if such rules are not merely imposed by the States fighting against them. That is precisely what occurs with the abovementioned effective sovereignty argument and the domestic legislative jurisdiction perspective. They seem to fail when addressing non-state armed groups' actions or expressions, denying them any significance whatsoever, and thereby ignoring the participation of these entities. By challenging the equality of belligerents, they may actually adversely affect IHL as an effective body of law.

The explanation that grants NSAGs a role in the process of creation of those rules that regulate their actions thus has an important edge in terms of equality of the parties to NIACs and NSAGs' ownership of humanitarian norms.[64] Indeed, it is better placed to solve IHL compliance issues, which often go back to different circumstances, such as the unwillingness to acknowledge that an armed conflict is taking place, the absence of incentives to comply with IHL obligations, or even the lack of appropriate structures or resources to comply.[65] Bangerter has explained that IHL compliance will be enhanced only "[...] if the reasons used by armed groups to justify respect or lack of it are understood and if the arguments in favor of respect take those reasons into account."[66] Acknowledging that NSAGs can have a role in the formation of the law applicable upon them is certainly an important step in this direction.[67]

In particular, considering that the value of their public expressions of willingness is a useful tool for understanding their views on IHL. In fact, non-state armed groups are keen on using unilateral declarations, special agreements and codes of conduct, and these have been encouraged by States, international organizations, the International Committee of the Red Cross (ICRC) and other non-governmental organizations.[68] As it will be seen, this is also the case when

64 Somer, *supra* note 7, 663-664.

65 ICRC 'Improving Compliance with International Humanitarian Law: ICRC Experts Seminars' (2003), 20-21, available at https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf (last visited 21 December 2017); cf. O. Bangerter, 'Reasons why Armed Groups Choose to Respect International Humanitarian Law or not', 93 *International Review of the Red Cross* (2011) 882, 353, 357.

66 Bangerter, *ibid.*, 353 and 383.

67 Heffes, Kotlik & Frenkel, 2015, *supra* note 30, 59.

68 Sassòli, *Taking Armed Groups Seriously, supra* note 43, 30.

dealing with their possible international responsibility. By publicly recognizing IHL violations, or by establishing formal mechanisms of reparation, NSAGs take an active role in the development and reaffirmation of the rules that could be applied when a breach is attributed.

In sum, the proposed theory tries to narrow the breach between theoretical explanations and real strategies to address IHL compliance. To that end, a broad interpretation of the principle of equality of belligerents takes into account NSAGs' contributions. Thus, this will serve for the purpose of ensuring the application of IHL equally and realistically.[69]

D. International Responsibility of Non-State Armed Groups: Why is it Important?

In general, the importance of holding non-state armed groups internationally responsible is related to different factors. Bellal, for instance, recognizes a moral perspective, "[...] as the group may be condoning, justifying and even inciting the individual to commit crimes."[70] Interestingly, she also claims that this can enable "[...] better implementation of international law, for instance by calling on the group to change its practice rather than simply punish the individual [...]".[71] Moffet focuses on a different aspect by affirming that "[...] [it] provides [for the victims] an important psychological function in appropriately directing blame at those who committed the atrocity against them and to relieve their guilt."[72] Zegveld also explains that

> "[...] [in] order to enforce international law applicable to armed opposition groups effectively, we should be able to involve the group itself as a collectivity. Indeed, the acts that are labelled as international crimes find their basis in the collectivity. [...] Therefore, the most challenging level of accountability is the accountability of armed opposition groups as such."[73]

69 *Ibid*., 13-26.

70 Bellal, *supra* note 12, 305.

71 *Ibid.*

72 L. Moffet, 'Beyond Attribution: Responsibility of Armed Non-State Actors for Reparations in Northern Ireland, Colombia and Uganda', in N. Gal-Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non–State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015), 323, 324-325.

73 L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (2002), 133.

When dealing with this topic, Sassòli has also proposed to "[...] enforce IHL directly and through international mechanisms against the armed group as a group."[74] By referring to Zegveld, he explained that international law must indeed be adapted to the current international realm, in which "[...] a variety of actors from multinational corporations to indigenous peoples, non-governmental organizations and armed groups play an increasing role."[75] Probably, the most important reason can be found in the gap created by the rules on international responsibility.[76] States and individuals, separately, can both be responsible for violating an international obligation.[77] On the one hand, individual criminal responsibility is applied over NSAGs' members, but only ensures that a specific set of violations is punished, those considered to amount to international crimes, e.g. war crimes and crimes against humanity.[78] On the other hand, *a priori*, States should not be held responsible for the actions of NSAGs acting beyond their control.

As Murray has pointed out, this "confirms the necessity of directly subjecting the armed groups themselves to the rule of international law, so that they may be held to account and a legal vacuum avoided".[79] This has already been affirmed by the British Secretary of State for Foreign Affairs in 1861 with respect to an unrecognized *de facto* government: "Her Majesty's Government hold it to be an undoubted principle of international law, that when the persons or the property of the subjects or citizens of a state are injured by a de facto government, the state so aggrieved has a right to claim from the de facto government redress and reparation".[80] The existence of NSAGs' international responsibility, therefore, shall be undertaken in the interests of both the affected individuals and the international community, and legal gaps should be avoided.

74 Sassòli, *Taking Armed Groups Seriously, supra* note 43, 9.
75 *Ibid,* 10; Zegveld, *supra* note 73, 224.
76 K. Schmalenbach, 'International Responsibility for Humanitarian Law Violations by Armed Groups', in H. Krieger (ed.), *Inducing Compliance with International Humanitarian Law. Lessons from the African Great Lakes Region* (2015), 470, 495-496.
77 M. Dixon, *Textbook on International Law*, 7th ed. (2007), 252-253 and 284.
78 Zegveld, *supra* note 73, 106.
79 Murray, *supra* note 4, 132.
80 *Ibid.*

I. Traditional Approaches to Non-State Armed Groups' International Responsibility

In the Articles on the Responsibility of States for International Wrongful Acts (ARSIWA),[81] the International Law Commission (ILC) decided to regulate the conduct of a certain type of NSAG: insurrectional movements that eventually become the new government of States. Article 10 affirms that the conduct of "a movement, insurrectional or other" which establishes a new State "in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law".[82] In order to determine the meaning of the phrase "movement, insurrectional or other", the ARSIWA commentaries assert that "[...] the threshold for the application of the laws of armed conflict contained in the *Additional Protocol to the Geneva Conventions* of 12 August 1949, and relating to the protection of victims of non–international armed conflicts (*Protocol II*) may be taken as a guide."[83]

Therefore, *AP II* must be analyzed in order to understand what kind of NSAG can be considered as an insurrectional movement. As mentioned above, this treaty refers to "dissident armed forces or other organized armed groups". Along this line, the commentary to the ARSIWA affirms that these dissident armed forces represent the essential components of an insurrectional movement.[84] As a consequence, it seems to be clear that Article 10 applies in the special case of the responsibility for the conduct of insurrectional movements in a NIAC within the scope of *AP II* – and therefore also of CA3. Interestingly, d'Aspremont recognizes that the *rationale* behind Article 10 is not only to ensure accountability, but also to prevent impunity for acts committed by non–state actors.[85] However, by using *AP II*'s definition as guidance, the commentary

81 *Articles on the Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission*, 2001, Vol. II 2, 26 [ARISWA].

82 ARSIWA, *supra* note 81, Art. 10. See also A. Clapham, *Brierly's Law of Nations*, 7th ed. (2012), 396 [Clapham, Law of Nations]; J. Crawford, *State Responsibility: The General Part* (2013), 170 [Crawford, State Responsibility]; and J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 554 [Crawford, Brownlie's Principles].

83 *Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries, Yearbook of the International Law Commission*, 2001, Vol. II 2, 31, 51 Art. 10, para 9. (hereinafter ARSIWA with Commentaries).

84 *Ibid.*

85 J. d'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents', 58 *International and Comparative Law Quarterly* (2009) 2, 427, 432 [d'Aspremont, Rebellion].

actually required a high threshold for the application of ARSIWA, since in contrast to CA3, the Protocol does not cover all NIACs.

In terms of the responsibility of these NSAGs, the ILC has also recalled that while it is not concerned with the responsibility of subjects of international law other than States

> "[a] further possibility is that the insurrectional movement may itself be held responsible for its own conduct under international law, for example for a breach of international humanitarian law committed by its forces."[86]

In any case, Article 10 of ARSIWA affirms that the responsibility of an insurrectional movement is recognized only when that group obtains power and replaces the government in the State's territory, becoming responsible as a State for those actions committed when it was a NSAG.[87] This position has also been recently reaffirmed by the ICRC in its latest Commentary to CA3:

> "The responsibility of armed groups for violations of common article 3 can also be envisaged if the armed group becomes the new government of a State or the government of a new State. In these circumstances, the conduct of the armed group will be considered as an act of that State under international law."[88]

Ago and Crawford explain the basis of this view by referring to the notion of "continuity" between the insurrectional movement and the State created by its actions.[89] Ago states in this sense that

86 ARSIWA with commentaries, *supra* note 83, 51.

87 H. Atlam, 'National Liberation Movements and International Responsibility', in M. Spinedi & B. Simma (eds), *United Nations Codification of State Responsibility* (1987), 35, 38 and 51–52; G. Cahin, 'The Responsibility of Other Entities: Armed Bands and Criminal Groups', in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010), 331, 248 and 253.

88 ICRC 'Commentary on Common Article 3 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (2016), para. 890, available at https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#863_B, (last visited 21 December 2017).

89 Crawford, *State Responsibility, supra* note 82, 174.

> "the affirmation of the responsibility of a newly-formed State for any wrongful acts committed by the organs of an insurrectional movement which preceded it would be justified by virtue of the continuity which would exist between the personality of the insurrectional movement and that of the State to which it has given birth. […] The attribution to the new State of the acts of organs of the insurrectional movement would therefore be only a normal application of the general rule providing for the attribution to any subject of international law of the conduct of its organs."[90]

Although the rule has been applied in certain arbitral decisions during the first half of the 20th century,[91] practices of States and NSAGs confirming this Article are rare,[92] if not non-existent. By failing to deal with real-world practice, and in particular with armed groups' actions or expressions, Article 10 may pay a very high cost in terms of effectiveness. In the end, as a rule that has never been applied by the entities included within its scope of application, its usefulness remains unclear.

[90] R. Ago, *Fourth Report on State Responsibility, Yearbook of the International Law Commission* (1972), Vol. II, 131-132, available at http://legal.un.org/ilc/documentation/english/a_cn4_264.pdf (last visited 21 December 2017).

[91] *Bolivar Railway Company*, Mixed Claims Commission Great Britain-Venezuela constituted under the protocols of 13 February and 7 May 1903, Opinion on Merits, 9 Reports of International Arbitral Awards, 445, 453; *Puerto Cabello and Valencia Railway Company*, Mixed Claims Commission Great Britain-Venezuela constituted under the protocols of 13 February and 7 May 1903, Opinion on Merits, 9 Reports of International Arbitral Awards, 510, 513; *Dix*, Mixed Claims Commission United States-Venezuela constituted under the protocol of 17 February, 9 Reports of International Arbitral Awards, 119, 120; *Henry*, Mixed Claims Commission United States-Venezuela constituted under the protocol of 17 February, 9 Reports of International Arbitral Awards, 125, 133; *French Company of Venezuelan Railroads*, Mixed Claims Commission France-Venezuela constituted under the protocols of 19 February 1902, Opinion, 31 July 1905, 10 Reports of International Arbitral Awards, 285, 354; Georges *Pinson v., United Mexican States*, Mixed Claims Commission France-Mexico, Decision, 24 April 1928, 5 Reports of International Arbitral Awards, 325, 353. See also S. I. Verhoeven, 'International Responsibility of Armed Opposition Groups. Lessons from State Responsibility for Actions of Armed Opposition Groups' in N. Gal–Or, C. Ryngaert & M. Noortmann (eds), *Responsibilities of the Non–State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015) 285, 287–288.

[92] d'Aspremont, Rebellion, *supra* note 85, 431–432.

II. Towards an Alternative Framework of Non-State Armed Groups' International Responsibility

Before accepting that NSAGs can be internationally responsible, the possible applicable rules to their behaviors should be clarified. As it was previously submitted, there is a good case to claim that armed groups already participate in the formation of customary rules, mainly with respect to international humanitarian law. It is submitted that the same argument could be proposed for certain rules on international responsibility, which can be deduced by looking at their actions and behaviors.

1. Rules of Attribution

The ARSIWA Commentary refers to "attribution" as the assessment of the circumstances in which "conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State".[93] For the purpose of this paper, however, "attribution" will be understood as linking an internationally wrongful act to a non-state armed group.

In general, depending on the organization of the entity, the attribution of the breach of an international obligation may not be an easy exercise. As it was previously affirmed, there is a variety of non-state armed actors in the international arena with different features. In this line, Zegveld has affirmed that this issue is "closely related to the problem of definition of armed opposition groups and it is a central aspect of their accountability. Armed opposition groups are abstractions. Like states, they act only through human beings".[94] This notion is also supported by Sassòli, who affirms that "[NSAGs] have members and other persons exercising elements of their authority, who act in that capacity, and they have direction or control over some persons. A group is responsible for such persons."[95] Bílková, by referring to Zegveld, has also followed this line of thought by stating that "it is accepted that [Armed] [Opposition] [Groups] must bear responsibility for wrongful acts committed by their organs/members".[96]

93 ARSIWA with commentaries, *supra* note 83, 38.

94 Zegveld, *supra* note 73, 152.

95 Sassòli, *Taking Armed Groups Seriously, supra* note 43, 47.

96 V. Bílková, 'Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?', in N. Gal–Or, C. Ryngaert & M. Noortmann

The ICRC has been ambiguous in this respect. While in its Customary Study it pointed out that NSAGs "incur responsibility for acts committed by persons forming part of such groups",[97] in the recent Commentary to CA3 affirmed that "[international] law is unclear as to the responsibility of a non–State armed group, as an entity in itself, for acts committed by members of the group".[98]

Traditionally, when dealing with States' responsibility, the ILC presented the principles of attribution in Articles 4 to 11 of ARSIWA.[99] As a general rule, it established that "the conduct of any State organ shall be considered an act of that State under international law […] whatever position it holds in the organization of the State. […] An organ includes any person or entity which has that status in accordance with the internal law of the State".[100] In this line, exploring NSAGs' practices requires an analysis of the possible existence of "non-state" organs that could potentially be considered as such by international law. As long as armed groups actually take part in the implementation of international obligations, there may be possibilities to eventually identify signs of a nascent *consuetudo* and *opinio iuris*. To that end, a broader interpretation based on the principle of equality of belligerents could recognize the existence of these organs grounded on NSAGs' own regulations. In this sense, the United Kingdom Manual of the Law of Armed Conflict considers that the word "law" in Article 6 (2) (c) of *AP II* "could also be wide enough to cover 'laws' passed by an insurgent authority".[101] Also, the commentary to *AP II* affirms "the possible co-existence of two sorts

(eds), *Responsibilities of the Non–State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015), 261, 279.

97 J.–M. Henckaerts & L. Doswald–Beck, *Customary International Humanitarian Law* Volume I (2005), 530.

98 ICRC, *supra* note 88, para. 892.

99 Although a detailed analysis of the possible application of all the rules of attribution to NSAGs' behaviors could be useful, this article only focuses on some of them, excluding those that the authors believe are either inapplicable or too theoretical.

100 ARSIWA, *supra* note 81, Art. 4. See also for an analysis of this rule Dixon, *supra* note 77, 248; C. Ahlborn, 'Rules Of International Organizations And Responsibility', SHARES Research Paper 02 2011/02, 37, available at http://www.sharesproject.nl/wp-content/uploads/2012/04/SHARES-RP-02-final.pdf (last visited 21 December 2017); D. Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority', in J. Crawford, A. Pellet & S. Olleson, *The Law of International Responsibility* (2010), 237, 239; Crawford, *Brownlie's Principles, supra* note 82, 117–118; and Crawford, *State Responsibility, supra* note 82, 543.

101 UK Ministry of Defence, 'The Joint Service Manual of the Law of Armed Conflict' (2004), 404, fn 94, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf (last visited 21 December 2017).

of national legislation, namely, that of the State and that of the insurgents".[102] Sivakumaran advances on a similar point by affirming that "reference to law in this context should not be limited to state law".[103]

This proposition could be validated by real-world examples and practice of armed groups. For instance, the *Mouvement de Libération du Congo* includes within its Statute four "organs": the President, the Political–Military Liberation Council, the General Secretariat and a military wing called "Liberation Army of Congo".[104] Articles 12 to 16 determine the internal organization of each organ. Article 16, in fact, establishes that the military branch is composed of an "Army Commander", or *Chief de Etat Major*, and other individuals who are in charge of different areas, such as personnel, intelligence, operations, logistics and civil and political affairs. According to the same provision, "all are appointed and removed by the Commander in Chief of the [Liberation Army of Congo] after favorable opinion of the politico-military council".[105] Furthermore, the Code of Conduct of the Islamic Emirate of Afghanistan has an entire chapter on its organizational structure. Article 34 points out that "[the] persons responsible in the provinces are obliged to create a commission at the provincial level comprised of qualified members. […] The provincial commission, along with each district chief and with the agreement of the person responsible in the province, should organize such commissions at the district level".[106] Article 40 also deals with the internal organization of the group, determining that

> "[it] is compulsory for the Mujahids to obey their [military] squad leader; for the squad leader to obey their district leader; for the district leader to obey the provincial leader; for the provincial leader to obey the organizing director and for the organizing director to

102 Y. Sandoz, C. Swinarski & B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987), 1339.

103 Sivakumaran, *Law of NIAC, supra* note 16, 306.

104 Mouvement de Libération du Congo, 'Statuts du Mouvement de Libération du Congo' (Statute of the Liberation Movement of Congo) (1999), Art. 11, available at http://theirwords.org/media/transfer/doc/cd_mlc_1999_09-28d0edd1d32a444ad3205b5f82476140.pdf (last visited 21 December 2017).

105 *Ibid.*, Art. 16.

106 Islamic Emirate of Afghanistan, 'The Layha [Code of Conduct] For Mujahids' (2010), Art. 112, available at https://www.icrc.org/eng/assets/files/review/2011/irrc-881-munir-annex.pdf (last visited 21 December 2017).

> obey the Imam and Najib Imam as long as it is rightful under the Sharia.[107]"

In Sudan, the leadership of the Justice and Equality Movement sent a "Command order" to all field commanders of the NSAG recalling the prohibition of child recruitment.[108] In 2010, the same group even established a "Committee for Human Rights" for which it appointed three lawyers and one representative of humanitarian affairs.[109] Also in Sudan, the *Statute of the Sudan Revolutionary Front* includes a chapter on its internal leadership structure. Article 11 establishes that it shall be composed of: "i) the Leadership Council, ii) The Chief, iii) The Deputy Chiefs / Head of Sectors; iv) The Secretariats, v) The Head of the Joint Forces Committee, vi) The rest of the Council members".[110] The Constitution of the Sudan People's Liberation Movement of 2008 also describes its organizational structure as follows: a) National organs, which includes the National Convention as the supreme political organ of the movement; b) State organs; c) County organs; d) Payam organs; e) Boma organs.[111]

In Colombia the *Ejército de Liberación Nacional* (National Liberation Army) and the *Fuerzas Armadas Revolucionarias de Colombia–Ejército del Pueblo* (FARC-EP) established in their "Rules of Conduct with the Masses" that

> "14. Leaders and combatants should bear in mind that executions may only be carried out for very serious crimes committed by enemies of the people and with the express authorization in each

107 *Ibid.*, Art. 40.

108 Justice and Equality Movement, 'Prohibiting Recruitment' (2012), available at http://theirwords.org/media/transfer/doc/sd_jem_2012_48-6fc3e6e13af6a631f2afcd86e7fb22bd.pdf (last visited 21 December 2017).

109 Justice and Equality Movement, Presidential Decree No 71 'Establishment of A JEM Committee for Human Rights' (2010), available at http://theirwords.org/media/transfer/doc/sd_jem_2010_49-03a60fff4d0b8044d99e8b15eae55d2e.pdf (last visited 21 December 2017).

110 Sudan Revolutionary Front, 'Statute of the Sudan Revolutionary Front of 2012' (2012), Art. 11, available at http://theirwords.org/media/transfer/doc/ut_sd_srf_2012_27_eng-3a5dcae4a8d4ebe3cdc9fc28f5536d44.pdf (last visited 21 December 2017).

111 Sudan Peoples' Liberation Movement, 'The Constitution of the Sudan People's Liberation Movement SPLM' (2008), Art. 12, available at http://theirwords.org/media/transfer/doc/1_sd_splm_spla_2008_42-3d12760c83c083afb4b1d84fb0e2e5ee.pdf (last visited 21 December 2017).

> case of each organization's senior governing body […] The leadership must produce a written record setting out the evidence."[112]

Finally, through the signature of Geneva Call's Deeds of Commitment for the protection of children in armed conflicts and the prohibition of sexual violence and gender discrimination, several NSAGs have committed to issue "the necessary orders and directive to [their] political and military organs, commanders and fighters for the implementation and enforcement of [their] commitment […]".[113]

As it can be noticed, these provisions recognize the existence of some sort of non-state armed groups' organs. Moreover, they may also provide for the distinction between *de jure* and *de facto* organs,[114] which with respect to States is enshrined in Article 5 of ARSIWA. While the former would include those "officially" designated by the armed group to act on its behalf, *de facto* organs would be those not having any official position by merely acting under its control.[115] In addition to those mentioned above, another example of a *de jure* member can be found in Sri Lanka, where there was an official "legal chief" exercising functions in the courts of the Liberation Tigers of Tamil Eelam.[116] Furthermore, they could serve to determine if NSAGs' organs were acting *ultra vires*, and therefore attribute their behavior to the non-state entity.[117] For instance,

112 *Coordinadora Guerrillera Simón Bolívar, Reglas de Conducta con Masas* (Rules of Conduct with the Masses), Art. 14, available at http://theirwords.org/media/transfer/doc/ut_co_farc_ep_eln_2009_03_eng-d6eeb91f83eb1e9976140625c24ff870.pdf (last visited 21 December 2017).

113 Geneva Call, *Deed of Commitment for the Protection of Children from the Effects of Armed Conflict* (2010), Art. 8, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Protecting-children-in-armed-conflict.pdf (last visited 21 December 2017) ; and Geneva Call, *Deed of Commitment for the Prohibition of Sexual Violence in Situations of Armed Conflict and Towards the Elimination of Gender Discrimination* (2012), Art. 7, available at https://www.genevacall.org/wp-content/uploads/dlm_uploads/2013/12/DoC-Prohibiting-sexual-violence-and-gender-discrimination.pdf (last visited 21 December 2017).

114 See in this sense Ahlborn, *supra* note 100, 39; Momtaz *supra* note 100, 243; Crawford, *State Responsibility, supra* note 82, 124; and Crawford, Brownlie's Principles, *supra* note 82, 545.

115 Bílková, *supra* note 96, 279.

116 C. Kamalendran 'The Inside Story of "Eelam Courts"', The Sunday Times Sri Lanka (2 December 2008), available at http://www.sundaytimes.lk/021208/news/courts.html (last visited 21 December 2017).

117 *Ultra vires* acts are considered under Article 7 in ARSIWA. See also Clapham, *Law of Nations, supra* note 82, 394; Dixon, *supra* note 77, 248; Ahlborn, *supra* note 100, 40,

the Special Rapporteur on Human Rights in Sudan stated in his report that the non-state armed group "bears responsibility for the violations and atrocities committed in 1995 by local commanders from its own ranks, although it has not been proved that they committed these actions on order from the senior leadership, nor is it known whether they have been or will be pardoned by superiors".[118] Interestingly, Bílková addresses this possibility, but correctly points out its difficulties since the line between those acts carried out under non-state armed groups' control and those in their members' private capacity does not seem to be clear.[119] Based on the abovementioned scenarios, however, there is nothing to prevent NSAGs' members to act *ultra vires*.

Although it has been recognized that the existence of an institutional link between individuals and the NSAGs may run into practical difficulties,[120] these examples indicate an organizational structure of the abovementioned NSAGs that resembles that of States. In this sense, they can serve as a promising road of action, proving a nascent *consuetudo* and *opinio iuris* by armed groups to the extent that they comply with the requirements of giving a legal basis for the existence of their organs. In the end, this could serve to attribute their members' acts to the armed groups.

2. Rules on Reparations

Generally, reparations in the international arena can take the form of restitution, compensation, satisfaction and guarantees of non-repetition.[121]

42; Condorelli & Kress, *supra* note 11, 230; O. de Frouville, 'Attribution of Conduct to the State: Private Individuals', in J. Crawford, A. Pellet & S. Olleson (eds), *The Law of International Responsibility* (2010) 257, 263; Crawford, *State Responsibility, supra* note 82, 136; and Crawford, *Brownlie's Principles, supra* note 82, 549.

118 Special Rapporteur of the Commission on Human Rights, *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives. Situation of Human Rights in the Sudan*, UN Doc. A/50/569, 16 October 1995, 73.

119 Bílková, *supra* note 96, 280.

120 Schmalenbach, *supra* note 76, 499-500.

121 ARSIWA, Articles 30, 34, 35, 36 and 37. See also C. Tams, 'Law-Making in Complex Process', in C. Chinkin & F. Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (2015), 287, 291; Dixon *supra* note 77, 253; Ahlborn *supra* note 100, 48; R. Higgins 'Overview of Part Two of the Articles on State Responsibility', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010), 537, 537–544; Brigitte Stern 'The Obligation to Make Reparation', in J. Crawford, A. Pellet and S. Olleson (eds), *The Law of International Responsibility* (2010), 563, 565; Crawford, *State Responsibility, supra* note 82, 459–462; and Crawford, *Brownlie's Principles, supra* note 82, 567.

Restitution requests "to re-establish the situation which existed before the wrongful act was committed"[122], and in the context of a NIAC, may imply "such conduct as the release of persons wrongly detained or the return of property wrongly seized".[123] Compensation relates to the "damage caused thereby, insofar as such damage is not made good by restitution" and includes "any financially assessable damage including loss of profits insofar as it is established".[124] Satisfaction implies, among others,[125] measures such as "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality".[126] In this vein, "[satisfaction], […] is the remedy for those injuries, not financially assessable, which amount to an affront […] These injuries are frequently of a symbolic character, arising from the very fact of the breach of the obligation, irrespective of its material consequences for the State concerned."[127] Finally, guarantees of non-repetition[128] involve assurances aiming to "the restoration of confidence in a continuing relationship, although they involve much more flexibility than cessation and are not required in all cases".[129] Instead, these are "being future-looking and concerned with other potential breaches. They focus on prevention rather than reparation".[130]

Non-state armed groups may not have the capacity to actually comply with all of these measures. In the aftermath of a NIAC, for example, the group may not even exist anymore,[131] either because they result victorious, they are dissolved or simply because they become another type of non-state entity.[132] In addition, these groups may not have any resources, or "they may have hidden such assets in off–shore accounts or laundered their resources through legitimate business making it difficult to trace".[133] Still, Daboné explains that restitutions or

122 ARSIWA, *supra* note 81, Art. 35.
123 ARSIWA with Commentaries, *supra* note 83, 96.
124 ARSIWA, *supra* note 81, Art. 36. See also, Case Concerning the Factory Chorzów, PCIJ Series A, No. 17 (1928), 27, 47; *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, paras. 80, 152.
125 ARSIWA with Commentaries, *supra* note 83, 105-106.
126 ARSIWA, *supra* note 81, Art. 37.
127 ARSIWA with Commentaries, *supra* note 83, 106.
128 ARSIWA, *supra* note 81, Art. 30.
129 ARSIWA with Commentaries, *supra* note 83, 89. See also, *LaGrand (Germany v. United States of America)*, Judgement, ICJ Reports 2001, para. 123.
130 ARSIWA with Commentaries, *supra* note 83, 90.
131 Heffes, *Responsibility of Armed Opposition Groups, supra* note 25, 91.
132 Sassòli, *Fascinating Questions, supra* note 25.
133 Moffet, *supra* note 72, 334; Clapham, *supra* note 3, 768.

compensations could come from the resources of the former leaders of the group, or States and individuals who were enriched by the actions of that group.[134]

The possibility of non-state armed groups giving reparations, however, has been recognized both historically and recently. Historically, Ago gives three examples of State practice where NSAGs were requested to provide compensation for the damages caused by them. These cases are the American Civil War (1861–1865), the Spanish Civil War (1936–1939) and an insurrectional movement in Mexico in 1914.[135] A recent example can also be found in the 2006 UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law that have been adopted by the General Assembly.[136] Although these are non-legally binding, Principle 15 affirms that where "a person, a legal person, or *other entity* is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the state if the state has already provided reparation to the victim" (emphasis added).[137] Despite not including a provision on how the breach could be attributed, according to this principle NSAGs could be held internationally responsible, with the following duty to provide reparation for their unlawful conduct.

Similar to the abovementioned analysis on attribution, assessing rules on reparations by non-state armed groups requires addressing their actual practice. Certain agreements concluded in the context of NIACs have included an obligation to make reparations as a consequence of international law violations. In 1998, the Government of Philippines and the National Democratic Front of the Philippines concluded an agreement entitled "Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Republic of the Philippines and the NDFP", which establishes in its Part III (Respect for Human Rights) that

> "[t]his Agreement seeks to confront, remedy and prevent the most serious human rights violations in terms of civil and political rights, as well as to uphold, protect and promote the full scope of human

134 Z. Daboné, *Le droit international relatif aux groupes armés non étatiques* (2012), 149.

135 Ago, *supra* note 90, 151-152.

136 UN General Assembly, *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc. A/RES/60/147, 21 March 2006.

137 *Ibid.*, Principle 15.

> rights and fundamental freedoms, including […] [t]he right of the victims and their families to seek justice for violations of human rights, including adequate compensation or indemnification, restitution and rehabilitation, and effective sanctions and guarantees against repetition and impunity."[138]

Furthermore, in the *Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord's Resistance Army* of 2007 it is affirmed that "[t]he Parties agree that collective as well as individual reparations should be made to victims through mechanisms to be adopted by the Parties upon further consultation".[139] Another example can be found in the 2006 *Darfur Peace Agreement between the Government of Sudan, the Sudan Liberation Movement and the Justice and Equality Movement*. Article 194 points out that "[displaced] persons have the right to restitution of their property, whether they choose to return to their places of origin or not, or to be compensated adequately for the loss of their property, in accordance with international principles".[140] Article 199 also addresses this issue, and establishes that "war-affected persons in Darfur have an inalienable right to have their grievance addressed in a comprehensive manner and to receive compensation. Restitution and compensation for damages and losses shall necessitate massive mobilization of resources".[141] Although these sources represent interesting steps, there is limited information regarding the execution of the reparation clauses.[142]

Additionally, when non-state armed groups do not have the monetary resources to provide compensation to the victims, symbolic forms of reparation as part of specific measures of satisfaction should not be dismissed. These could be carried out through public apologies or information aiming to find the

138 *Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Republic of the Philippines and the National Democratic Front of the Philippines*, Part III Art 2 (3), available at http://www.incore.ulst.ac.uk/services/cds/agreements/pdf/phil8.pdf (last visited 21 December 2017). On the legal value of special agreements, see generally Heffes & Kotlik, *supra* note 41, 1195-1224.

139 *Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement*, Art. 9(2), available at http://theirwords.org/media/transfer/doc/ug_lra_2007_08-1093f38010fc545b1610f537e0c82394.pdf (last visited 21 December 2017).

140 *Darfur Peace Agreement*, 5 May 2006, Art. 194, available at http://peacemaker.un.org/sites/peacemaker.un.org/files/SD_050505_DarfurPeaceAgreement.pdf (last visited 21 December 2017).

141 *Ibid*., Article 199.

142 Schmalenbach, *supra* note 76, 502.

truth.[143] Also, as Mampilly has suggested, "[d]ue to their low cost, symbolic processes allow insurgencies to economize their use of material resources in their asymmetric battles with incumbents".[144] Moreover, armed groups could carry out guarantees of non-repetition through the passing or modification of internal laws to ensure and respect humanitarian rules.[145]

Interestingly, this has been included by the ICRC in its Customary Study when it referred to a public apology by the *Ejército de Liberación Nacional* (National Liberation Army) in Colombia. In Rule 150 it affirms that "[i]t is also significant that in 2001 a provincial arm of the ELN in Colombia publicly apologized for the death of three children resulting from an armed attack and the destruction of civilian houses during 'an action of war' and expressed its willingness to collaborate in the recuperation of remaining objects".[146] Since this was done while the NIAC was taking place, the abovementioned difficulty of non-state armed groups' disappearance in the aftermath of the hostilities would not be present.[147]

Reparations are an essential element in remedying breaches of international law. Taking NSAGs' practice into account can help to solve both theoretical and practical problems, mostly regarding the lack of formal rules.

143 R. Dudai, 'Closing the Gap: Symbolic Reparations and Armed Groups' (2011), 93 *International Review of the Red Cross* 783, 808. For instance, in the agreement between the government of Colombia and the FARC it was recognized that to "compensate the victims is at the center of the agreement National Government – FARC-EP", including two points on the victims' human rights and the possibility of obtaining the truth. See General Agreement for the Termination of the Conflict and the Construction of a Stable and Lasting Peace, 26 August 2012, Point 5, available in Spanish at https://colombiareports.com/agreement-colombia-government-and-rebel-group-farc/ (last visited 21 December 2017). Furthermore, in the context of the al-Mahdi case before the ICC, the accused publicly apologized to Mali and "to mankind for destroying religious monuments in the ancient city of Timbuktu". He affirmed that "[all] the charges brought against [him] are accurate and correct. I am really sorry, and I regret all the damage that my actions have caused", available at https://www.theguardian.com/world/2016/aug/22/islamic-extremist-pleads-guilty-at-icc-to-timbuktu-cultural-destruction (last visited 12 December 2017).

144 Z. Mampilly, 'Performing the Nation-State: Rebel Governance and Symbolic Processes', in A. Arjona, N. Kasfir & Z. Mampilly (eds), *Rebel Governance in Civil War* (2015), 74, 82.

145 Moffet, *supra* note 72, 335; Zegveld, *supra* note 73, 222.

146 Henckaerts & Doswald–Beck, *supra* note 97, 550.

147 For an analysis on the temporal scope of application of IHL in NIACs, see M. Milanovic, 'The End of Application of International Humanitarian Law', 96 *International Review of the Red Cross* (2014) 893, 163, 178–181. See also Atlam, *supra* note 87, 50.

The abovementioned examples, although insufficient, show that this is neither fictitious nor impossible.

E. Concluding Remarks: Some Selected Challenges and Possible Solutions

It shall be noted that considering non-state armed groups' behaviors and *opinio iuris* for the creation of customary international law rules on responsibility raises some problematic scenarios. At least two can be identified. Firstly, although the examples abovementioned do not make a comprehensive case, the more evidence there is, the stronger the notion becomes that NSAGs could be internationally responsible. Certainly, we are aware of the fact that it could not be applied in practice to every group. As explained, their level of organization is a determining factor. The question is whether, in situations where armed groups are not sufficiently organized, they would be bound by some of the abovementioned rules, if any. Some non-state armed groups, for instance, do not have written rules, thus making it quite difficult to identify their "non-state" organs. This scenario seems to follow what Sassòli has called a "sliding scale of obligations". In his words, "[t]he better organized an armed group is and the more stable control over the territory it has" the more IHL rules would become applicable.[148] According to him, this "sliding scale of obligations" is the rationale behind the higher level of organization and control over territory required for *AP II* to be applicable.[149] As such, one could argue that a highly organized armed groups exercising long-term control over a territory and having developed State-like institutions would be bound by rules on international responsibility.

In order to address this difficulty and shed some light on the topic, it is submitted that if a non-state armed group does not reach this level of organization, an alternative approach could be implemented in which the group's chain of command linked to the disciplinary power over individuals "exercised on behalf of the group, indicates de facto membership of the group". In Schmalenbach's words, this can be compared to the position of a de facto organ within a State.[150] And in those cases where the position of the acting individuals remains dubious,

148 M. Sassòli, 'Introducing a Sliding–Scale of Obligations to Address Fundamental Inequality Between Armed Groups and States?', 93 *International Review of the Red Cross* (2011) 882, 426, 430 [Sassòli, Fundamental Inequality].

149 *Ibid*., 430-431.

150 Schmalenbach, *supra* note 76, 500.

> "the effective military command becomes the focus for the rules of attribution. If a military commander can be identified and organizationally linked to the armed group, the conduct of all individual combatants acting under the commander's military command and control are attributable to the group."[151]

As we have seen, there are a variety of armed groups acting in the international realm. This proposal is built upon the awareness that NSAGs differ in their features, going "from those that are highly centralized (with a strong hierarchy, effective chain of command, communication capabilities, etc.) to those that are decentralized (with semi-autonomous or splinter factions operating under an ill-defined leadership structure)".[152]

Regarding the second problematic scenario, non-state armed groups are not meant to exist outside the context of armed conflicts. As Sassòli has recently pointed out, "the requirements of organization that an entity must fulfil to qualify as an armed group […] do not make sense absent an armed conflict".[153] This scenario makes it extremely difficult to identify rules on NSAGs' responsibility applicable after the end of an armed conflict, specifically with respect to possible reparations. Although they could still be provided during hostilities, for instance, in the form of satisfaction and public apologies, when post–conflict situations are being dealt with, it is suggested to assess on a case–by–case basis the feasibility of having the former organs of a NSAG providing for reparatory measures. For instance, if an armed group is dissolved after the end of a conflict, its former leader could still provide a public apology to the victims. As already indicated, one NSAG's commitment can actually positively affect another group's engagement. For instance, the Three Main Rules of Discipline and the Eight Codes of Conduct of the Chinese People's Liberation Army under Mao Tse-Tung were adopted many years later by certain non-state armed groups, such as the National Resistance Army of Uganda and the RUF in Sierra Leone.[154] A public response from a former non-state armed group's leader,

151 *Ibid.*

152 ICRC, 'Increasing Respect for International Humanitarian Law in Non–International Armed Conflicts' (2008), 11, available at http://www.icrc.org/eng/resources/documents/publication/p0923.htm (last visited 21 December 2017).

153 Sassòli, *Fascinating Questions, supra* note 25.

154 *Prosecutor v. Sesay, Kallon and Gbao*, Judgment, SCSL-04-15-T, 2 March 2009, 232, para 705. See also Sivakumaran, *Implementing Humanitarian Norms, supra* note 15, 135.

as other positive actions by these entities, may have an impact on other groups' respect for the law.

It is important to highlight that the principle of equality of belligerents as the basis for the participation of NSAGs in the process of creation of those rules that regulate their actions could serve the purpose of creating a feeling of ownership of the norms. Nowadays, improving the clarity of the rules on a subject may entail higher levels of respect, since every involved party would be able to recognize its own obligations and act accordingly. As Sivakumaran has explained, "the norms have to be 'translated' into a language that is understood by fighters. They must be internalized both within the group and by individual fighters".[155] This will indeed have a direct impact on the level of compliance demonstrated by a NSAG.

Certainly, we should acknowledge that this paper did not address all the questions that could be raised by the prospect of holding NSAGs internationally responsible, or even by suggesting the inclusion of these non-state entities in law-making processes. In any case, the goal was (and has always been) the continuing study of their actions, especially in order to achieve enhanced IHL compliance by these groups.

[155] Sivakumaran, *Implementing Humanitarian Norms*, *supra* note 15, 125.

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Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders and Structures*

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Abstract

The notion of transparency manifests in three contexts in international investment law. It manifests first at the point of norm creation, regulating the public availability of information about the norms included in investment treaties and the capacity for interested stakeholders to view or participate in the creation of those norms. Transparency secondly features in the content of substantive investment obligations. In this incarnation, transparency norms empower foreign investors to bring proceedings against States for failures of transparency in State dealings with investors. Finally, transparency features as a procedural requirement for investment arbitration proceedings. Here, transparency refers to the extent to which individual dispute settlement proceedings are publicly accessible or documents produced in those proceedings made publicly available. The precise features of transparency in each of these contexts differ, as do the stakeholders which stand to benefit from transparency. Studying these three distinct manifestations of transparency offers insights into the development of international investment law and the sources, stakeholders and structures which shape it. This article considers each manifestation of transparency in turn (Section I), before considering what they reveal about the nature and structure of international investment law and arbitration (Section II).

A. Transparency's Three Manifestations

Transparency is a difficult term to define. As Bianchi notes in a recent anthology devoted to transparency in international law, "[n]ot even the one NGO that is expressly devoted to transparency issues provides a general definition of transparency".[1] Given this, transparency is typically treated as a broad concept which takes shape in a range of guises in different contexts.[2] For the purposes of this article, the notion of transparency is understood broadly to relate to the availability and accessibility of information about norms and institutions.[3] Transparency may be favoured for instrumental reasons or as "an intrinsic value in its own right".[4] Instrumentally, transparency may facilitate

1 A. Bianchi & A. Peters (eds), Transparency in International Law (2013), 7.

2 See, especially *ibid.*, 8.

3 See further ECOSOC, *Definition of Basic Concepts and Terminologies in Governance and Public Administration*, UN Doc E/C.16/2006/4, 5 January 2006, 10, para. 49.

4 L. E. Peterson, 'Amicus Curiae Interventions: The Tail That Wags the Transparency Dog' (2003), available at http://kluwerarbitrationblog.com/2010/04/27/amicus-curiae-interventions-the-tail-that-wags-the-transparency-dog/ (last visited 18 December 2017).

stakeholder participation and/or engagement with legal regimes, and support the legitimacy and accountability of actors or norms operating in them. As noted above, the term *transparency* has been given a range of meanings in discussions of international investment law. The below subsections examine three such manifestations of transparency to highlight how the concept has been operationalized in international investment law.[5]

I. Transparency of Norm-Making

State to State negotiations of treaties providing investment protection are a major source of substantive international investment norms.[6] Historically, investment treaties were negotiated in confidence and only made public following their signature or ratification. This reflects the fact that early investment treaties were oftentimes mere photo opportunities. As such, little time or energy was devoted to drafting or negotiation, and there was therefore little scope for early disclosure of the negotiated terms or in-depth public consultation.[7] This also reflects broader trends. As Bianchi notes, "[t]he world of international diplomacy and high politics has long been depicted as secretive and enigmatic, far removed from the public's eye".[8] In more recent times, however, investment treaties have come to be more widely perceived as important tools of economic policy, and States have therefore dedicated more time to their drafting and negotiation. States have nevertheless sought to defend continued secrecy of treaty negotiations on the grounds that greater transparency would undermine State bargaining positions and reduce the frankness of exchanges between negotiating parties.[9]

5 Of course, transparency may manifest in this and other regimes in ways other than those highlighted in this article. The article therefore does not aim to be comprehensive in its treatment of manifestations of transparency, instead aiming to highlight three key sites of transparency in international investment law as a means of examining the importance of that concept to this body of law.

6 Other sources include investment contracts between investors and States, and domestic legislation relating to foreign investment. This article focusses principally upon international investment law created through treaties. The observations in Sections 1(B) and (C) may hold relevance to these other sources of international investment law, particularly insofar as they are applied by international arbitral tribunals for example within the ICSID framework.

7 See further L. N. Poulsen & E. Aisbett, 'When the Claims Hit: Bilateral Investment Treaties and Bounded Rational Learning' 65 *World Politics* (2013) 273, 280, 296.

8 Bianchi & Peters, *supra* note 1, 3.

9 Australian Government Department of Foreign Affairs and Trade, 'Release of Confidentiality Letter' (2011), available at http://dfat.gov.au/trade/agreements/tpp/news/

States have come under increasing pressure to adopt more transparent and consultative approaches to the negotiation of trade and investment treaties.[10] These calls for greater transparency are linked to the increasing public interest in the social and economic effects of investment treaties, including their dispute settlement clauses. In October 2015, for example, over 150,000 protestors took to the streets of Germany to protest against the Trans-Pacific Investment Partnership then under negotiation between the United States and the European Union.[11] Like other contemporaneous protests, this protest featured calls from civil society for more transparent treaty making and the opportunity for public input into treaty negotiations.[12] Such protests constitute an element of a broader public "backlash" against international investment law and arbitration.[13] Recent civil society mobilisation against the investment treaty regime is arguably as much about the content of norms as it is about the processes used to make them.[14] Thus, "[t]he public backlash against trade deals points to a process that leaves many feeling excluded and to terms that are presented publicly for the first time

Pages/release-of-confidentiality-letter.aspx (last visited 18 December 2017).

10 See for example G. Ruscalla, 'Transparency in International Arbitration: Any (Concrete) Need to Codify the Standard?', 3 *Groningen Journal of International Law* (2015) 1, 2.

11 J. Delcker & C. Kroet, 'More than 150,000 Protest against EU-US Trade Deal', Politico (9 October 2015), available at http://www.politico.eu/article/germany-mobilizes-against-eu-u-s-trade-deal-merkel-ttip-ceta/ (last visited 18 December 2017). Some reports put the number of protestors as high as 250,000: 'Hundreds of Thousands Protest in Berlin against EU-U.S. Trade Deal', Reuters (10 October 2015), available at http://www.reuters.com/article/us-trade-germany-ttip-protests-idUSKCN0S40L720151010 (last visited 18 December 2017); C. Johnston, 'Berlin Anti-TTIP Trade Deal Protest Attracts Hundreds of Thousands', The Guardian (10 October 2015), available at http://www.theguardian.com/world/2015/oct/10/berlin-anti-ttip-trade-deal-rally-hundreds-thousands-protesters (last visited 18 December 2017).

12 F. Francioni, 'Foreign Investments, Sovereignty and the Public Good', 23 Yearbook of International Law (2013) 3, 4–5; UNCTAD, *World Investement Report 2015. Reforming International Investment Governance*, UNCTAD/WIR/2015, 2015, 176; K. Nowrot, 'How to Include Environmental Protection, Human Rights and Sustainability in International Investment Law?', 15 *The Journal of World Investment & Trade* (2014) 3-4, 612, 619; M. Langford, 'Cosmopolitan Competition: The Case of International Investment', in C. Bailliet & K. Aas (eds), Cosmopolitan and its Discontent (2011), 178, 183.

13 See, generally M. Waibel et al. (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (2010).

14 I. Cate, 'International Arbitration and the Ends of Appellate Review' 44 *New York University Journal of International Law and Politics* (2012) 4, 1109, 1111. See also L. Trakman, 'Resolving Investor-State Disputes under a Transpacific Partnership Agreement – What Lies Ahead?' *Transnational Dispute Management* (2012) 7, 17–8.

as final".[15] Proponents of greater transparency contend that civil society access to, and participation in, investment treaty negotiations might both improve the bargains reached by States and make the public more amenable to accepting them.[16]

States have been somewhat receptive to these calls for greater transparency. Responses have ranged from the publication of negotiating records or position papers[17] to the inclusion of civil society representatives in negotiations,[18] the holding of consultation processes,[19] and provision for greater parliamentary oversight of treaty negotiations or ratification.[20] Most of these approaches have generated some level of passive transparency: stakeholders can observe treaty negotiations, but not directly intervene in them. States have, however, also achieved some level of active transparency by engaging civil society in the development of model treaties. Model treaties reflect a State's conception of its *ideal* treaty bargain, and form a basis for State negotiations with prospective treaty partners.[21] Transparency during the development of model treaties does not raise the same strategic issues associated with transparent treaty negotiation. The drafting of model treaties is also not subject to particular time pressures, such that stakeholder engagement can be both iterative and comprehensive.

15 M. Geist, 'In Ottawa, TPP's Death Could Open the Door to Transparent Trade Dealing', The Globe and Mail (16 November 2016), available at https://beta.theglobeandmail.com/report-on-business/rob-commentary/in-ottawa-tpps-death-could-open-the-door-to-transparent-trade-dealing/article32860162/ (last visited 18 December 2017).

16 D. Barstow Magraw Jr. & N. Amerasinghe, 'Transparency and Public Participation in Investor-State Arbitration' 15 *ILSA Journal of International & Comparative Law* (2008) 2, 337, 351; C. Birchall, 'Introduction to 'Secrecy and Transparency': The Politics of Opacity and Openness', 28 *Theory Culture and Society* (2011) 7, 9.

17 European Commission, 'Opening the Windows: Commission Commits to Enhanced Transparency in TTIP', 25 November 2014, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1205&title=Opening-the-windows-Commission-commits-to-enhanced-transparency-in-TTIP (last visited 18 December 2017).

18 See, further L. Sadat, 'An American Vision for Global Justice: Taking the Rule of (International) Law Seriously', 4 *Washington University Global Studies Law Review* (2005) 2, 329, 334.

19 See, for example European Commission, 'Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' Commission Staff Working Document - Report SWD (2015).

20 Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, *Blind Agreement: Reforming Australia's Treaty-Making Process* (2015), 39–57.

21 See further N. Calamita, 'The Making of Europe's International Investment Policy: Uncertain First Steps' 39 *Legal Issues of Economic Integration* (2012) 3, 301.

Through reforms at a number of stages of the treaty-making process, States are thus taking important steps towards achieving greater transparency during the development of international investment treaty norms.

There are important parallels between these current debates about the transparency of investment treaty negotiations, and those which featured in the context of the first modern multilateral negotiation of an arbitration treaty. States party to the 1899 Hague Peace Conference – which ultimately led to the development of the Permanent Court of Arbitration – were confronted with very similar issues. At the start of the Conference, "a strenuous effort was made [...] to keep all reports of the debates secret from the public".[22] Such secrecy was, however, met with resistance, particularly from the press.[23] The delegates at the Conference were ultimately forced to acknowledge "the legitimate curiosity of the public attentive to our labors".[24] By the 1907 Conference, publicity was viewed with less suspicion: members of the public were permitted to witness the negotiations, and reports about the Conference were prepared for public release.[25] The shift from secrecy to transparency had an important, albeit unexpected, benefit: the public came to accept that the States were negotiating for, and guided by, their interests. As Baroness von Suttner observed at the time:

> "That which impresses me most is [the negotiating delegates'] respectful obedience to the desires of public opinion [...] The fact is that the delegates are only the hands on a watch; their movements are governed by a great invisible spring. This spring is public opinion [...] That is the master, and even the god, of the conference."[26]

Provision of greater transparency during negotiations ultimately supported the results achieved during the Conference. Hull goes so far as to observe that:

> "the conference itself would very probably have failed in its most important work, the promotion of arbitration, had it not been fortified at a critical time by the power of public opinion".[27]

22 W. I. Hull, *The Two Hague Conferences and Their Contributions to International Law* (1970), 21.
23 *Ibid.*
24 Resolution of the Conference of 20 May 1899, cited in *ibid.*, 22.
25 *Ibid.*
26 *Ibid.*, 24–25.
27 *Ibid.*, 23.

At a time of low community confidence in international investment law and arbitration, transparency has similarly come to play an increasingly central and important role during the creation of modern investment treaty norms.[28] Greater transparency during this phase holds the potential to improve substantive negotiated outcomes, whilst also generating greater public acceptance of the international investment regime and the treaties which constitute it.[29]

II. Transparency as a Substantive Investment Obligation

Transparency also features as one of the obligations imposed upon States by international investment treaties. Many treaties, for example, include a requirement that States make publicly available any laws and regulations which affect investment activities.[30] Arbitral tribunals have also interpreted the *fair and equitable treatment* obligation (FET) to require that States accord transparency to foreign investors. The dispute settlement procedures adopted in many investment treaties means that this latter obligation is directly enforceable by investors through investor-State dispute settlement proceedings.

Transparency was first identified as a constituent element of FET by a tribunal in 2000.[31] Like many other FET provisions, the provision interpreted by

28 See generally Australian Senate Standing Committee on Foreign Affairs, Defence and Trade References, *supra* note 20; N. Gal-Or, 'The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate' 32 *Suffolk Transnational Law Review* (2008) 2, 271; Waibel *et al*., *supra* note 13; Geist, *supra* note 15; S. Puig, 'Recasting ICSID's Legitimacy Debate: Towards a Goal-Based Empirical Agenda', 36 *Fordham International Law Journal* (2013) 2, 465.

29 F. Megret, 'Private Actor Litigation and the Evolving Legitimacy of Supranational Adjudication', in A. S. Dreyzin De Klor, L. M. Maduro & A. Vauchez (eds), Courts, *Social Change and Judicial Independence* (2012), 3.

30 See for example *Agreement Among the Government of Japan, the Government of the Republic of Korea and the Government of the People's Republic of China for the Promotion, Facilitation and Protection of Investment*, 13 May 2012, Japan, China and Republic of Korea, I-52807, Art 10.; *Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment*, 14 November 1991, United States of America and Argentina, (1992) 31 ILM 124, Art. II (7).

31 *Metalclad Corporation v. United Mexican States*, Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000 [Metalclad v. Mexico].

the tribunal in that case did not contain an express reference to transparency.[32] The tribunal referred, however, to the objectives of the investment treaty, which indicated the desire of the treaty parties to achieve "national treatment, most-favored-nation treatment and transparency".[33] In light of these objectives, the tribunal held that the FET provision imposed upon States an obligation to accord to investors a "transparent and predictable framework".[34] For the tribunal, this FET-based transparency norm required that:

> "[A]ll relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters. Once the authorities [...] become aware of any scope for misunderstanding or confusion in this connection, it is their duty to ensure that the correct position is promptly determined and clearly stated so that investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws."[35]

This interpretation of the FET provision was challenged in subsequent proceedings before a Canadian court.[36] Two of the States party to the treaty contended that "the Tribunal went beyond the transparency provisions contained in the [investment treaty] and created new transparency obligations".[37] They noted the linkage of the FET provision at issue to the minimum standard of treatment under customary international law (MST), contending that an obligation of

32 *North American Free Trade Agreement*, 17 December 1992, Canada, Mexico and the United States of America, 32 ILM 289, 605 (1993), Art. 1105. [NAFTA] ('Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.'). Compare, though *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95, Art. 10 (1), interpreted in *Electrabel SA v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No ARB/07/19, 30 November 2012, para. 7.73.

33 NAFTA, *supra* note 32, Art. 102(1).

34 *Metalclad Corporation v. United Mexican States*, *supra* note 31, para. 76.

35 *Ibid*.

36 *The United Mexican States v. Metalclad Corporation and Attorney General of Canada and la procureure generale du quebec on behalf of the Province of Quebec*, 2 May 2001, Supreme Court of British Columbia L002904.

37 *Ibid*., para. 66.

transparency had not yet crystallised as a component of that standard.[38] The court observed that "[n]o authority was cited or evidence introduced [in the award] to establish that transparency has become part of customary international law".[39] It nevertheless held that it was unnecessary to decide this point, instead holding that the tribunal's decision in respect of transparency was "a matter beyond the scope of the submission to arbitration".[40] The tribunal's finding of a breach of the FET provision for failures in transparency was set aside on this basis.

Despite this mixed result in 2000, some forty-six other tribunals have since held that some form of transparency is required as part of FET/MST. Figure 1, below, maps these decisions over time.[41]

38 *Ibid*., paras. 66–76.

39 *Ibid*., para. 68.

40 *Ibid*., paras. 72, 76.

41 Based upon a unique dataset coding publically available decisions by investment treaty tribunals as at November 2016, at least 49 tribunals were identified to have analysed whether transparency forms a part of FET/MST provisions. Figure 1 reflects the total number of decisions of tribunals endorsing such a requirement, as follows: *Metalclad v. Mexico*, *supra* note 31, para. 75–76, 88, 91, 99; *Emilio Agustín Maffezini v. The Kingdom of Spain*, Award, ICSID Case No ARB/97/7, 13 November 2000, para. 83; *Técnicas Medioambientales Tecmed, SA v. United Mexican States*, Award, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para. 153–155 [TECMED v. Mexico]; *Waste Management, Inc v. United Mexican States*, Final Award, ICSID Case No. ARB(AF)/00/3, 30 April 2004, para. 98 [Waste Management v. Mexico]; *Iurii Bogdanov, Agurdino-Invest Ltd and Agurdino-Chimia JSC v. Republic of Moldova*, Award, 22 September 2005 [Bogdanov/Agurdino v. Moldova]; *Saluka Investments BV. v. The Czech Republic*, Partial Award, 17 March 2006 (UNCITRAL), paras. 309, 407, 420–425 [Saluka v. Czechia]; *LG&E Energy Corp, LG&E Capital Corp and LG&E International Inc v. Argentine Republic*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006, paras. 128–131 [LG&E v. Argentina]; *Siemens AG v. Argentine Republic*, Award, ICSID CASE No. ARB/02/8, 6 February 2007, paras. 308–309 [Siemens v. Argentina]; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, Award, ICSID Case No. ARB/05/22, 24 July 2008 [Biwater v. Tanzania]; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan*, Award, ICSID Case No ARB/05/16, 29 July 2008, paras. 609, 617–618 [Rumeli/Telsim v. Kazakhstan]; *Plama Consortium Limited v. Republic of Bulgaria*, Award, ICSID Case No. ARB/03/24, 27 August 2008, para. 178 [Plama v. Bulgaria]; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, Award, ICSID Case No. ARB/05/15, 1 June 2009, para. 450 [Waguih/Clorinda v. Egypt]; *Glamis Gold, Ltd v. The United States of America*, Award, 8 June 2009 (UNCITRAL), para. 771, 789, 798–801, 808 [Glamis v. USA]; *Invesmart v. Czech Republic, Award*, 26 June 2009 (UNCITRAL) [Invesmart v. Czechia]; *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v. Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29, 27 August 2009, para. 178 [Bayindir v. Pakistan]; *Mohammad*

Ammar Al-Bahloul v. Tajikistan, Partial Award on Jurisdiction and Liability, Partial Award, CASE No. V (064/2008), 2 September 2009, paras. 183, 187–188 [Al-Bahloul v. Tajikstan]; EDF (Services) *Limited v. Romania*, Award, ICSID Case No. ARB/05/13, 8 October 2009, para 286; *Joseph Charles Lemire v. Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/05/13, 14 January 2010, 267; *SGS Société Générale de Surveillance SA v. Republic of Paraguay*, Decision on Jurisdiction, ICSID Case No ARB/07/29, 12 February 2010, para. 149; *Inmaris Perestroika Sailing Maritime Services GmbH and others v. Ukraine*, Excerpts of Award, ICSID Case No ARB/08/8, 1 March 2010, para. 265; *Ioannis Kardassopoulos and Ron Fuchs v. The Republic of Georgia*, Award, ICSID Case No ARB/05/18 and ARB/07/15, 3 March 2010, para. 441, 446; *Merrill & Ring Forestry LP v. The Government of Canada*, Award, 31 March 2010 (UNCITRAL), para. 189, 208, 231, 238–239 [Merrill & Ring v. Canada]; *Frontier Petroleum Services Ltd v. The Czech Republic*, Final Award, 12 November 2010 (UNCITRAL), para. 285–286 [Frontier v. Czechia]; *Total SA v. The Argentine Republic*, Decision on Liability, ICSID Case No ARB/04/1, 27 December 2010, para. 110; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, para. 304 [Paushok/CJSC v. Mongolia]; *Binder v. Czech Republic*, Final Award, 15 July 2011, para. 446 [Binder v. Czechia]; *Peter Franz Vocklinghaus v. Czech Republic*, Award, 19 September 2011, para.201; *Spyridon Roussalis v. Romania*, Award, ICSID Case No ARB/06/1, 7 December 2011, paras. 314, 498–505; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Final Award, 23 April 2012 (UNCITRAL), para. 221; *Marion Unglaube and Reinhard Unglaube v. Republic of Costa Rica*, Award, ICSID Case No. ARB/08/1 and ARB/09/20, 16 May 2012, para. 245; *Railroad Development Corporation v. Republic of Guatemala*, Award, ICSID Case No. ARB/07/23, 29 June 2012, para. 219; *Bosh International, Inc and B&P, LTD Foreign Investments Enterprise v. Ukraine, Award*, ICSID Case No ARB/08/11, 25 October 2012; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, Award, ICSID Case No ARB/09/2, 31 October 2012, paras. 420–421, 486–488; *Electrabel S.A. v. Hungary*, Decision on Jurisdiction, Applicable Law and Liability, ICSID Case No. ARB/07/19, 30 November 2012, paras. 7.73-7.79 [Lectrabel S.A. v. Hungary]; *ECE Projeckmanagement v. The Czech Republic*, Award, PCA Case No. 2010-5, 19 September 2013, paras. 4.752, 4.807-4.808 [ECE v. Czechia]; *Franck Charles Arif v. Republic of Moldova*, Award, ICSID Case No. ARB/11/23, 8 April 2013; *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania*, Final Award, ICSID Case No. ARB/05/20, 11 December 2013, paras. 517–520, 530–535, 864–871; *Renée Rose Levy de Levi v. Republic of Peru, Award*, ICSID Case No. ARB/10/17, 26 February 2014, paras. 327–328; *Perenco Ecuador Limited v. Republic of Ecuador*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/08/6, 12 September 2014, paras. 558–559; *Gold Reserve Inc v. Bolivarian Republic of Venezuela*, Award, ICSID Case No ARB(AF)/09/1, 22 September 2014, paras. 568–570, 609, 613; *Valeri Belokon v. The Kyrgyz Republic*, Award, 24 October 2014 para. 237; *Bernhard von Pezold v. Zimbabwe*, Award, ICSID Case No ARB/10/15, 28 July 2015, paras. 545–546; *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, Award, ICSID Case No ARB/11/33, 3 November 2015, paras. 386, 394, 399, 426–431 [Al Tamimi v. Oman]; *Oxus Gold v. Uzbekistan*, Award, 17 December 2015 (UNCITRAL), para. 811–815; *Crystallex v. Venezuela*, Award,

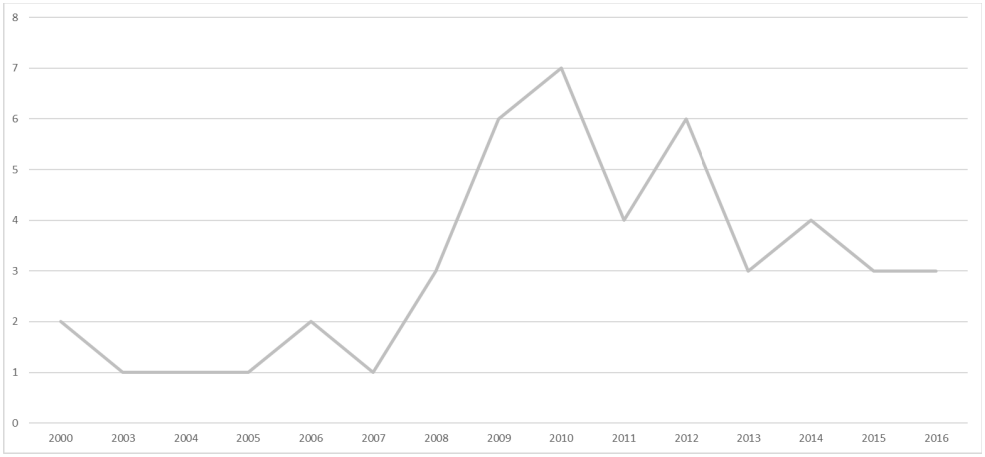

Figure 1: References to transparency as a component of treaty-based FET or MST (2000-2016)

In contrast to the first decision of 2000, later tribunals have not sought a similar textual or preambular hook to justify the interpretation of FET/MST as imposing a transparency obligation upon States. Instead, tribunals have justified recognising transparency as part of FET/MST through one of two approaches. Under the first approach, the obligation to accord transparency is identified by reference to previous arbitral decisions endorsing such requirement.[42] Under the

ICSID Case No ARB(AF)/11/2), 4 April 2016; *Murphy Exploration v. Ecuador*, Partial Final Award, PCA Case No. 2012-16, 6 May 2016, paras. 206–207; *Rusoro Mining v. Venezuela*, Award, ICSID Case No ARB(AF)/12/5, 22 August 2016, paras. 524. The graph excludes two decisions in which the tribunal decided that there was no such requirement or was neutral as to the existence of such a requirement: *Cargill, Incorporated v. United Mexican States*, Award, ICSID Case No ARB(AF)/05/2, 18 September 2009, para. 294 [Cargill v. Mexico]; *Mesa Power v. Canada*, Award, PCA Case No 2012-17, 24 March 2016, para. 502, 512, 595, 607–612 [Mesa v. Canada]. At least four separate or dissenting opinions have also analysed whether FET/MST incorporates a requirement of transparency: *SD Myers, Inc v. Government of Canada*, Separate Opinion (Schwartz), 12 November 2000, para. 255; *Eastern Sugar BV(Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Dissenting Opinion of Volterra, 12 April 2007, paras. 28–31; *Mamidoil Jetoil Greek Petroleum Products Societe SA v. Republic of Albania*, ICSID Case No. ARB/11/24, Dissenting Opinion of Hammond, 20 March 2015, paras. 75, 111–122, 1720173; *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/11/24, Dissenting Opinion of Morales Godoy, 26 February 2014, para. 111–113.

42 See, for example *Siemens v. Argentina*, *supra* note 41, para. 308–309; *Biwater v. Tanzania*, *supra* note 41; *Rumeli/Telsim v.Kazakhstan*, *supra* note 41, para. 609; *Waguih/Clorinda v. Egypt*, *supra* note 41, para. 450; *Invesmart v. Czechia*, *supra* note 41, para. 200; *Bayindir v. Pakistan*, *supra* note 41, para. 178; *Bogdanov/Agurdino v. Moldova*, *supra* note 41.

second approach, the transparency obligation is linked to other components of the FET obligation.[43] Using this approach, tribunals have variously linked transparency to a State's obligations to respect investor expectations, provide a stable legal framework, or avoid arbitrariness.[44]

These shifting bases of the transparency norm have resulted in a range of differing enunciations of its content. Most tribunals agree that host States are obliged to be transparent in their direct dealings with investors. This has included, for example, a requirement that States give notice to the investor of any meetings at which the State will assess permit applications filed by the investor.[45] The transparency requirement has also been interpreted to require transparency in State acts which affect the investor less directly. This includes, for example, a requirement that States ensure that "the legal framework for the investor's operations is readily apparent and that any decisions of the host state affecting the investor can be traced to that legal framework".[46] Broader and more active notions of transparency have also been endorsed by tribunals. In *Electrabel*, for example, the tribunal held that States must be "forthcoming with information about intended changes in policy and regulations that may significantly affect investments".[47]

Other tribunals, though, have sought to restrict the scope of transparency requirements. In *Sergei Paushok*, the tribunal held that the State had not

43 On the various components of the FET obligation see, generally J. R. Picherack, 'The Expanding Scope of the Fair and Equitable Treatment Standard: Have Recent Tribunals Gone Too Far?', 9 *Journal of World Investment & Trade* (2008) 4, 255; R. Dolzer, 'Fair and Equitable Treatment: Today's Contours', 12 *Santa Clara Journal of International Law* (2014) 1, 7; C. Schreuer, 'Fair and Equitable Treatment in Arbitral Practice', 6 *The Journal of World Investment & Trade* (2005) 3, 357.

44 See, for example *Saluka v. Czechia*, *supra* note 41, para. 309; *LG&E v. Argentina*, *supra* note 41, para. 128; *Plama v. Bulgaria*, *supra* note 41, para. 178; *Frontier. v. Czechia*, *supra* note 41, para. 285; *Glamis v. USA*, *supra* note 41, para. 798; *TECMED v. Mexico*, *supra* note 41, para. 155 (noting that '[t]he foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations'); *Binder v. Czechia*, *supra* note 41, para. 446 (transparency having the effect of 'enhancing legal certainty' and thus being 'hand in hand' with stability and predictability of the legal order).

45 See, for example *Al-Bahloul v. Tajikistan*, *supra* note 41, para. 188; *ECE v. Czechia*, *supra* note 41, 4.808.

46 *Frontier v. Czechia*, *supra* note 41, para. 285; *Metalclad v. Mexico*, *supra* note 31, para. 88.

47 *Electrabel S.A. v. Hungary*, *supra* note 32, 7.79.

breached the treaty despite having adopted a law "in less than one week" and with "no consultation [...] with the industry".[48] The tribunal observed that "[l]egislative assemblies in all countries regularly adopt legislation within a very short time and, sometimes, without debates".[49] States have also themselves sought to restrain broad interpretations of FET provisions by expressly linking those provisions to the MST. This has had important impacts on the scope of transparency obligations imposed by tribunals interpreting such provisions. Tribunals have consistently held that an MST-linked FET provision cannot be interpreted as imposing a general duty of transparency.[50] Instead, to breach an MST-linked FET provision, tribunals have held that State acts would need to display a "complete lack of transparency" or be "so unusual and non-transparent as to be manifestly arbitrary".[51] There have been, nevertheless, indications by some arbitral tribunals that the customary international law standard may evolve in the future to incorporate greater substantive transparency requirements.[52]

III. Procedural Transparency

The final manifestation of transparency in international investment law occurs during dispute settlement proceedings, which constitute a key site for the interpretation and application of investment treaty obligations.[53] Investment arbitration has long been criticised as a non-transparent dispute settlement process.[54] This was because, until recently, treaties and institutional rules were

48 *Paushok, CJSC v. Mongolia*, Award on Jurisdiction and Liability, *supra* note 41, para. 304.

49 *Ibid*.

50 See, especially *Cargill v. Mexico*, *supra* note 41, para. 294.

51 *Glamis v. USA*, *supra* note 41, para. 771; *Al Tamimi v. Oman*, *supra* note 41, paras. 386, 399; *Mesa v. Canada*, *supra* note 41, para. 502; *Waste Management, Inc v. Mexico*, *supra* note 41, para. 98.

52 *Merrill & Ring v. Canada*, *supra* note 41, para. 231 (observing that 'it would be difficult today to justify the appropriateness of a secretive regulative system').

53 I analyze this form of transparency, as well as recent developments related to it, in more detail in: E. Shirlow, 'Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration' 31 *ICSID Review* (2016) 3, 622.

54 See, for example R. Teitelbaum, 'A Look At the Public Interest in Investment Arbitration: Is It Unique? What Should We Do About It?', 5 *Berkeley International Law Publicist* (2010), 54; A. Mourre, 'Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?', 5 *The Law & Practice of International Courts and Tribunals* (2006) 2, 257, 257. See, to similar effect D. Euler, M. Gehring, & M. Scherer, *Transparency in International Investment Arbitration: A Guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 2;

largely silent as to the degree of transparency which should attach to the arbitral proceedings conducted pursuant to them. One empirical review, for example, indicates that approximately 88 percent of bilateral investment treaties concluded between 2010 and 2013 did not address the matter of procedural transparency.[55] Institutional rules also largely left the matter of procedural transparency to arbitral or party discretion.[56] The 1976 *United Nations Commission on International Trade Law* (UNCITRAL) *Arbitration Rules* (UNCITRAL Rules), for example, do not address the publication of information about disputes and prevent public access to awards and hearings other than with consent of both disputing parties.[57] *The Arbitration Rules of the International Centre for Settlement of Investment Disputes* (ICSID Rules) are slightly more permissive, providing for an online list containing basic details of proceedings registered by th International Centre for Settlement of Investment Disputes (ICSID) and the publication (from 1984) of excerpts of awards showing "the legal rules applied by the Tribunal".[58] The *ICSID Rules* also permit attendance of third parties at hearings with party

J. A. VanDuzer, 'Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation', 52 *McGill Law Journal* (2007) 4, 681, 684.

55 C. Nyegaard Mollestad, 'See No Evil? Procedural Transparency in International Investment Law and Dispute Settlement', 38.

56 D. Euler, 'UNCITRAL Working Group II Standards in Treaty Based Investor-State Arbitration: How Do They Relate to Existing International Investment Treaties?' 12 *Asper Review of International Business and Trade Law* (2012), 139, 143; J.A. Maupin, 'Transparency in International Investment Law: The Good, the Bad, and the Murky', *Transparency in International Law* (2013); C. Knahr & A. Reinisch, 'Transparency Versus Confidentiality in International Investment Arbitration – The Biwater Gauff Compromise', 6 *The Law and Practice of International Courts and Tribunals* (2007) 1, 97, 116; Nyegaard Mollestad, *supra* note 55, 36–38.

57 *UNCITRAL Arbitration Rules* (1976), GA Res. 31/98, UN Doc A/RES/31/98, 15 December 1976, Art. 25(4), 32(5) (the latter providing that an award cannot be disclosed by either the tribunal or the parties without the consent of both parties). UNCITRAL Arbitration Rules (2010), GA Res. 65/22, UN Doc A/RES/65/22, 6 December 2010, Art. 34(5). As Crook notes, however, enforcement proceedings under the New York Convention often mean that such awards do become public: J. R. Crook, 'Joint Study Panel on Transparency in International Commercial Arbitration', 15 *ILSA Journal of International & Comparative Law* (2008) 2, 361, 364.

58 *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 14 October 1965, 575 UNTS 159, Art. 48(5); ICSID Rules of Procedure for Arbitration Proceedings, Rules 6(2), 48(4); ICSID Administrative and Financial Regulations, Reg 22(1).

consent (up to 2006) or unless a party objects (from 2006).[59] In light of silence in treaties and institutional rules, parties to investment disputes held significant residual discretion to deal with many aspects of transparency by agreement. In the absence of agreement, tribunals were left to decide matters of transparency under the rubric of their general powers to regulate the proceedings.[60] This led to the adoption of unpredictable and at times inconsistent approaches.

This *status quo* has shifted in recent times, particularly due to the development of the *UNCITRAL Rules* (2013) and *Convention on Transparency in Investor-State Treaty-Based Arbitration* (2014).[61] The Rules apply to treatybased investor-State arbitrations and regulate a range of matters previously unaddressed in procedural rules and treaties.[62] They provide for the public release of

59 ICSID Rules of Procedure for Arbitration Proceedings, *supra* note 58, Rules 32(2), 37(2). For further information on the changes made to the ICSID Rules in 2006 see, generally Nyegaard Mollestad, *supra* note 55, 101; P.J. Martinez-Fraga, 'Juridical Convergence in International Dispute Resolution: Developing a Substantive Principle of Transparency and Transnational Evidence Gathering', 10 *Loyola of Los Angeles International and Comparative Law Review* (2012) 1, 37, 53; VanDuzer, *supra* note 54, 706, 717; R. Polanco Lazo, 'International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes', 104 *American Society of International Law* (2010), 591, 594; A. Kawharu, 'Public Participation and Transparency in International Investment Arbitration: Suez v. Argentina', 4 *New Zealand Year Book of International Law* (2007), 159, 166; E. de Brabandere, 'NGOs and the 'Public Interest': The Legality and Rationale of Amicus Curiae Interventions in International Economic and Investment Disputes' 12 *Chicago Journal of International Law* (2011), 1, 85.

60 See, for example, the approaches adopted in *United Parcel Service of America Inc v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, 17 October 2001; *Methanex Corporation v. United States of America*, Decision of the Tribunal on Petitions for Persons to Intervene as 'Amici Curiae', 15 January 2001; *Glamis v. USA*, *supra* note 41, Decision on Application and Submission by Quechan Indian Nation, 16 September 2005.

61 The Convention was designed to ensure the wider applicability of the Rules, providing a mechanism for their application to arbitral proceedings conducted under treaties already in force when the Rules came into effect on 1 April 2014. The Convention was adopted by the UN General Assembly on 10 December 2014 but at the time of writing is yet to enter into force: UNCITRAL, 'Status: United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (New York, 2014)', available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (last visited 21 December 2017) [UNCITRAL, Status: Convention on Transparency in Arbitration].

62 For a detailed analysis of the approaches taken in other rules, see F. Ortino, 'External Transparency of Investment Awards' (2008), 9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1159899 (last visited 21 December 2017).

information[63] and documents generated as part of investment treatyarbitrations as well as the capacity for non-disputing third parties to attend or even participate in the proceedings.[64]

The Rules and Convention establish what has been hailed as "the most wide-ranging set of transparency commitments seen thus far in international practice".[65] The Rules and Convention have already had some impacts upon State practice and arbitral procedures. The UNCITRAL website currently lists thirteen treaties concluded after entry into effect of the Rules "where the Rules on Transparency, or provisions modelled on the Rules on Transparency, are applicable".[66] Two proceedings have also, by disputing party consent, been conducted under the Rules.[67] States have furthermore signalled a willingness to go beyond the provisions on transparency contained in the Rules.[68] The

63 This is often referred to as a 'foundational' form of transparency, insofar as it precedes or informs all other forms of procedural transparency. A. Peters, 'The Transparency Turn of International Law', 1 *The Chinese Journal of Global Governance* (2015) 1, 3, 3; Nyegaard Mollestad, *supra* note 55, 79; J. Koepp & C. Sim, 'The Application of Transparency' in D. Euler and others (eds), *Transparency in International Investment Arbitration: A Guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration* (2015), 65. This was recognised during the drafting of the Transparency Rules: UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Third Session (Vienna, 4-8 October 2010)' (2010) UN Doc. A/CN.9/712, para. 32. [UNCITRAL, Report II, 2010].

64 UNCITRAL, Report II, 2010, *supra* note 63, para. 52; See, further Peterson, *supra* note 4; European Parliament Directorate-General for External Policies, 'The Investment Chapters of the EU's International Trade and Investment Agreements in a Comparative Perspective' (2015) EP/EXPO/B/INTA/2015/01 70; N. Jansen Calamita, 'Dispute Settlement Transparency in Europe's Evolving Investment Treaty Policy: Adopting the UNCITRAL Transparency Rules Approach', 15 *The Journal of World Investment & Trade* (2014) 3-4, 645, 649; O. Bennaim-Selvi, 'Third Parties in International Investment Arbitrations: A Trend in Motion', 6 *The Journal of World Investment & Trade* (2005) 5, 773.

65 Jansen Calamita, *supra* note 64, 667.

66 UNCITRAL, Status: Convention on Transparency in Arbitration, *supra* note 61.

67 *BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, ICSID Case No. ARB/15/46, Procedural Order No. 1, 13 May 2015 and Procedural Order No. 2, 17 September 2015; *Iberdrola, SA (España) and Iberdrola Energía, SAU (España) v. The Plurinational State of Bolivia*, PCA Case No. 2015-05, Procedural Order No. 1, 7 August 2015.

68 The Rules expressly anticipate the scope for States to modify the transparency framework of the Rules by treaty. Where a treaty provides for a different approach to transparency that approach will, under Article 1(7), apply: UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014, available at: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html (last visited

Trans-Pacific Partnership provides, for example, for the "prompt" disclosure of the notice of arbitration after receipt, rather than following the tribunal's constitution as provided in the Rules.[69] The European Union's Transatlantic Trade and Investment Partnership proposal similarly proposes enlarging the list of documents to be made public to incorporate documents relating to arbitrator challenges.[70]

Despite these advances, international investment arbitration is still frequently referred to as a secretive dispute resolution process. To some extent, this might be due to disputing party choices. An empirical study of the ICSID reforms to transparency, for example, suggests that parties involved in arbitrations initiated subsequent to the reforms were "more likely to conceal the outcome of arbitration than are the parties to disputes that took place prior to ICSID's intensive efforts to increase transparency".[71] The recent *UNCITRAL Rules* attempt to abrogate disputing parties' capacity to similarly exercise choice in overriding the transparency framework they establish.[72] It is too early to tell, however, whether these safeguards will impact upon the capacity of parties to file disputes under instruments to which the Transparency Rules do not apply.

1 May 2017) [UNCITRAL Rules on Transparency 2014]; See, further UNCITRAL, 'Report of the Working Group on Arbitration and Conciliation on the Work of Its Fifty-Fifth Session (Vienna, 3–7 October 2011)' (2011) A/CN.9/736, para. 31; A different approach applies for arbitrations conducted pursuant to the Convention, which excludes the operation of Article 1(7) and prevails to the extent of conflict with a treaty unless the treaty provides otherwise: UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Ninth Session (Vienna, 16–20 September 2013)' (2013) A/CN 9/794, paras 80, 101.

69 *Trans-Pacific Partnership*, Art 9.24(1), available at https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership (last visited 21 December 2017).

70 This matter was raised before the WG, but did not receive support for inclusion in the rules: UNCITRAL, 'Report of Working Group II (Arbitration and Conciliation) on the Work of Its Fifty-Fourth Session (New York, 7–11 February 2011)' (2011) UN Doc. A/CN.9/717 para. 153 [UNCITRAL, Report II, 2011]. See, for further information about the EU proposal I. Venzke, 'Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication', Amsterdam Law School Legal Studies Research Paper Series (2016), Paper No. 2016-11.

71 E. Hafner-Burton, Z. Steinert-Threlkeld & D. G. Victor, 'Predictability versus Flexibility: Secrecy in International Investment Arbitration', Laboratory on International Law and Regulation Working Papers, Paper No. 18 (2015), 34.

72 UNCITRAL Rules on Transparency 2014, *supra* note 68, Art. 1(3)(a) (providing that neither disputing party may 'derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty').

B. Transparency as a Reflection of the Sources, Stakeholders and Structures of Investment Arbitration

In addition to highlighting the three differing manifestations of transparency in international investment law, the above discussion facilitates an analysis of the sources, stakeholders and structures which shape the regime. This section examines the sources of transparency norms in international investment law, and the stakeholders which have contributed to their development. It then considers the ways in which each site of transparency influences and reinforces the presence of transparency at other sites, and the prospects for each type of transparency to influence the future development of other transparency norms.

I. Sources and Stakeholders

At each of the above three sites, requirements of transparency are imposed through a variety of sources. Transparency finds expression through treaties, unilateral State decisions, disputing party agreements, arbitral decisions, and institutional rules. These sources reflect the diversity of authors of international investment norms. Whereas States have led efforts to incorporate greater transparency at the point of norm negotiation, arbitral tribunals have been instrumental in identifying a role for transparency as part of substantive investment norms, and international institutions have performed a similarly important role in securing transparency of arbitral proceedings.

The formal authors of international investment norms have also acted in conjunction with or at the behest of other, more external, stakeholders. Advances in transparency have been prompted by a diversity of stakeholders. The consultation process run by the European Union in relation to the Trans-Pacific Investment Partnership provides a good illustration of the range of stakeholders currently engaging with international investment law. That process generated some 150,000 responses, which were provided *inter alia* by trade associations, trade unions, non-governmental organisations, think tanks, consultancy firms, government institutions, academics, and law firms.[73] In other areas, public engagement as a result of increased transparency has been less numerically overwhelming. ICSID's experience of webcasting, for example, indicates that the public may have so far only exhibited modest interest in attending or viewing

[73] European Commission, *supra* note 19, 10.

webcast hearings.[74] In 2010, for example, ICSID reported that the webcast *Pac Rim*[75] proceedings generated "150 hits during the live webcast".[76]

As transparency at each site has been a relatively recent development, it remains to be seen which outputs will be used, by whom and for what purpose. In particular, it is as yet unclear whether greater transparency at the sites of norm creation by States, or application and interpretation by investment tribunals, will rely upon public uptake and engagement to achieve significance, or whether benefits will accrue merely by the promise of enhanced transparency.[77] Thus far, institutions and States have worked under the assumption that there is both an interested public and that that public would seek to engage with negotiating processes and arbitral proceedings in some detail.[78] There has, however, been little comprehensive consideration of who might constitute that public, how big it might be, or what it might be interested in. Given the costs and burdens associated with transparency these are important issues for future study.

The differing levels of engagement at each site of transparency indicate the differing audiences and stakeholders that each form of transparency seeks to engage. Different constituents of the public are likely to have differing levels of interest in the various aspects of international investment law. Webcasting of proceedings might, for example, only engage an "audience that already exists and is already engaged", such as law students, academics or practitioners.[79] The publication of pleadings may be of utility to States, investors and third parties actively participating in proceedings, but of less interest to a more diffuse *civil society*. Conversely, State officials and investors are likely to form the major beneficiaries of arbitral interpretations of substantive transparency norms.

74 J. J. Coe Jr., 'Transparency in the Resolution of Investor-State Disputes – Adoption, Adaptation, and NAFTA Leadership', 54 *University of Kansas Law Review* (2006) 5, 1339, 1361–1362.

75 *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No ARB/09/12.

76 Reported in: S. Plagakis, 'Webcasting: A Tool to Increase Transparency in Judicial Proceedings' in J. Nakagawa (ed.), *Transparency in International Trade and Investment Dispute Settlement* (2012), 84.

77 UNCITRAL, Report II, 2010, *supra* note 63, para. 65.

78 See for example the discussion in *ibid*., 34; UNCITRAL, Report II, 2011, *supra* note 70, para. 84.

79 L. J. Moran, 'Visible Justice: YouTube and the UK Supreme Court', 5 *Annual Review of Interdisciplinary Justice Research* (2016), 253, 256 [Moran, Visible Justice]; C. Green, 'Footage of Supreme Court Hearings Proves an Unlikely Hit with the Public', The Independent (3 January 2016), available at http://www.independent.co.uk/news/uk/home-news/footage-of-supreme-court-hearings-proves-an-unlikely-hit-with-the-public-a6795041.html (last visited 21 December 2017).

To the extent an interested public exists (and this seems likely), a second issue is how best to engage that public. Instrumentally, transparency has been viewed as "an important step to respond to the increasing challenges regarding the legitimacy of international investment law and arbitration as such".[80] Transparency has, in this light, been viewed as a tool to bolster public confidence in investment treaty law and to assuage public suspicion of the regime.[81] The effects of transparency on public education and understanding have, however, yet to be properly tested.[82] Domestic studies overwhelmingly indicate that few members of the public are likely to learn about judicial systems through direct observation of proceedings.[83] Instead, the media or third parties may need to perform intermediary functions in transmitting details about transparent proceedings to a mass audience.[84] Depending upon the ultimate goals pursued by transparency norms, then, future developments may be necessary. Transparency norms may increasingly, for example, need to evolve from passive to active forms of transparency in order to generate the desired levels of public awareness and acceptance of the regime. The former refers to the ability of non-disputing parties to be informed about proceedings, whereas the latter refers to the scope for a non-disputing party to participate in proceedings.

Regardless of the concrete impacts of increased transparency in international investment law, its development indicates an important shift in focus from formal source-based legitimacy to a richer understanding of legitimacy as the basis for the legitimacy of the investment treaty regime.[85] Generally speaking,

80 UNCITRAL, Report II, 2010, *supra* note 63, paras. 16–17, 46, 62; UNCITRAL, Report II, 2011, *supra* note 70, paras. 25, 60, 112. See generally Euler, Gehring & Scherer, *supra* note 54, 355; VanDuzer, *supra* note 54, 687; Teitelbaum, *supra* note 54, 60.

81 UNCITRAL, Report II, 2010, *supra* note 63, 17, 63; UNCITRAL, 'Report of the Working Group on Arbitration and Conciliation on the Work of Its Forty-Eighth Session (New York, 4–8 February 2008)' (2008) UN Doc. A/CN.9/646 para. 57; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 351; D. Stepniak, Audio-Visual Coverage of Courts: A Comparative Analysis (2012), 1; Nyegaard Mollestad, *supra* note 55, 13; Moran, Visible Justice, *supra* note 79.

82 See, further P. Lambert, *Courting Publicity: Twitter and Television Cameras in Court* (2011), 1–2, 69, 178–233; Stepniak, *supra* note 81, 397.

83 L. J. Moran, 'Every Picture Speaks a Thousand Words: Visualizing Judicial Authority in the Press', in P. Gisler, S. Steinert Borella & C. Wiedmer (eds), *Intersections of Law and Culture* (2012), 31 [Moran, Judicial Authority].

84 Moran, Visible Justice, *supra* note 79, 234.

85 See, for a further elaboration of this analysis Shirlow, *supra* note 53. See, further, on the notion of legal legitimacy D. Bodansky, 'Legitimacy in International Environmental Law' (2009), available at https://ssrn.com/abstract=899988 (last visited 21 December 2017), 10; A. D'Amato, 'On the Legitimacy of International Institutions', Northwestern Public

legitimacy might be sourced in the qualities or mandate of the decisionmaker, the decisionmaking process (input legitimacy), or the decision itself (output legitimacy).[86] An example of source-based legitimacy is consent of treaty or disputing parties to the establishment of international courts or tribunals.[87] As Kumm notes, however, "such a thin notion of legitimacy has been gradually replaced by [a] considerably richer idea" such that, to be legitimate, "more is required of [an institution] than just its legal pedigree".[88] This shift in focus has accompanied the developing remit of international courts and tribunals and the perception that they increasingly exercise not just private but also public functions.[89] An international court might not, for example, be able to rely upon consent as a basis for legitimacy to the extent that its decisions are perceived to impact upon parties other than those formally consenting to its existence.[90] In these cases, a wider input into the grant of the initial mandate of a court or tribunal might be demanded to bolster source-based legitimacy.[91] Alternatively, the procedures or decisional outputs of the court or tribunal might be addressed in an effort to secure enhanced input or output legitimacy.

Early discussions of investment arbitration positioned States and investors as the two key stakeholders in the regime. This led to an almost complete denial

Law Research Paper No. 06-35 (2007), 1; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907, 920.

86 See, generally *ibid*., 926; T. Risse, 'Transnational Governance and Legitimacy' (2004), 7, available at http://userpage.fu-berlin.de/~atasp/texte/tn_governance_benz.pdf (last visited 21 December 2017); T. Broude, 'The Legitimacy of the ICJ's Advisory Competence in the Shadow of the Wall', 38 *Israel Law Review* (2005) 1-2, 189, 5; Bodansky, *supra* note 85, 5; D. Schneiderman, 'Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?' 1 *Oñati Socio-Legal Series, Socio-Legal Aspects of Adjudication of International Economic Disputes* (2011) 4, 5.

87 See, further A. von Bogdandy & I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), 3; Venzke, *supra* note 70, 10; Bodansky, *supra* note 85, 7–8.

88 Kumm, *supra* note 85, 920. See, also Schneiderman, *supra* note 86, 5; Bodansky, *supra* note 85, 13.

89 *Ibid*., 2, 12; B. Kingsbury, 'The International Legal Order', New York University School of Law Public Law & Legal Theory Research Paper Series 2003/1, 22.

90 Von Bogdandy & Venzke, *supra* note, 87, 3.

91 Public involvement in the creation of international norms or institutions might, for example, link the regime to "the will of the people" and result in a stronger form of source based legitimacy. See Bodansky, *supra* note 85, 15; A. Maurer, 'The Creation of Transnational Law – Participatory Legitimacy of Privately Created Norms', ZenTra Working Papers in Transnational Studies 2012/03, 1.

of the value of transparency where it operated against the interests of these parties. Increasingly, however, it has been recognised that investment arbitration has to cater to a broader audience. The value placed upon transparency in norm negotiation and application indicates that investment arbitration may be shifting from a private form of dispute settlement to a more public form that takes into account external interests and participants.[92] As Professor Stern notes,

> "[t]his system, which was traditionally based on private legitimacy arising from the consent of the parties, seems to now be in search of public legitimacy, which it is thought can be obtained from a certain degree of openness to civil society".[93]

II. Structural Linkages

The development of transparency at each of these three sites also offers important insights into how norms emerge, gain traction, and ultimately stabilise within the regime.[94] An analysis of transparency indicates, in particular, the ways in which the presence of transparency at one site in the life cycle of investment norms informs its emergence and status at other sites. These interactions are illustrated in Figure 2, below.

92 On this distinction, see R. Kolb, *The International Court of Justice* (2013), 47. This is something I develop further in Shirlow, *supra* note 53. See also scholarship considering these public law aspects of investment treaty arbitration E. de Brabandere, Investment Treaty Arbitration as Public International Law: Procedural Aspects and Implications (2015); A. Mills, 'Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration', 14 *Journal of International Economic Law* (2011) 2, 469; A. Kulick, *Global Public Interest in International Investment Law* (2012).

93 B. Stern, 'Civil Society's Voice in the Settlement of International Economic Disputes', 22 *ICSID Review – Foreign Investment Law Journal* (2007) 22, 280, 347. See, also L. Bartholomeusz, 'The Amicus Curiae before International Courts and Tribunals', 5 *Non-State Actors and International Law* (2005) 3, 209, 283; J. Ribeiro & M. Douglas, 'Transparency in Investor-State Arbitration: The Way Forward' (2015), available at https://espace.curtin.edu.au/bitstream/handle/20.500.11937/47596/228217_228217.pdf?sequence=2&isAllowed=y (last visited 21 December 2017), 23; de Brabandere, *supra* note 59, 18.

94 See, especially C. Borgen, 'Transnational Tribunals and the Transmission of Norms: The Hegemony of Process', St John's University School of Law, Legal Studies Research Paper Series Paper No. 09-0024 (2005), 30 (identifying three life cycles associated with norms, as follows: "[1] norm emergence; [2] norm cascade; and [3] internalization").

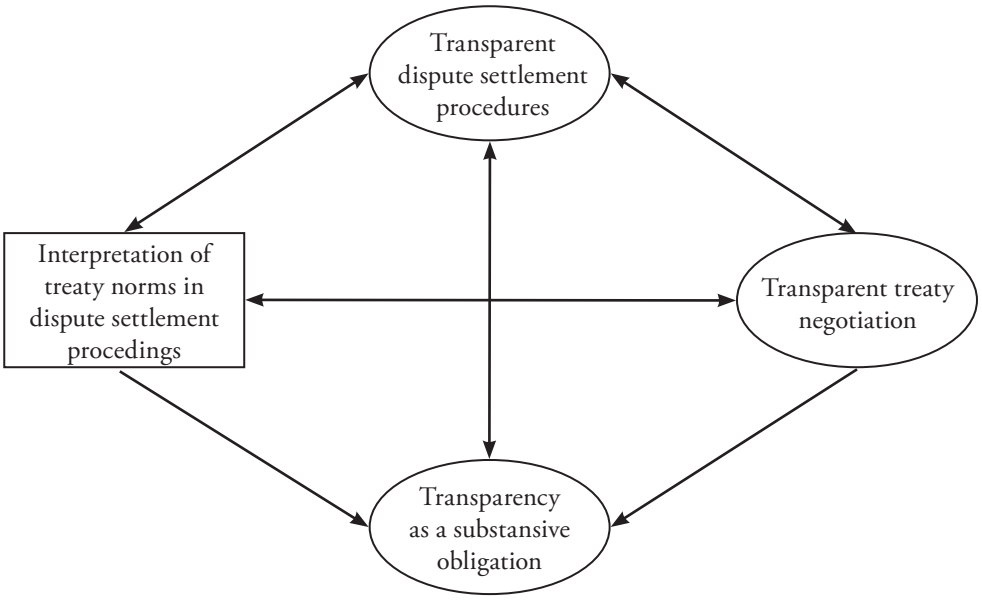

Figure 2: Interactions between the three sites of transparency in international investment law

As Figure 2 demonstrates, each source and site of transparency is interconnected with, and informed by, the manifestation of transparency at other sites and in other sources. Transparent dispute settlement procedures have, for example, influenced the development of transparency as a substantive obligation. As noted in Section I (B), arbitral tribunals have justified the interpretation of FET/MST provisions as incorporating a substantive requirement of transparency by reference to past arbitral awards. This is either because past tribunals have recognised a requirement of transparency as part of the FET/MST obligation, or because they have identified other components of FET/MST, like a requirement to respect an investor's legitimate expectations, from which a requirement of transparency is then derived. More transparent investor-State dispute settlement procedures have in this sense created a public body of decisions to which other tribunals refer to support the development or consolidation of new norms.[95] Procedural transparency has thus supported and informed the stabilisation of

[95] Nyegaard Mollestad, *supra* note 55, 13; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 345. This has also been a stated aim of transparency measures in other fora. See, for example ICSID Administrative and Financial Regulations, *supra* note 58, regulation 22(2) (providing for publication of legal reasoning "with a view to furthering the development of international law in relation to investments").

a body of jurisprudence recognising a substantive transparency obligation as a component of FET/MST.

The public availability of arbitral decisions also informs the development of new investment treaties. The release of arbitral decisions increasingly prompts public debates around the permissible scope and structure of investment norms. This may support both State and scholarly analysis of treaties, which may come to inform the practice of States in drafting them.[96] In turn, these analyses will influence transparency at the point of dispute settlement. The European Union's consultation process for the Trans-Pacific Investment Partnership illustrates such inter-linkages. In that process, interested stakeholders had the opportunity to express views as to the appropriate scope of international investment treaties and the means of conducting dispute settlement proceedings pursuant to them. Many stakeholders used this opportunity to provide observations as to the desired level of transparency in investor-State arbitral proceedings, whilst also commenting upon substantive transparency norms. Some respondents, for example, noted developments in arbitral jurisprudence to emphasise the scope for enhanced substantive transparency obligations. This included suggestions that States include in future treaties new transparency provisions, including an obligation for States to make the investment admission regime "transparent and easily accessible" to investors and home States.[97] In this sense, transparent treaty negotiation has capacity to inform the development of both procedural and substantive transparency norms.

Transparent treaty negotiation may also inform the notion of transparency as a substantive obligation in further respects. An important outcome of transparent treaty negotiation is the increased likelihood that States will generate and make publicly available detailed records relating to investment treaty negotiations. Due to past approaches to negotiation, the records for the some 3,000 investment treaties in existence, if they even exist, are either inaccessible or incomplete.[98] Tribunals have consistently lamented that such "sparse negotiating history [...] offers little additional insight into the meaning of the aspects of

96 See, though, on the impact of arbitral decisions on States' treaty-making L. N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015); W. Alschner, 'The Impact of Investment Arbitration on Investment Treaty Design: Myth versus Reality', 42 *Yale Journal of International Law* (2017) 1, 1.

97 European Commission, *supra* note 19, 46.

98 T. W. Wälde, 'Investment Arbitration under the Energy Charter Treaty: An Overview of Selected Key Issues Based on Recent Litigation Experience', in N. Horn & S. Kröll (eds), *Arbitrating Foreign Investment Disputes. Procedural and Substantive Legal Aspects*,

the [treaty] at issue".[99] Even where they exist, such records are typically held in confidence by the negotiating States, placing investors at a relative disadvantage in terms of obtaining access to them.[100] The investor must typically rely upon assistance from its home State, a third State, or the arbitral tribunal to access such documents. The increased transparency of treaty negotiations makes it more likely that tribunals and investors will have at their disposal documents preceding the creation of investment treaties. Transparent negotiations are also likely to qualitatively improve the content of such documents, insofar as they are likely to be more detailed where they are provided as the basis for public consultation and comment.

Such materials are, under the *Vienna Convention on the Law of Treaties*, capable of informing arbitral interpretations of investment treaties as a subsidiary means of interpretation.[101] Such documents might reveal, for example, State intentions concerning the interpretation of FET/MST provisions. Arbitral interpretations of the transparency norms incorporated within FET/MST provisions may thus come to be informed by the very documents created or released by greater transparency at the point of treaty negotiation.

As the above discussion illustrates, the manifestation of transparency at each of the three identified sites has the potential to inform and solidify developments in transparency norms at other sites. Each form of transparency also holds the potential to influence future arbitral approaches to procedural and substantive transparency,[102] approaches to transparency in State treaty negotiations, and the transparency of State dealings with investors.[103] Each type of transparency also offers scope to generate new sources and stakeholders in

Vol. 19 (2004), 198; C. McLachlan, 'Investment Treaties and General International Law', 57 *International and Comparative Law Quarterly* (2008) 2, 361, 372.

99 *Aguas del Tunari SA v. Republic of Bolivia*, Decision on Respondent's Objections to Jurisdiction, ICSID Case No ARB/02/3, 21 October 2005, para. 274.

100 See, further *Industrial Nacional de Alimentos, SA and Indalsa Perú, SA v. The Republic of Peru*, Annulment ICSID Case No ARB/03/4, 5 September 2007, para. 9.

101 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 32, 1155 UNTS 331. See further J. R. G. Weeramantry, *Treaty Interpretation in Investment Arbitration*, (2012).

102 Ortino, *supra* note 62, 14; C. Lo, 'On a Balanced Mechanism of Publishing Arbitral Awards', 1 *Contemporary Asia Arbitration Journal* (2008) 2, 235, 243; Knahr & Reinisch, *supra* note 56, 115; L. LoPucki, 'Court System Transparency', UCLA School of Law, Public Law and Legal Theory Research Paper Series, Paper No. 07-28, 6; Euler, Gehring & Scherer, *supra* note 54, 355; Risse, *supra* note 86, 7; Barstow Magraw Jr. & Amerasinghe, *supra* note 16, 352; Kawharu, *supra* note 59, 168.

103 C. Buys, 'The Tensions between Confidentiality and Transparency in International Arbitration', 14 *American Review of International Arbitration* (2003) 1-2, 121, 134;

international investment law. Transparency offers a means to raise the overall visibility of investment law and, in turn, encourage new stakeholders to enter the field.[104] Transparency may, for example, assist tribunals geographically removed from the persons who their decisions affect to garner a greater sense of proximity to those persons.[105] In so doing, transparency might give such persons greater familiarity with investment law, and the confidence to engage with and shape the regime going forward.[106] Transparency is also likely to generate more informed decision-making by the authors of international investment law, whilst ensuring that this body of law is shaped by a wide range of sources and responsive to a wider variety of stakeholders. By opening up access to a range of different perspectives, transparency holds the potential to improve the quality of awards, of State decisions concerning investors, and of treaties.[107]

C. Conclusions

This article has charted the development of three forms of transparency in international investment law. Section I examined how transparency manifests at the points of norm creation, as a component of substantive investment norms, and as a procedural requirement during the interpretation and application of those norms by investment treaty tribunals. Section II highlighted how transparency has become an increasingly valued component of investment treaty law and arbitration, coming to be reflected in a range of different sources and at the prompting of a variety of stakeholders. Through this study of transparency, the article has highlighted the sources of international investment law, and the stakeholders which shape its development. The article has also highlighted systemic aspects of international investment law, examining how distinct sites

K. Nadakavukaren Schefer, 'Article 1: Scope of Application', in Euler, Gehring & Scherer, *supra* note 54, 33; LoPucki, *supra* note 102, 6; Jansen Calamita, *supra* note 64, 651.

104 Plagakis, *supra* note 76, 106.

105 K. Dzehtsiarou & A. Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners' 12 *German Law Journal* (2011) 10, 1707, 1712; Plagakis, *supra* note 76, 104.

106 Stepniak, *supra* note 81, 10; Ortino, *supra* note 62, 14; Bennaim-Selvi, *supra* note 64, 803; Green, *supra* note 79.

107 *Aguas Argentinas S.A and Others v. Argentina*, ICSID Case No. ARB/03/19, Order in Response to a Petition for Transparency and Participation as Amicus Curiae, 19 May 2005, paras 13, 21. See further P. Wieland, 'Why the Amicus Curia Institution Is Ill-Suited to Address Indigenous Peoples' Rights before Investor-State Arbitration Tribunals: Glamis Gold and the Right of Intervention', 3 *Trade, Law and Development* (2011) 2, 334, 335, 340; European Commission, *supra* note 19, 71.

of transparency interact with and inform each other to contribute to norm emergence, cascade and solidification. It remains to be seen whether transparency will arise in other areas of international investment law and in what form, and the extent to which those manifestations will be linked to the existing three sites considered herein. The story of transparency in international investment law brings into focus key components of the regime, and the potential for future developments. What is clear is that the story of transparency in international investment law is far from over, and perhaps has only just begun.

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Modification of Renewable Energy Support Schemes Under the Energy Charter Treaty: *Eiser* and *Charanne* in the Context of Climate Change

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Abstract

Nearly half of the claims brought under the *Energy Charter Treaty*[1] raise issues related to the modification of the Renewable Energy Support Schemes (RESs), but only two decisions have been published: *Charanne* and *Eiser*. This paper evaluates these decisions in light of the existing general practice on expropriation and Fair and Equitable Treatment, as well as from a pragmatic perspective in the context of climate change. The article concludes that tribunals should recognize reinforced stability to RESs under the *ECT*.

A. Introduction: Vulnerability of Renewable Energy Support Schemes

The decade of the 2000s witnessed the adoption of several RESs in Europe. In accordance with the Directives *2001/77/EC* and *2009/28/EC*, the Member States designed investor-friendly regulations, implementing different benefits such as Feed-in Tariffs, Feed-in Premiums, Green Certificates, Quota Obligations, Loans, Subsidies, Net-Metering or Tax Exemptions. However, the progressive elimination of some of the incentives initially provided has shown these schemes are particularly vulnerable towards regulatory changes.

If one compares renewable energies with conventional energies, one might come to the conclusion that the particular vulnerability of RESs could find its origins mainly in the high costs of production and the unpredictability of the results of its implementation. Regarding the first factor – the high costs – production from renewable energies is more expensive than production from conventional sources of energy.[2] In fact, the experience on RESs shows that the prices of household supply have increased due to the need for subsidization[3] – jeopardizing the affordability of the service. On an industry level, the higher costs of energy supply might increase the costs of production for different sectors

1 *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 [ECT].

2 See J. P. Morgan, 'A Brave New World: Deep De-Carbonization of Electricity Grids', Eye on the Market Special Edition: Annual Energy Paper (2015), available at https://www.jpmorgan.com/jpmpdf/1320687247153.pdf (last visited 21 December 2017).

3 Eurostat, Eurostat statistics explained, electricity price statistics, File: Development of electricity prices for household consumers, EU-28, 2008-2016 (EUR per kWh) YB17.png, available at http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Development_of_electricity_prices_for_household_consumers,_EU-28,_2008-2016_(EUR_per_kWh)_YB17.png (last visited 21 December 2017).

of the economy[4] and, therefore, may affect their competitiveness in a globalized market. As a consequence, governments might be tempted to modify the RESs not only as a way to foster exports and maximize the social welfare, but also in order to satisfy the claims of the civil society and the industries, which might put pressure to lower the prices by returning to conventional sources of energy.

The second factor of particular vulnerability – the unpredictability of the results – refers to the fact that the production of renewable energies is less predictable than the production of conventional energies,[5] since the technologies involved in renewable energy are heavily dependent on innovation and the natural conditions on which they rely are very often unstable. If, given this unpredictability, the adoption of a scheme reaches its objective in less time than what was expected or, on the contrary, fails to achieve the estimated results, it is likely that the government chooses to modify the legal framework by removing the benefits.

Besides the particular vulnerabilities just described, renewable energies and conventional energies share the regulatory risks typical to long long-term contracts and licenses that require a considerable amount of time to achieve pay-out. The dynamics of the regulatory instability affecting these long-term energy investments are well depicted by Cameron's *cycles*: "[…] [the] obsolescing bargain […]" and "[…] the price cycle […]".[6] In the *obsolescing bargain* cycle, the investor concludes a contract and/or obtains a license to undertake a long-term energy project under certain favorable regulatory conditions, but as time passes by, these conditions might appear obsolete to the government, who will attempt to change them to the detriment of the investor. In this regard, the change of government, the volatility of the economy, the discovery of new energy resources or the pressure of the community, etc. – in addition to the fact that the investor has already perfected the investment – may incentivize the government to force a renegotiation of the terms and conditions of the exploitation.[7] On the other hand, *the price cycle* relates to the situation where the investor concludes a contract and/or obtains a license to undertake a long-term energy project under certain conditions based on specific price assumptions; however, the market

4 See ECOFYS, 'Electricity Costs of Energy Intensive Industries an International Comparison' (2015), available at http://www.ecofys.com/files/files/ecofys-fraunhoferisi-2015-electricity-costs-of-energy-intensive-industries.pdf (last visited 21 December 2017).

5 D. Timmons *et al.*, 'The Economics of Renewable Energy' (2014), 32, available at http://www.ase.tufts.edu/gdae/education_materials/modules/RenewableEnergyEcon.pdf (last visited 21 December 2017).

6 P. D. Cameron, *International Energy Investment Law: the Pursuit of Stability* (2010), 4-7.

7 *Ibid*., 4-5.

price unexpectedly increases in a way that the firm obtains extraordinary good profits. The host government might find this situation disproportionate and, subsequently, it will attempt to adjust the contract or capture some of the investor's earnings through taxation.[8]

The experience regarding the RES adopted in Spain as well as experiences in the Czech Republic, Italy, and Bulgaria, are indeed good examples on how Cameron's cycles operate. After the heavy investments required to develop solar energy were channelled and once the production and consumption targets were achieved – sooner than expected – in the context of the 2008 financial crisis, the conditions of the RESs appeared to the host governments as an obsolete bargain and, consequently, were modified.[9] Moreover, as if it was predicted by the price cycle, given the sharp decrease of the solar energy production costs, the profits seemed disproportionate to the host governments, adding one more reason for restructuring the RESs.[10]

The modification of the RESs in Spain, Czech Republic, Italy, and Bulgaria, was followed by 48 international investor-State arbitration claims under the *ECT*. This means that, currently, 48 out of 99 disputes brought under the *ECT* are related to the modification of the RESs.[11] 33 of these claims are against Spain; 3 of them have been resolved; two concluded that Spain is not liable to pay damages and the other considered it is. While *Isolux* remains confidential and the only information available shows that the decision favours

8 *Ibid*., 5.

9 Regarding the modification of RESs in europe: D. Behn & O. K. Fauchald, 'Governments Under Cross-Fire? Renewable Energy and International Economic Tribunals', 12 *Manchester Journal of International Economic Law*, (2015) 2, 117, 120; J. Tirado, 'Renewable Energy Claims Under the Energy Charter Treaty: An Overview', 13 *Oil Gas & Energy Law*, (2015) 3, 8; G. Bellantuono, 'Regulatory Stability in the Energy Sector: the Italian Experience', University of Trento, Working Paper, 2016, 4, available at http://ssrn.com/abstract=2790980 (last visted 21 December 2017); B. Vasani *et al.*, 'Bulgaria: International Remedies for Foreign Investors in Bulgaria's Renewable Energy Sector', available at http://www.lexology.com/library/detail.aspx?g=b755a41f-d1b0-41a3-a485-6b4108a93505 (last visited 21 December 2017).

10 In fact, from 2009 to 2014 photovoltaic modules' prices decreased in 80 %. See IRENA, 'REthinking Energy: Renewable Energy and Climate Change' (2015), 12, available at http://www.ren21.net/wp-content/uploads/2015/11/IRENA-_REthinking_Energy_2nd_report_2015.pdf (last visited 21 December 2017).

11 *International Energy Charter, List of all Investment Disputes Settlement Cases*, available at http://www.energycharter.org/what-we-do/dispute-settlement/all-investment-dispute-settlement-cases/ (last visited 21 December 2017).

Spain, *Charanne*[12] and *Eiser*[13] are published and arrived to opposite conclusions regarding liability.

In *Charanne*, the Tribunal found that the firm did not breach the expropriation, nor the *fair and equitable treatment* (FET) protections.[14] Contrarily, in *Eiser*, the Tribunal ordered the Host Government to pay the investor 128 million euros for breaching the FET provision.[15] As it is shown in both cases, the Protections provided in Article 10 (1) *ECT* – on FET – and Article 13 *ECT* – concerning expropriation – should be the most frequently invoked in the massive number of claims. However, it should be noted that issues on the jurisdiction of the Tribunal were discussed in both cases[16] and the effective protection and enforcement of rights duty was discussed in *Charanne*.[17] Nevertheless, these two topics will not be addressed in this paper, since the former deals with procedural law rather than with protections against the risks to the investors, and the latter might not be general to all the cases for the modification of RESs.

The objective of this paper is to evaluate *Charanne* and *Eiser* in light of the existing general practice on expropriation and FET, as well as from a pragmatic point of view in the context of climate change. For this purpose, the factual background of both Decisions (B.) is followed by the study of the parties' elaboration (C.), which serves not only to understand the particular arguments that were raised, but also to lay out the variety of interpretations in the case-law when addressing the conflict between the protection of the investor's interests and the right of the States to regulate. Next, the paper critically analyses from a pure legal perspective the particular features that influenced the outcome in both cases (D.) to finally, in the last section, propose a pragmatic approach that fosters the goal of levelling global warming (E.).

12 *Charanne B.V. and Construction Investments S.A.R.L. v. The Kingdom of Spain*, Final Award, Arbitration No. 062/2012, 21 January 2016, available at http://www.italaw.com/cases/2082#sthash.Ut5QaoXA.dpuf (last visited 21 December 2017) [Charanne].

13 *Eiser Infrastructure Limited and Energía Solar Luxembourg S.A.R.L. v. The Kingdom of Spain*, Final Award, ICSID Case No. ARB/13/36, 4 May 2017, available at https://www.italaw.com/cases/5721#sthash.BgklL7i2.dpuf (last visited 21 December 2017) [Eiser].

14 *Charanne*, *supra* note 12, para. 573.

15 *Eiser*, *supra* note 13, para. 474.

16 *Ibid*., 50-109. *Charanne*, *supra* note 12, paras. 394-450; see E. Bonafé & G. Mete, 'Escalated Interactions Between EU Energy Law and the Energy Charter Treaty', 9 *The Journal of World Energy Law & Business* (2016) 3, 174-188.

17 *Charanne*, *supra* note 12, paras. 488-474.

B. The Factual Background

The facts in both cases, even if related, originate to a considerable degree in the application of different sets of modifications that were issued in different moments. The competence of the Tribunal in *Charanne* is limited to the measures taken by the Spanish government from 2007 to 2010, leaving aside the modifications from then onwards. *Eiser* comprehends a wider universe, which covers not only the measures taken by the Host Government from 2007 to 2010, but also those that were adopted from 2012 to 2014, which had a deeper impact on the profits of the solar energy investors in Spain.

Charanne (2007-2010)

In November 1997, the Spanish Parliament enacted the *Ley 54/1997* (Act 54/1997)[18] on the regulation of the energy sector.[19] The *Ley 54/1997* established two regimes: a general regime and a special regime.[20] As opposed to the general regime, which was applicable to conventional sources of energy, the special regime contained special benefits to investments in renewable energies.[21] The benefits of the special regime included priority access,[22] the right to connect the facilities to distribution and transmission grids, the right to use third parties' energy, and the redistribution through a premium tariff scheme.[23]

Almost 8 years after the enactment of *Ley 54/1997,* the government passed the *Real Decreto 436/2004 (Royal Decree 436/2004)*[24] in order to regulate the special regime. However, this instrument – practically immediately – proved itself insufficient to foster considerable investments in the energy sector. Consequently, beginning in 2005, the government adopted an aggressive campaign to promote

18 *Boletín Oficial del Estado* (B.O.E), number: 285/1997, publication date: 28 November 1997, 35097-35126, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1997-25340 (last visited 21 December 2017).

19 *Charanne*, *supra* note 12, para. 82.

20 *Ibid*., para. 84.

21 *Ibid*.

22 *Ibid*.

23 *Ibid*., paras. 87-88.

24 *Boletín Oficial del Estado* (B.O.E), number: 75/2004, publication date: 27 March 2004, 13217-13238, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2004-5562 (last visited 21 December 2017).

investments, such as road shows and official documents emphasizing the need for regulatory stability, as well as forecasting brilliant returns for investors.[25]

The promotion of investments in the Spanish solar energy sector resulted in the enactment of the *Real Decreto 661/2007 (Royal Decree 661/2007)*,[26] which developed the principles established in the *Ley 54/1997* regarding solar power and confirmed that the operators of photovoltaic installations were entitled to a reasonable return.[27] The benefits under this Decree encompassed the connection to the distribution and transportation grid, the access of the total energy produced to the grid, the right to a regulated tariff or prime, the possibility of performing direct sales, priority access, and priority connection.[28]

The *Real Decreto 661/2007* rocketed investments in photovoltaic installations and the production of solar energy in Spain.[29] The success of this scheme was rooted in setting an attractive regulated tariff or a premium to investors for a 25-year period (Arts. 35-37 and 44; Annexes 7-8 and 12), which would be, subsequently, amended for a second period (Art. 36). Very soon after the enactment of the *Real Decreto 661/2007,* the goals established by the Spanish government for solar energy production were achieved. Thus, the government enacted a new Decree, *Real Decreto 1578/2008 (Royal Decree 1578/2008)*,[30] which established a pre-registry burden on photovoltaic installations and a quarterly tender process for the applicability of regulated tariffs (Arts. 4 and 5). It also limited the application of the regulated tariff to the first period of 25 years (Art. 11.5).

The limitation of 25 years was later extended to the photovoltaic installations registered under *Real Decreto 661/2007* by the enactment of the *Real Decreto 1565/2010 (Royal Decree 1614/2010)*[31] (Art. 29.2). In other words,

25 *Charanne*, *supra* note 12, para. 95 and paras. 102-130, *Eiser*, *supra* note 13, para. 358.

26 *Boletín Oficial del Estado* (B.O.E), number: 126/2007, publication date: 1 June 2007, 22846-22886, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2007-10556 (last visited 21 December 2017).

27 *Charanne*, *supra* note 12, para. 111.

28 *Ibid*., para. 118.

29 *Boletín Oficial del Estado* (B.O.E), number: 126/2007, 22846-22886, publication date: 1 June 2007, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2007-10556 (last visited 21 December 2017).

30 *Boletín Oficial del Estado* (B.O.E), number: 234/2008, publication date: 27 September 2008, 39117-39125, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2008-15595 (last visited 21 December 2017).

31 *Boletín Oficial del Estado* (B.O.E), number: 298/2010, publication date: 28 December 2010, 101853-101859. available at https://www.boe.es/buscar/doc.php?id=BOE-A-2010-18915 (last visited 21 December 2017).

the regulated tariff for the second period was abolished for installations regulated under *Real Decreto 661/2007*. This measure was only the first of a set of measures that would affect *Charanne's* interests in solar energy production. Succeeding its implementation, the *Real Decreto Ley 14/2010 (Royal Decree Act 14/2010)*[32] imposed on operators the payment of an access fee to the grid of 0.5 euros per megawatt and *Real Decreto 1614/2010* limited the operation hours that would be subject to the benefits of the regulated tariff (Art. 2). Additionally, *Real Decreto 1565/2010 (Royal Decree 1565/2010)*[33] imposed some technical obligations regarding the control to the tension gaps, which significantly increased the costs for the investors without obtaining any compensation.[34] These new burdens and costs were justified in the government's perspective by the considerable growth in energy production and the deficit of the tariff scheme.

According to the claimant, the abovementioned modifications reduced the profitability of the firm by 10 % with regards to the installations subjected to the *Real Decreto 1578/2008* and 8.5 % to those subjected to the *Real Decreto 661/2007*.[35] Consequently, on May 7 2012 – after the parties failed to reach an agreement on the controversy within the three-month period provided by Article 26 *ECT* – *Charanne* filed notice of arbitration request before the Arbitration Institute of the Stockholm Chamber of Commerce (SCC).[36]

Eiser (2012-2014)

In December 2012, a new government was appointed in Spain. The government publicly expressed its intention to tackle the tariff deficit of the energy system, whose amount was calculated to be 22.000 million euros.[37] The enactment of *Ley 15/2012 (Act 15/2012)*,[38] which taxed the access to the grid

32 *Boletín Oficial del Estado* (B.O.E), number: 163/2010, publication date: 6 July 2010, 59628-59652, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2010-10707 (last visited 21 December 2017).

33 *Boletín Oficial del Estado* (B.O.E), number: 283/2010, publication date: 23 November 2010, 97428-97446, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2010-17976 (last visited 21 December 2017).

34 *Charanne*, *supra* note 12, para. 152.

35 *Charanne*, *supra* note 12, para. 284.

36 *Ibid*., para. 14.

37 *Eiser*, *supra* note 13, paras. 137 and 150.

38 *Boletín Oficial del Estado* (B.O.E), number: 312/2012, publication date: 28 December 2012, 88081-88096, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2012-15649

at 7 % (Art. 8), was the first measure in this regard. This tax caused a loss of 95 % to the operator company's income and put the investor in a position where the income was barely enough to service debt – being its service coverage ratio nearly 1.[39] Afterwards, *Real Decreto 2/2013 (Royal Decree 2/2013)*[40] abolished the possibility to adopt the regulated prime, thus the options for the investors were restricted to choose between the market price and the regulated tariff. Furthermore, this Decree discarded inflation as a factor for the calculation of tariff adjustment by replacing it with a lower index.

The group of measures that followed in Spain obliterated the difference between the special regime for solar energy and the general regime for conventional energy. Firstly, *Real Decreto Ley 9/2013 (Royal Decree Act 9/2013)*[41] derogated *Real Decreto 661/2007* and established a new tariff system where the redistribution was based on model costs instead of real costs. This legislation was later complemented by *Ley 24/2013 (Act 24/2013)*,[42] which derogated *Ley 54/1997 (Act 54/1997)*[43] and *Real Decreto 413/2014 (Royal Decree 413/2014)*,[44] which intended to promote a reasonable profit under the model of an efficient plant. Finally, the *Orden Ministerial IET/1045/2014 (Ministerial Order IET/1045/2014)*[45]detailed the technical parameters for the assessment of the redistribution.

The investor suffered a huge negative impact as a result of these changes in legislation. On the one hand, the expected income of the investment decreased

(last visited 21 December 2017).

39 *Eiser*, *supra* note 13, para. 144.

40 *Boletín Oficial del Estado* (B.O.E), number: 29/2013, publication date: 29 February 2013, 9072-9077, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-1117 (last visited 21 December 2017).

41 *Boletín Oficial del Estado* (B.O.E), number: 167/2013, publication date: 13 July 2013, 52106-52147, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2013-7705 (last visited 21 December 2017).

42 *Boletín Oficial del Estado* (B.O.E), number: 310/2013; publication date: 27 December 2013, 105198-105294, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2013-13645 (last visited 21 December 2017).

43 *Boletín Oficial del Estado* (B.O.E), number: 285/1997, publication date: 28 November 1997, 35097-35126, available at https://www.boe.es/buscar/doc.php?id=BOE-A-1997-25340 (last visited 21 December 2017).

44 *Boletín Oficial del Estado* (B.O.E), number: 140/2014, publication date: 10 June 2014, 43876-43978, available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6123 (last visited 21 December 2017).

45 *Boletín Oficial del Estado* (B.O.E); number: 150/2014, publication date: 20 June 2014, 46430-48190, avialable at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2014-6495 (last visited 21 December 2017).

by 66 % in comparison to what was foreseen under *Real Decreto 661/2007*.[46] On the other hand, the company's income in 2015 was not even enough to cover the operational costs and the service of debt.[47] Therefore, the investor had to renegotiate with creditors[48] and reach the agreement that all future incomes above the operational costs would cover financial debt, leaving no room for returns.[49] As a result, *Eiser* claimed 196 million euros in compensation for loss of profit and 13 million euros for historical loss.[50]

C. Elaboration of the Parties: Investor's Protection v. the Right to Regulate

Charanne and *Eiser* plainly picture the never-ending conflict in international investment arbitration between the State's right to regulate and the investor's protection under international investment agreements (IIAs): while the investors claim that the measures disrupted the regulatory stability and, consequently, negatively affected interests protected under the *ECT*, Spain contends that the measures are in the public interest and correspond to the usual exercise of sovereignty. Both assertions are true, though the question on how to balance the interests between the parties depends to a large extent on the arbitrators' discretion. Certainly, not only the IIA's protections have an open texture, but also the elements used by Tribunals to determine liability, sometimes respond to opposing positions – e.g. police-power doctrine v. sole-effects doctrine – or their scope may differ in the extent – such as the assessment of legitimate expectations or proportionality. This section represents how the lack of consistency of the Tribunals provides fairly good arguments to both parties when addressing the Expropriation and the FET Provisions, by examining the parties' elaborations in light of the existing practice. However, it should be noted that while *Charanne* describes, to a certain extent, the elaboration of the parties regarding both protections, *Eiser* only illustrates the parties' arguments on FET. In the latter, the Tribunal considered, for reasons of judicial economy, that all of the claimant's allegations could be subsumed in the FET.[51] Accordingly, this

46 *Eiser*, *supra* note 13, para. 151.
47 *Ibid*., para. 152.
48 *Ibid*.
49 *Ibid*.
50 *Ibid*., paras. 460 and 457.
51 *Ibid*., paras. 352-353.

section addresses both protections in *Charanne*, but only the FET protection in *Eiser*.

Expropriation

The definition of expropriation in the *ECT*, as it has been standardized in most of the IIAs, is broader than the definition endorsed in many national legal systems. The meaning of expropriation in this regard is not restricted to the physical and/or legal taking of property rights (direct expropriation), but also comprehends government actions that produce a similar effect (indirect expropriation). In the *ECT's* language, this includes measures "[…] having effect equivalent to nationalization or expropriation […]" (Art. 13 (1)). In general, there is no problem for identifying direct expropriations.[52] On the contrary, determining when an indirect expropriation has occurred requires a deeper analysis, which entails evaluating the substantiality of the loss, the character of the Host State's measure, and the generation of legitimate expectations.

The most palpable characteristic of and the first element to be analysed in indirect expropriation cases is *substantiality*. In this regard, the impact must be significant enough to assert that the measure *destroyed* the investment.[53] Therefore, an indirect expropriation occurs when the lack of control on the assets "[…] is not merely ephemeral […]"[54] and the "[…] rights are rendered so useless that they must be deemed to have […] expropriated […]" them.[55]

Given the importance of this criterion, it is natural that, in this kind of dispute, the investor affirms that the measures adopted by the Host Government have an impact substantial enough to constitute an indirect expropriation, while the respondent, on the contrary, holds that the impact of the measures on the company's asset's value or control is non-existent or not significant. In this regard, *Charanne*'s dispute is not different from the general practice.

52 P. D. Isakoff, 'Defining the scope of indirect expropriation for international investments', 3 *Global Business Law Review* (2013) 2, 189, 192.

53 *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, 29 May 2003, 44, para. 116, available at http://www.italaw.com/cases/1087#sthash.9Pg82zdi.dpuf (last visited 21 December 2017) [Tecmed S.A.].

54 *Tippetts, Abbett, Mc Carthy, Stratton v. TAMS-AFFA*, Award, 6 Iran-US CTR, 22 June 1984, 225.

55 Iran-United States Claims Tribunal, cited in OECD, "Indirect expropriation' and the 'Right to Regulate' in International Investment Law', OECD Working Papers on International Investment, 2004/04, 11, available at http://dx.doi.org/10.1787/780155872321 (last visited 21 December 2017).

In fact, the loss of the shares' value as well as the loss of profit from the photovoltaic installations due to the Spanish legislative changes were considered by the claimant as measures having an equivalent effect to expropriation, falling under the scope of Article 13 (1) *ECT*.[56] The claimant considered that *Charanne* – through its subsidiaries – acquired vested rights on the regulated tariffs established in *Real Decreto 661/2007* and *Real Decreto 1578/2008 (Royal Decree 1578/2008)*[57] when it registered the installations within the time provided by these regulations.[58] Consequently, the retroactive application of *Real Decreto 1565/2010 (Royal Decree 1565/2010)*[59]and *Real Decreto Ley 14/2010 (Royal Decree Act 14/2010)*[60] constituted an expropriatory measure that reduced profitability by approximately 10 %, as mentioned previously.[61] Furthering its elaboration, the claimant stated that this percentage was significant and sufficient to constitute an expropriation, since in its concept "[…] the arbitral jurisprudence does not require the total destruction of the investment […]."[62]

The defendant opposed these arguments by stating that the loss experienced by *Charanne* was not substantial enough to constitute an expropriation according to the arbitral jurisprudence.[63] In its opinion, the measures did not involve the deprivation of the exploitation or economic use of the investment, neither the interruption of operations nor the control of its shares or assets.[64] The Host Government added that the measures did not destroy the company's value and, in any case, that there is not any precedent recognizing a concept such as partial expropriation.[65]

Once substantiality has been established, the Tribunal must assess the character of the government's measure in order to determine whether an indirect

56 *Charanne*, *supra* note 12, para. 280.

57 *Boletín Oficial del Estado* (B.O.E), number: 234/2008, publication date: 27 September 2008, 39117-39125, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2008-15595 (last visited 21 December 2017).

58 *Charanne*, *supra* note 12, para. 282.

59 *Boletín Oficial del Estado* (B.O.E), number: 283/2010, publication date: 23 November 2010, 97428-97446, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2010-17976 (last visited 21 December 2017).

60 *Boletín Oficial del Estado* (B.O.E), number: 163/2010, publication date: 6 July 2010, 59628-59652, available at https://www.boe.es/buscar/doc.php?id=BOE-A-2010-10707 (last visited 21 December 2017).

61 *Charanne*, *supra* note 12, para. 284.

62 *Ibid*., 64, para. 283.

63 *Ibid*., para. 343.

64 *Ibid*.

65 *Ibid*., paras. 344-345.

expropriation happened, i.e. whether or not the measure is characterized as a public interest measure, non-discriminatory, rational, adequate, proportional, in good faith, etc. A propos, arbitral decisions have adopted two clashing theories. For one theory, the *sole-effect doctrine*, liability should arise disregarding the *public interest* character of the measure, since the expropriation provision focuses on protecting the investor from the economic result.[66] On the contrary, *the police power doctrine* proposes that a non-discriminatory measure taken in the public interest and in good faith should not entitle the investor to a compensation.[67] As a consequence, it is normal to find in investor-State arbitration disputes that the claimant adheres to the sole-effect doctrine and the Host State to the police power doctrine; *Charanne* was not the exception.

In this respect, following the sole-effect doctrine, and in order to support the idea that the mere loss was sufficient to define the measure as expropriatory, the company asserted "[…] that it is not necessary to prove the bad faith of the State, but that the essential element [of expropriation] is the effect suffered by the investment."[68] Moreover, the claimant affirmed that the most visible evidence that an expropriation occurred was the transfer of wealth from the operators to the Government to cover the electricity tariff deficit.[69] As a counterargument, following the police power doctrine, Spain argued that the investor's position in this regard was based on a doctrine that was rejected by subsequent decisions and emphasized on the need to evaluate the nature, purpose, and character of the measures.[70]

66 *Metalclad Corporation v. The United Mexican States*, Final Award, ICSID Case No. ARB(AF)/97/1, 30 August 2000, para. 111, available at http://www.italaw.com/cases/671#sthash.2TPwidW3.dpuf (last visited 21 December 2017) [Metalclad Corporation]; *Azurix Corp. v. The Argentine Republic*, Final Award, ICSID Case No. ARB/01/12, 14 July 2006, paras. 309-313, available at http://www.italaw.com/cases/118#sthash.pz1dK8UU.dpuf (last visited 21 December 2017) [Azurix Corp.]; *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Final Award, ICSID Case No. ARB/96/1, 17 February 2000, para. 72, available at https://www.italaw.com/documents/santaelena_award.pdf (last visited 21 December 2017).

67 *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, available at https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf (last visited 21 December 2017) [Methanex Corporation]; *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 March 2006, 52, para. 255, available at https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf (last visited 21 December 2017) [Saluka Investments B.V.].

68 *Charanne*, *supra* note 12, 65, para. 286.

69 *Ibid*., para. 289.

70 *Ibid*., para. 842.

Subsequently, the debate deviated from the doctrinal discussion abovementioned and focused on the character of the measures as such. The claimant insisted that 2010's regulation did not pursue a valid public purpose,[71] was discriminatory, did not comply with due process, and was not complemented by a prompt, adequate, and effective compensation.[72] Furthermore, according to the claimant, the tariff deficit was not a valid argument to justify the measures against the investor's interests, since it existed long before and was attributable to the government's mismanagement.[73] Conversely, Spain stated that the measures constituting the modification of the scheme, rather than being expropriatory, are within the usual expressions of the right of the States to regulate grounded on their sovereignty, were adopted in good faith, were non-discriminatory, complied with due process, and were proportional to the protection of the public interest, as well as adequate to avoid the collapse of the Spanish electricity system.[74]

The third and last element to evaluate indirect expropriations is the presence of investment-backed expectations. The evaluation of this element consists of assessing whether the investor has objective grounds to believe that the legal framework will not be modified during the life of the investment.[75] Therefore, legal changes are not contrary to investment-backed expectations – or expropriatory – when these should be envisioned by the investor according to the governments' representations, the circumstances surrounding the investment, and the context or the information available. Surprisingly, in *Charanne*, there was not any elaboration from the parties in this regard when discussing the breach of the expropriation protection. However, since the analysis of investment-backed expectations somehow overlaps with the evaluation of the creation of legitimate expectations in the FET protection, the interplay between the Host Government's representations and the due diligence, which usually determine the existence of expectations, was discussed when addressing FET.

71 *Ibid*., para. 285.
72 *Ibid*.
73 *Ibid*., para. 289.
74 *Ibid*., paras. 342-345.
75 OECD, 'Indirect expropriation and the right to regulate in international investment Law', OECD Working Papers on International Investment, OECD Publishing, 2004, 19, available at http://dx.doi.org/10.1787/780155872321 (last visited 21 December 2017).

FET

The FET protection compels the Host State to act before the investor in accordance with the business standard of fairness[76] in order to maintain "[…] stable, equitable, favourable and transparent conditions […]" (Art. 10 *ECT*). The analysis of legitimate expectations is the key element to identify whether or not the Host Country has breached the FET protection.[77]

The concept of *Legitimate Expectations* is related to the investor's confidence that the Host State will not change the conditions of the investment or, at least, that the changes in the legal framework will not be unreasonable and/or disproportionate. A first dogmatic approach takes on a clearly pro-investor interpretation of legitimate expectations. This approach holds that the conditions at the moment of the investment should remain untouched during the life of the investment, being any change in the investment framework contrary to legitimate expectations.[78] A second, more flexible approach suggests that the Host State has some room of manoeuvre to modify the investor's legal framework without dishonoring legitimate expectations, subject to some qualifying requirements (State's representations, the general regulatory environment, and the legitimacy of the regulatory measures).[79] Therefore, while the claimant in this kind of dispute usually relies on the first approach, the defendant naturally adopts the second approach.

In the decisions under analysis, the parties addressed the dogmatic discussion just described. In *Charanne*, although in the beginning the claimant gave the idea of adopting the second approach by expressing that the Tribunal has "[…] a wide margin of appreciation to analyse the just character of the acts of the States […]"[80], its main argument consisted of asserting that the legislation valid at the time of the investment is sufficient to create legitimate expectations.[81] Accordingly, the mere fact of "[…] breaking the stability of the

76 C. Dugan *et al.*, Investor-State Arbitration (2011), 504.

77 *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II, 2012, xiii, 63, available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf (last visited 21 December 2017) [UNCTAD Fair and Equitable Treatment].

78 *Tecmed S.A*, *supra* note 53 para. 122; *CMS Gas Transmission Company v. The Republic of Argentina*, Final Award, ICSID Case No. ARB/01/8, 12 May 2005, para 138, [CMS Gas Transmission Company].

79 *UNCTAD Fair and Equitable Treatment*, *supra* note 77.

80 *Charanne*, *supra* note 12, para. 291.

81 *Ibid*., para. 296.

regulatory framework […]" constitutes their violation[82]; a position that matches with the first approach. Similarly, the claimant in *Eiser*, after emphasizing on stability as a core value of the *ECT* – expressed that the *Real Decreto 661/2007* created legitimate expectations because it was the reason why the company decided to invest. According to him, it was accepted that a legal framework itself can originate legitimate expectations and its mere modification leads to liability.[83]

In opposition, Spain claimed in both cases that agreeing with the claimants' position would be accepting that the legislation should be kept petrified during the life of the investment as if the Government was compelled by a stability contract to maintain the regulation unmodified, which was not the case. Subsequently, adopting the second approach, the defendant in both issues complemented its elaboration by expressing that the analysis of legitimate expectations must be developed along with the evaluation of the reasonability of the measures, as well as taking into consideration the balance between the investor's expectations and the Host State's interest to fulfil public needs.[84]

If one agrees with the first approach, the evaluation of legitimate expectations is exhausted by simply verifying whether or not the changes in the law were detrimental to the investor's interest. However, if one adheres to the second approach, one opens the key question on how to determine what could the investor legitimately expect, bearing in mind that the power of the State to regulate and adapt to the changing situations cannot be completely curtailed. To answer this key question, it is necessary to divide it in two different sub-questions, which correspond in reality to two different expectations. While the first sub-question depends on whether the representations from the government created the expectation that the legal framework would remain untouched during the life of the investment, the second ponders whether or not the changes in the law were reasonable, in the sense that the investor expects changes to be legitimate.[85]

In regards to when representations create legitimate expectations, in general, two positions could be adopted. Under the first, legitimate expectations could only originate in specific commitments. The second position proposes that

82 *Ibid*., para. 294.

83 *Eiser*, *supra* note 13, paras. 357-358 and para. 363.

84 *Ibid*., para. 359; *Charanne*, *supra* note 12, paras. 348-349.

85 See F. Mutis Téllez, 'Conditions and Criteria for the Protection of Legitimate Expectations under International Investment Law', 27 *International Centre for Settlement of Investment Disputes Review* (2012) 2, 432, 434.

legitimate expectations could arise, not only from specific commitments, but also from other different host government's representations and the legislative background. There is significant opposition to the adoption of this second position in the case law.[86] However, the acceptance of the other position – the one that relies on specific commitments – is not less problematic, since its application has been inconsistent in the investor-State arbitration jurisprudence.[87] Nevertheless, there is more or less a consensus that specific commitments are endorsed throughout a stabilization clause, stabilization contract or any similar representation; or where the regulation, though it is not directed at a specific investor, is intentionally drafted to incentivize an identifiable group of investors.[88] In this regard, claimants will always try to promote the soundness of the theory that the formation of legitimate expectations can be grounded in any representation from the government and, contrarily, defendants will insist on the narrowest interpretation of representations.

In this respect, in *Charanne*, the company asserted that legitimate expectations were grounded on commitments, representations, and actions from the host government that led the investor to believe that the conditions of the investment were going to be maintained throughout the whole project. In *Charanne's* opinion, the most palpable representation was the enactment of *Real Decreto 661/2007* and *Real Decreto 1578/2008*, which had as a clear intention the attraction of investments in photovoltaic technologies.[89] Besides there were other representations and actions that the investor claimed enhanced its confidence, such as the expected profits described to the investors in the promotional presentations entitled *El Sol Puede ser Suyo 2005 (The Sun*

86 *Ibid*., 435-437.

87 It should be highlighted that decisions regarding specific commitments and representations are unsystematic and contradictory. In *Enron v. Argentina and CMS v Argentina*, the Tribunal considered that, since the legislation on gas tariffs was addressed to a particular type of investors, it created legitimate expectations. Consequently, the measures that compelled investors to recalculate the tariff in pesos instead of dollars and the measures that restricted the tariff adjustments were against legitimate expectations. On the contrary, in *Metalpar v. Argentina*, which was grounded on the same facts, it was held that legitimate expectations cannot arise in the absence of a license, permit or contract. Nevertheless, to make it even more confusing, in *Hamester v. Ghana and Parkerings v. Lithuania*, the Tribunals expressed that a contract by itself is not proof of specific commitments.

88 M. Hirsch, 'Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law', 12 *The Journal of World Investment & Trade* (2011) 6, 783, 784.

89 *Charanne*, *supra* note 12, para. 297-298.

can be Yours 2005)[90] and *El Sol puede ser Suyo 2007 (The Sun can be Yours 2007)*,[91] as well as the aim of providing stability to investors expressed in the *Spanish Plan for Renewable Energies*' development for the period 2005-2010, drafted by the government.[92] In the same way, in *Eiser* it was argued that, in addition to the legislation itself and some of the documents just described, legitimate expectations were grounded on different government actions such as road shows or several resolutions from the authorities reiterating that the investor was covered under the regime of the *Real Decreto 661/2007*.[93]

As a response, Spain categorically rejected the investors' arguments in the two cases, by pointing out the absence of a specific commitment such as a stabilization clause that guaranteed the inalterability of the scheme and, thus, denying the existence of legitimate expectations based on the theory that restricts the origin of legitimate expectations to stability clauses or similar representations.[94]

Representations, however, cannot be interpreted in a vacuum; they must be capable of creating legitimate expectations on an objective and subjective basis.[95] In this sense, the regulatory stability and the context of the Host State in which the investment is made should be measured by the investor as part of his due diligence.[96] If the investment is done in a Host Country particularly prone to regulatory instability or experiencing particular unstable circumstances, it would be very difficult from an objective analysis to conclude that legitimate

90 Ministerio de Energía, Turismo y Agenda Digital and IDAE, 'El Sol Puede Ser Suyo: Respuestas a Todas las Preguntas Clave sobre Energía Solar Fotovoltaica' (2005), available at http://www.erasolar.es/pdf%27s/EL-SOL-PUEDE-SER-SUYO-(FV-IDAE)%20 2005.pdf (last visited 25 December 2017) [The Sun can be Yours 2005].

91 Ministerio de Energía, Turismo y Agenda Digital and IDAE, 'El Sol Puede Ser Suyo: Respuestas a Todas las Preguntas Clave sobre Energía Solar Fotovoltaica' (2007), available at http://biblioteca.climantica.org/resources/25/fotovoltaicaelsolpuedesersuyojunio2007.pdf [The Sun can be Yours 2007].

92 Ministerio de Energía, Turismo y Agenda Digital and IDAE, 'Plan de Energías Renovables en España' (2005), paras. 289-299, available at http://www.idae.es/uploads/documentos/documentos_PER_2005-2010_8_de_gosto-2005_Completo.(modificacionpag_63)_Copia_2_301254a0.pdf (last visited 25 December 2017) [Spanish Plan for Renewable Energy].

93 *Eiser*, *supra* note 13, para. 358.

94 *Charanne*, *supra* note 12, para. 356.

95 Mutis Téllez, *supra* note 85, para. 433-434.

96 *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile Case*, Final Award, ICSID Case No. ARB/01/7, 25 May 2004, paras. 164, 167 and 242-243.

expectations arose.[97] Similarly, if the investor had access to special information showing that the investment conditions might change, it would be contradictory to conclude the formation of legitimate expectations. In this respect, Spain argued in *Charanne* that a "[…] reasonably informed investor […]"[98] would expect the RES to change and suggested that the investor did not perform a proper due diligence,[99] because several judicial and administrative decisions, issued before the investment was made, confirmed that the only expectation for a RESs producer was obtaining a reasonable return.[100] In response, the claimant contended that, despite acting diligently and seeking advice from experts to assess all the risks associated to the investment, including legal aspects, "[…] it was impossible to foresee the subsequent actions of Spain[…]" (para. 305). In *Eiser*, Spain was even more incisive and suggested that the investor knew, based on the due diligence that regulatory changes were within the probabilities, but that even with this information it decided to invest.[101] The investor's response was that the due diligence, which was performed by a top law firm, as well as the financial creditors' assessment concluded that it was a secure investment in terms of regulatory stability and, therefore, the company was diligent in measuring this risk.[102]

The second key sub-question on legitimate expectations – whether or not the changes in the law were legitimate – involves the analysis of the *bona fide* and public interest character of the measure, as well as its necessity and proportionality.[103] Even if it is true that the conclusion of an IIA and the existence of the FET protection does not entail that the regulation should be indefinitely frozen, the investor has the legitimate expectation that any change in the law must be reasonable. As a result, in international arbitration disputes there is always tension between the parties about the reasonability of the measure. Surprisingly, in *Charanne*, the claimant did not really confront the legitimacy of

97 *Alex Genin, Eastern Credit Limited, Inc. and A. S. Baltoil v. The Republic of Estonia*, Final Award, ICSID Case No. ARB/99/2, 25 June 2001, paras. 348 and 370, available at http://www.italaw.com/cases/484#sthash.b3eW6wYx.dpuf (last visited 21 December 2017); *Parkerings-Compagniet AS v. Republic of Lithuania*, Final Award, ICSID Case No. ARB/05/8, 11 September 2007, paras. 332-335, available at http://www.italaw.com/cases/812#sthash.z7iv7m6q.dpuf (last visited 21 December 2017) [Parkerings-Compagniet AS]; *Methanex Corporation*, *supra* note 67.

98 *Charanne*, *supra* note 12, 82, para. 365.

99 *Ibid*., para. 366.

100 *Ibid*., para. 365.

101 *Eiser*, *supra* note 13, para. 360.

102 *Ibid*., para. 118.

103 *Saluka Investments B.V.*, *supra* note 67.

the measures but rather just pointed out, as a general rule, that Host States breach legitimate expectations when they perform 'acts incompatible with criteria for economic rationality, the public interest or the principle of rationality'.[104] On the contrary, the respondent presented an extensive elaboration to explain that the new regulations were a reasonable and predictable response to the tariff deficit.[105] Within those reasons, it is worth highlighting that the limitation of the period benefited by the regulated tariff established in the new regulations matched the expected operative life of a photovoltaic installation: that the imposition of technical requirements concerning the power tension gaps complied with the needs of enhancing the security of the electricity system and avoiding its collapse, and that the limitations on the operating hours were predicted in the *Spanish Plan for Renewable Energies* for the period 2005-2010.[106]

In *Eiser*, the debate on proportionality was the central issue. Indeed, it was argued that 2014's regulations, which cancelled the special regime for renewables, were endorsed after the tariff deficit was resolved, thus they were not needed.[107] Furthermore, the claimant argued these measures were disproportionate because they changed the basis of the legal framework that incentivized the company to invest, which was the calculation of the fees based on real costs instead of hypothetical costs (the change in nature of the calculation factors destroyed the value of the investment: after investing 124 million euros, the value of the investment was only 4 million euros when the claimant filed the notice of arbitration).[108] Additionally, the company had to renegotiate the terms of payment with its financial creditors and agreed to direct any future income that surpassed operational costs to the payment of debt. The defendant, on the other hand, asserted that the measures were needed to create a sound tariff scheme in the long run, and that the new tariff scheme was adjusted to the innovation in the solar sector. In addition, it was said that the loss suffered by the defendant was in reality the result of the mismanagement of the company.[109] Finally, Spain reiterated that a 'reasonable return' was the only legitimate expectation that the investor had and that the new scheme guaranteed this 'reasonable return'; thus, there was no real frustration of legitimate expectations.[110]

104 *Charanne*, *supra* note 12, para. 294.
105 *Ibid*., paras. 350-354.
106 *Spanish Plan for Renewable Energy*, *supra* note 92, para. 353.
107 *Eiser*, *supra* note 13, para. 150.
108 *Ibid*., para. 418.
109 *Ibid*., para. 361.
110 *Ibid*., paras. 149 and 361.

D. Pure Legal Analysis

As it has been stressed in this paper, as well as depicted in the previous section, the different legal approaches developed by the investment arbitration decisions regarding the criteria to determine liability for the breach of the expropriation and FET protections provide a high degree of flexibility to arbitrators who, even if not bound by prior decisions, can support their argumentation based on this variety. The aim of this section is to critically analyse some special features of the decision that were crucial for the outcome in both cases, from a purely legal perspective. For the same reasons explained in the analysis of the parties' elaboration, this section deals with both protections in *Charanne*, but only with the FET protection in *Eiser*.

I. Particular Features Regarding Expropriation (Article 13 (1) *ECT*)

In regards to expropriation, it is worth highlighting the conclusions of *Charanne* on the expropriation of the "[…] expected value cash flow […]"[111] and the *substantiality*:

Expropriation of the Expected Value of Cash-Flow

The Tribunal in *Charanne* firmly discarded the assumption that the *expected value of cash-flow* was covered under the scope of Article 13 (1) *ECT*. According to the Decision, the *expected value of cash-flow* is not an investment which fits within the definition of Article 1 (6) *ECT*. While this provision requires the asset to be "[…] owned or controlled directly or indirectly […]" in order to be qualified as *investment*, the expected revenues are, by their nature, incapable of being possessed or controlled by the investor. If the *expected value of cash-flow* is not an investment, then it would be a mistake to claim expropriation under Article 13 (1) *ECT*.[112]

On a first approach, there is little room to disagree with the logic of the Tribunal. However, the text of Article 1 (6) could generate misperception as it includes *returns* in the catalogue of investments protected under the *ECT*. Nevertheless, a proper understanding of the expression *returns* in line with the general statement of Article 1 (6) would be to grasp this expression as

[111] *Ibid*., 71, para. 316.
[112] *Charanne*, *supra* note 12, 105-106, para. 459.

earned returns as opposed to e*xpected returns*. While the *expected returns* are uncertain and do not constitute part of the investor's patrimony, the *earned returns* certainly constitute part of the investor's patrimony and can be within the scope of Article 1 (6).

It must be noted that the compensation of *lucrum cessans* in expropriation claims has been admitted in several international investment arbitration decisions.[113] Nonetheless, in these cases, the debate was not centred on whether the expected returns were investments subject to be expropriated, but rather on the content of concepts such as adequate compensation, appropriate compensation, fair market value, just value, etc., in order to determine the extent of reparation in expropriation cases. Therefore, the interpreter must be careful not to generalize the conclusion of the Tribunal when rejecting the compensation of *expected returns,* without examining first if it matches the text of the particular IIA that governs the relationship between the parties involved.

Substantiality

After defining expropriation as the total or partial deprivation of the investor's property rights, the decision established two forms in which indirect expropriation can be perfected under Article 13 (1): the deprivation of its assets or the loss of the value equivalent to deprivation of the investor's property rights.[114] In the specific case, the Tribunal correctly considered that, regarding the first type of expropriation, *Charanne's* investments were not expropriated since the shares of its Spanish subsidiaries were still in its portfolio.[115]

With respect to the second form of expropriation – the loss of value equivalent to deprivation of the property rights – the Tribunal evaluated whether the decrease of the expected returns was substantial enough to fall under Art. 13.[116] It must be noted that the evaluation of the Tribunal was not

113 *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic*, *Ad Hoc* Award, 19 January1977, ILM, 1978, 36-37, paras. 110-112; *Libyan American Oil Company (LIAMCO) v. The Libyan Arab Republic*, Award, 18 January 1980, *ILC Model Rules on Arbitral Procedure* (1958), Vol.II, 1179; *Greek Telephone Company v. Government of Greece*, 1 March 1935, cited by R. Doak Bishop *et al.*, Foreign Investment Disputes, (2005), 1303; *CME Czech RepublicB.V. v. The Czech Republic,* Final Award, 14 March 2003, 115-116, para. 497 available at https://www.italaw.com/cases/281 (last visited 21 December 2017).

114 *Charanne*, *supra* note 12, paras. 460-461.

115 *Ibid*., para. 462.

116 *Ibid*., para. 462.

focused on the expected returns themselves, but on the impact that the decrease in the expected returns could have on the value of the shares.[117] On this issue, it was established that a substantial loss entails the fully annhihilation of the investment – a standard that is consistent with previous awards.[118]

The Arbitrators considered that the impact on the value of *Charanne's* shares was not substantial. Albeit, the investor was negatively affected, the loss was not significant enough to state that the value was totally destroyed. The Tribunal acknowledged that the opposite conclusion would be equal to finding indirect expropriations whenever the share's value decreases as a result of the government's measures, which "[…] of course, cannot be the case."[119] However, it remains unclear from which point the loss is sufficiently large to be considered substantial.

II. Particular Features Regarding FET (Article 10 (1) *ECT*)

Two aspects draw our attention regarding the FET. First, the conclusions of the Tribunal on the representations capable of creating legitimate expectations and, second, the methodology to assess the proportionality of the measure.

Representations

Both Tribunals discarded the existence of specific commitments and, thereby, the appearance of legitimate expectations arising from these commitments.[120] The basis of this decision was the absence of any stability contract or any declarations from the Government directed specifically to the investor.[121] Additionally, the Tribunal in *Charanne* categorically rejected that the regulation itself could lead to the legitimate expectation that the law will be unmodified, because – in its view – that would be equal to restrict the State's capability to adapt the legal framework to the circumstances.[122] *Eiser*, in turn, emphasized that in the absence of a stability clause or any similar commitment the investor should envision that the regulation might change.[123] In this regard, *Eiser* and *Charanne* adhere to the case law that tends to narrow the interpretation

117 *Ibid*., para. 459.
118 *Tecmed S. A.*, *supra* note 53, para. 116.
119 *Charanne*, *supra* note 12, para. 465.
120 *Ibid*., 490; *Eiser*, *supra* note 13, para. 362.
121 *Charanne*, *supra* note 12, para. 490.
122 *Ibid*., paras. 498-503.
123 *Eiser*, *supra* note 13, para. 362.

of representations by confining the emergence of legitimate expectations to the existence of stability clauses and or any other similar specific assurance given to the investor.[124]

On the contrary, Guido Santiago Tawil – in the Dissenting Opinion of *Charanne* – opposed the Tribunal's narrow interpretation of representations. He claims that the applicable law at the moment of investing is capable of generating legitimate expectations.[125] Regarding the argument posed by the Tribunal that a wider recognition of representations would lead to the crystallization of the regulation, the dissenting opinion states as a very strong counterargument that the acknowledgment of legitimate expectations arising from the valid law at the moment of the investment does not involve depriving the State of the right to regulate, but merely generate the obligation of the State to redress the damage suffered by the investor when his expectations were frustrated.[126]

In addition to Professor Tawil's argument, the Tribunal's assertion may be contradictory, because if it is acknowledged – as it was by the Tribunal – that the idea of specific commitment arising from legislation would be a disproportionate restriction to the ability of the State to change the law, forcefully, it must be also acknowledged that a specific commitment arising from stability clauses hinders this ability too. The validity of stability clauses as a means to generate legitimate expectations would be put into question if one accepts the Tribunal's reasoning in this regard.

A more flexible concept for the determination of representations, capable of creating specific commitments and legitimate expectations, would also be consistent with the principle of good faith. The Tribunal in *Charanne* recognizes "[…] that a State cannot induce an investor to make an investment, hereby generating legitimate expectations, to later ignore the commitments that had generated such expectations […]"[127], but does not apply this principle to the extent that fits to the several expressions that can generate the convincement that the legal framework will remain unaltered during the whole project. In fact, legislation could be enacted in a way that convinces a certain group of foreign investors that it is feasible to invest in a certain market or industry under certain conditions that will be maintained for a certain period. Furthermore,

124 *Total S.A. v. The Argentine Republic*, Decision on Liability, ICSID Case No. ARB/04/01, 27 December 2010, para. 107, available at http://www.italaw.com/cases/1105#sthash.wTdX5hQc.dpuf (last visited 21 December 2017).

125 *Charanne*, *supra* note 13, para. 5.

126 *Ibid*., paras. 11 and 12.

127 *Charanne*, *supra* note 12, 111, para. 486.

the evaluation of the regulation along with other actions of the Host State and the circumstances surrounding the relationship between the parties, might objectively generate the conviction that the legal framework will stay unaltered. An analysis like this one is not unusual in the arbitral jurisprudence.[128]

Proportionality

The analysis of proportionality was the key factor that influenced the decision in both cases. Here, far from being contradictory, the two decisions complement each other. In fact, *Eiser* based the analysis of proportionally on the methodology adopted in *Charanne*, where the Tribunal established that the proportionality is fulfilled where the modifications to the legal framework are not "[…] capricious or unnecessary […]" and do not "[…] suddenly and unpredictably eliminate the essential characteristics of the existing regulatory framework."[129]

While the Tribunal in *Eiser* does not pay much attention to the analysis of predictability and simply states that 2014's measures were abrupt, as a side effect of the radical changes,[130] *Charanne* went deeper on the predictability of 2010's measures by asserting that the cancellation of the regulated tariff for the second period was predictable, given the fact that the expected operative period of solar installations matches the period redefined in the modifications.[131] Likewise, regarding the limitation of the amount of operation hours, the *Charanne* Tribunal asserted that it was expected according to the government's representations.[132]

Additionally, in general terms, the Tribunal in *Charanne* made clear that, as the investor was an expert in the energy market, *a level of care* was expected from him which included envisioning legislation changes.[133] This last assertion should be taken with certain reserves, since its adoption as a general rule would entail that an expert-investor should always forecast any changes in the legislation, which would render any IIA useless. Then, the analysis of predictability should be assessed by reference, for example, to the representations made by the host

128 *El Paso Energy International Company v. The Argentine Republic*, Award, ICSID Case No. ARB/03/15, 31 October 2011, para 375-376, available at https://www.italaw.com/cases/documents/383 (last visit 21 December 2017).

129 *Charanne*, *supra* note 12, 118, para. 517.

130 *Eiser*, *supra* note 13, para. 387.

131 *Charanne*, *supra* note 12, paras. 518-529.

132 *Ibid*., paras. 530-534.

133 *Ibid*., para. 507.

government, the context, the dynamic of industry, and the information available to the investor. Indeed, to arrive at the conclusion that the modifications of the period and the operation hours were predictable, the Tribunal not only took into account *t*he expertise of *Charanne* but also the representations and the technical characteristics of the solar panels' operation. Consequently, regarding predictability, rather than stating that the *level of care* requires that the investor forecast in general the changes in the law, it is preferable to use the language of *reasonably foreseeable* changes – as the Tribunal did in paragraph 505 – when describing the range of the regulatory changes that the investor should have expected.

As for the second requirement of proportionality – that the "[…] changes are not capricious or unnecessary […]"[134] – neither *Charanne* nor *Eiser* expressed which test was used to assess *necessity* or *capriciousness*. Nevertheless, in the former decision, the arbitrators stated that the measures taken by the government were rational and non-arbitrary given the fact that they were supported by objective criteria.[135] Similarly, in the latter, the Tribunal was emphatic in clarifying that it was not questioning that the changes were addressing a real problem – the tariff deficit – that needed to be tackled.[136] The elaboration in both cases seems to follow the test used in other decisions, which consists on the question of whether or not there was a "[…] manifest lack of reason for the legislator […]"[137], where only the measures that are "[…] manifestly arbitrary[…]"[138] are considered as disproportional. This low standard is generally justified by the fact that a higher standard might entail that arbitrators are entitled to judge the accuracy of Host State's public and "[…] [the role of the Tribunal is not] […] to supplant its own judgement […] for that of a qualified domestic agency."[139]

On the third requirement of proportionality – the preservation of the essential characteristics of the existing regulatory framework – *Charanne's* Tribunal considered that 2010's changes were not disproportionate because they did not change the basic benefits for the investor, i.e. the perception of a tariff and the priority access were still operating.[140] On the contrary, according

134 *Ibid*., 118, para. 517.
135 *Ibid*., para. 534.
136 *Eiser*, *supra* note 13, para. 371.
137 *Glamis Gold, Ltd. v. The United States of America*, Award, 8 June 2009, para. 803, available at https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf (last visited 21 December 2017).
138 *Ibid*.
139 *Ibid*., para. 779.
140 *Charanne*, *supra* note 12, para. 533.

to *Eiser*, 2014's modifications eliminated a favorable scheme that benefited the investor and replaced it with a completely different scheme, grounded on completely different premises, such as assessing the fee based on hypothetical costs instead of real costs, not including costs of debt in the calculation, or based on the capacity of production instead of the energy actually produced.[141] These modifications caused a substantial reduction of the subsidies and, in the end, the claimant's precarious situation.[142]

In *Eiser*, the scheme was regarded by the Tribunal as "[…] profoundly unfair and inequitable […]"[143] because it dispossessed the investment from its whole value.[144] In fact, the decision reduces the analysis of proportionality *strictu sensu* to the *devastator*[145] *dramatic effects*[146] that were by "[…] far less sweeping […]" in *Charanne*.[147] This type of analysis of proportionality does not really reflect a balance of interests or, in any case, does not indicate what weight was given to the interests at issue. The absence of the evaluation of these factors poses the idea that in the end the decision is made on the grounds of justice. The appropriateness of a proportionality analysis has been argued as "[…] a clearer and more transparent structure that requires tribunals to be explicit about their reasoning and thus produce better quality awards."[148] In this regard, neither *Eiser* nor *Charanne* is explicit about the significance given to the interests of other stakeholders such as taxpayers or consumers, or the weight given to other more general interests such as the soundness of economy or, equally important, the national and global interest of cutting greenhouse gas emissions. These considerations do not mean that we do not agree with both decisions in their ruling, it means that a well-structured proportionality test would be a desirable scrutinizing element for having clarity on the political and the pragmatic motivations behind it.[149]

141 *Eiser*, *supra* note 13, paras. 397-398.
142 *Ibid*., para. 390.
143 *Ibid*., para. 365.
144 *Ibid*., para. 365.
145 *Ibid*., para. 409.
146 *Ibid*., para. 368.
147 *Ibid*., para. 368.
148 L. Isatolo, 'Climate Compatible Investment Treaty Law: The Role of Legitimate Expectations', Scottish Centre for International Law Working Paper Series 2016/6, 23, available at http://www.scil.ed.ac.uk/__data/assets/pdf_file/0004/172039/Laura_Isotalo_SCIL_Working_Paper_6_FINAL_for_publication.pdf (last visited 21 December 2017).
149 *Ibid*.

E. Pragmatic Approach in the Context of Climate Change: Reinforced Stability of RESs

There are conflicts and synergies between IIAs and the climate change international instruments.[150] On the one hand, the existence of investor-State arbitration represents a threat to the common objective of levelling global warming, as it may incentivize the Host States not to take climate change measures in order to avoid the risk of facing high value claims and/or adverse decisions. This phenomenon is known in the law and economics literature as regulatory chill.[151] On the other hand, IIAs also promote the fight against global warming by attracting foreign investment for the implementation of green technologies, as well as by providing some degree of regulatory stability to the investors and, therefore, to the operation of low carbon energy projects.[152] Investment Arbitration Tribunals should not ignore the interaction between investor-State arbitration and climate change, since its dogmatic constructions, argumentation, and adjudication may have an impact on climate change i.e. to a certain degree they make climate change law decisions. A pragmatic approach when dealing with RESs should be in line with the objective of levelling global warming by reinforcing the regulatory stability.

Charanne and *Eiser* did not make any explicit mention to the weight given to the objective of cutting emissions, neither expressed the importance to align the interests of the parties with the interests of levelling global warming or resolving the possible conflicts in this regard. However, *Eiser* concludes that the *ECT* entails a higher degree of stability given the particular functioning of the energy investments.[153] Its reasoning is based on Article 2 of the *ECT*, which establishes that the treaty's general purpose is "[…] to promote long-term cooperation in the energy field based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter." According to *Eiser*, the aim of promoting long-term cooperation in energy projects supposes that the treaty

150 See J. E. Viñuales, *Foreign Investment and the Environment in International Law* (2015), 24-55 [Viñuales, Foreign Investment and the Environment].

151 F. Baetens, 'Foreign Investment Law and Climate Change: Legal Conflicts Arising from Implementing the Kyoto Protocol through Private Investment', CISDL Working Papers Series 2010, 11, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117950 (last visited 21 December 2017).

152 See A. Boute, 'Combating Climate Change through Investment Arbitration', 25 *Fordham International Law Journal* (2012), 3, 613, 617.

153 *Eiser*, *supra* note 13, para. 377.

is an instrument to achieve the stability required to meet this aim.[154] Moreover, the Tribunal invoked the content of the European Energy Charter to stress the to stress the importance of approving treaties that promote a "[…] high degree of regulatory stability […]"[155] and asserts that Article 10 (1) *ECT* expressly reinforces the idea of stability.[156]

The "[…] high degree of regulatory stability […]" should be reinforced in the case of RESs because, as expressed in the introduction, renewable energy projects face higher risks than conventional energy projects, and they are vital instruments to achieve the objective of levelling global warming. The integration of the concept of reinforced stability for RESs based on climate change considerations should not represent a problem for arbitrators under the *ECT*. Despite the controversy regarding the legitimacy of relying on international environmental and climate instruments in investor-State arbitration[157] or the trend to protect these interests by means of interpretation of legal concepts,[158] the *ECT's* preamble recalls "[…] the United Nations Framework Convention on Climate Change, the Convention on Long-Range Transboundary Air Pollution and its protocols, and other international environmental agreements with energy-related aspects[…]", as well as recognizes "[…] the increasingly urgent need for measures to protect the environment […]". Additionally, Article 19 (d) *ECT* expressly highlights the duty of host governments to foster RESs: "[…] Contracting Parties shall […] have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution […]".

In this section, this paper openly takes sides for the dogmatic constructions that maximize the stability for RESs. For this purpose, it is suggested that Tribunals should adopt the sole effect doctrine, a broad interpretation of representations, the *less harmful measure* standard and the analysis of proportionality in the context of climate change, when dealing with this kind of disputes. However, it is important to highlight that the increasing stability for RESs could be counter-productive if it fosters the inefficiency of the investors.

154 *Ibid*.
155 *Eiser*, *supra* note 12, para. 378.
156 *Ibid*., para. 380.
157 J. E. Viñuales, Green Investment after Rio 2012, 16 *International Community Law Review* (2014), 2, 153, 173 [Viñuales, Green Investment].
158 *Ibid*.

Consequently, our pragmatic interpretation also requires demanding from investors an *expert's level of care*.

The *Sole-Effect Doctrine*

As previously explained, the sole-effect doctrine, as opposed to the police-power doctrine, entails that the Host State is found liable to pay damages under the expropriation protection whenever the investor has been deprived of the control or the value of the investment, "[...] even if not necessarily to the obvious benefit of the host State."[159] In this sense, "[...] the issue is not so much whether the measure concerned is legitimate and serves to a public purpose, but whether it is a measure that, being legitimate and serving a public purpose, should give rise to a compensation claim."[160]

From our pragmatic approach of *reinforced stability of RESs*, it is appropriate to adopt the sole-effect doctrine rather than the police-power doctrine. The fact that the host government is aware that the good faith or the legitimate public interest of the measure would not serve as defense for excluding liability, would incentivize the authorities to implement the modification of the RESs in a subtle way that does not deprive the investment from its whole value and, therefore, would protect as much as possible the production of low carbon emissions from dramatic changes in the regulation.

Indeed, a position like this one might also provide some coherence to the problem of expropriation and FET overlapping each other. In this sense, under the approach proposed, while the expropriation protection would take the form of strict liability when the full value or control of the investment is destroyed, and the compensation would correspond to the *fair market value*, the FET would require the frustration of the investor's legitimate expectations, where the reasonability and proportionality of the measure might exclude the host government's liability. Actually, despite the fact that the decision in *Eiser* was the result of the evaluation of the FET, the defining feature for finding the host government liable was the substantiality of the loss and the amount of the compensation was very close to the value that the company actually invested. Somehow, this might reflect that the Tribunal took a longer route through the FET to find out that an expropriation happened.

However, opting for strict liability when the modification of RESs involves expropriation would foster the investor's inefficiency if a proper degree of

[159] *Metalclad Corporation*, *supra* note 49, para 103.
[160] *Azurix Corp.*, *supra* note 66, para. 310.

diligence is not required from him. Consequently, it is important for arbitrators, in order to avoid this inefficiency, to examine in depth to which proportion the loss was foreseeable to the investor according to the analysis of the investment-back expectations, and to evaluate to which degree the mismanagement of the investor contributed to the destruction of the investment.

Broad Interpretation of Representations

The Tribunals' position of restricting the creation of legitimate expectations to stability contracts or any similar direct representations has the advantage of providing certainty, since it can be synthetized in a simple-fix rule that does not admit much interpretation: either the State creates legitimate expectations by providing clear, specific, and direct assurances, like stability clauses, or it does not. Nonetheless, a solution as such may bend the balance in favor of the Host State. Indeed, none of the Spanish companies involved in RES disputes concluded stability contracts with the authorities.[161]

Our approach of 'reinforced stability of RESs' suggests that the assessment of specific commitments and legitimate expectations should be perfected in a less strict manner in order to bring balance to the investors' and States' interests, as well as to promote the global interest of levelling global warming. As a consequence of broadening the interpretation of representations, host governments are forced to be more cautious in not sending the wrong message to the investors and, furthermore, they may be incentivized to design sustainable RESs. In the case of Spain, it seems that the authorities designed a system that was not sustainable in the long-term and ended up in what they described as the tariff deficit.

This does not mean that any change in the regulation that affects the investment shall be deemed against legitimate expectations and may give rise to liability, as some arbitral decisions proclaimed based on the dogma of stability under IIAs.[162] It means that arbitrators should apply a wider interpretation to define whether the action or inaction of the government, from an objective perspective, was sufficient to generate the convincement that the legal framework would remain unaltered during the life of the project. Informal and formal representations, regulations, negotiations, meetings, public and private declarations, etc., should be considered – isolated and/or jointly – to infer whether or not specific commitments were endorsed by the host government.

161 *Eiser*, *supra* note 13, para. 359.
162 *Tecmed S.A.*, *supra* note. 53; *CMS Gas Transmission Company*, *supra* note 78.

In section 4.2, it was already mentioned that a broader approach to specific commitments is consistent with the principle of good faith and has support not only in the dissenting opinion of *Charanne* but also in investor-State arbitration case law.

Less Harmful Measure Standard

The standard of *capriciousness* or *arbitrariness* adopted by the Tribunals to assess whether the conduct was proportional does not match the pragmatic approach of *reinforced stability of RESs*. The standard that the Host State's measures should reach to be exempted from liability appears to be very low, since a measure that is mistaken or reckless, but not capricious or unnecessary, will not be regarded as contrary to proportionality. Concerning RESs, hardly one could find a conduct of the government that is capricious or arbitrary. The current technology and costs of low carbon industries require some sort of state aid to be developed and, consequently, represents a burden for taxpayers and consumers. In this regard, cutting benefits to investors in renewable energy might always be justified for economic reasons.

Establishing a higher standard would incentivize the authorities to modify the RESs only if necessary. This higher standard should require the host government to implement the *less harmful measure*,[163] in the sense that, if it appears to be a better alternative than the one the authorities have chosen, they should be liable to compensate damages. This seems to be a common approach in WTO disputes.[164] However, in investor-State arbitrations, there are not many examples. S. D. Myers could be the referent of this higher standard. According to this decision, the purpose of Canada when promoting the ability to process PCBs was legitimate, however, for achieving this purpose "[…] there were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs […] was not one of them."[165] Similarly, in Oxy v. Ecuador, the Tribunal concluded that the host government had other options than declaring the termination of the contract such as the "[…] insistence on payment of a transfer fee […] improvements to the economic terms

[163] This expression is taken from Viñuales, *Foreign Investment and the Environment*, *supra* note 150, 270.

[164] Isatolo, *supra* note 148, 30.

[165] *S.D. Myers Inc. v. Government of Canada*, Partial Award, 13 November 2000, para. 255, available at https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf (last visited 21 December 2017).

of the original contract; and/or a negotiated settlement […]".[166] Consequently, the Tribunal "[…] finds that the Respondent's argument that there was really no option but to terminate is unsound and it is not accepted."[167]

Nevertheless, this standard needs to be applied by tribunals in a very careful manner. As previously mentioned, the authorities are better equipped and prepared than the Tribunals to take measures regarding RESs. The technical questions regarding RESs usually require a high level of expertise. Accordingly, the operation of this standard demands a high degree of deference to the decision of local authorities and local courts.[168] In the cases of *Charanne* and *Eiser*, it is surprising that the Tribunals did not provide any deference to the Spanish Courts, which found that the modifications were adjusted to the Constitution and proportional.[169] Deference to the national authorities and courts might give more legitimacy to the Tribunals' decisions.

Proportionality *Stricto Sensu* in a Climate Change Context

Eiser and *Charanne* did not weight all the interests at issue e.g. consumers, taxpayers, the economy, and climate change. In both cases, proportionality was assessed by evaluating three elements: necessity, predictability, and the preservation of the fundamental characteristics of the investment legal framework. According to the Tribunals, while in *Charanne* the modifications did preserve the fundamental characteristics, in *Eiser* they did not. However, upon examining the cases, one can easily arrive at the conclusion that the main factor to determine proportionality was the substantiality of the loss. This might give a sense that the decision was based on a pure instinct of fairness or that it covers an indirect expropriation.[170] Indeed, the Tribunal in *Eiser* expressed that dispossessing the investment from its entire value was "[…] profoundly unfair and unequal […]."[171]

166 *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, Final Award, ICSID Case No. ARB/06/11, 5 October 2012, para. 434, available at https://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf (last visited 21 December 2017) [Occidental Petroleum Corporation].

167 *Ibid*., para. 436.

168 Isatolo, *supra* note 148, 30.

169 See C. Otero García Castrillón, 'Spain and Investment Arbitration: The Renewable Energy Explosion', CIGI, paper No. 17, Investor-State Arbitration Series, 2016, 8-10.

170 *Ibid*.

171 *Eiser*, *supra* note 13, para. 365.

An approach that takes into account the importance of tackling global warming, naturally, requires not only that the evaluation of proportionality include climate change as one of the interests at issue, but also requires giving a considerable weight to it. Yet, we are not suggesting that the climate change interest should always prevail so the RESs are preserved no matter the particularities of the case. The Tribunal should weigh all the factors and make a decision on a case-by-case basis. Nevertheless, it is important to highlight that under, our approach decisions should first take the climate change interest into account, second, give a proper weight to the interest of climate change, grounded on the global intention to lower greenhouse emissions and the international instruments supporting this objective, and finally, conceive transparently how the interaction between the climate change interest and other interests give shape to the final decision.

An analysis on proportionality like the one proposed provides more transparency and legitimacy to the ruling, as well as forces arbitrators to take the context of climate change into account. However, arbitrators might find the task of weighing financial interests – such as the loss for investors, the tariff deficit, the burden for consumers, etc.- against the interest of leveling global warming, very difficult to measure. This level of complexity also requires a high degree of deference to the local authorities and courts.

Expert's Level of Care Standard

In *Charanne*, the Tribunal expressed that the investor was expected to have a level of care that would drive him to envision that the RES would change in the future.[172] This statement suggests that the level of care required from the investors in RESs is the level of an expert. Even though, in *Charanne*, this concept was used to define whether the investor had legitimate expectations, this level of care should be required throughout the whole project. Indeed, as mentioned previously, our approach of 'reinforced stability of RESs' might lead to the inefficiency of the investor if he is not required to act with the level of care of an expert.

The expert's level of care required of the investors might play an important role in RESs' cases. In fact, around 120 large solar energy firms, mostly in Europe and the United States of America, were bankrupted from 2010 to 2015. It would be excessive to blame governments for all these failures. Many investors leveraged

[172] *Charanne*, *supra* note 12, para. 507.

their investments in unhealthy proportions and bore inefficient operational costs, motivated by what has been described as an "[…] equivalent to the real-state bubble […]."[173] In *Eiser*, while the Tribunal seemed very strict in analyzing the reasonability of the modifications, it did not give much attention to the level of care employed by the investor. In this regard, the Tribunal merely stated that the leverage of the company was normal[174] and even put the burden of proof on the defendant by claiming that he did not prove that the costs of the investor were unreasonable.[175] Moreover, the Tribunal did not present any deep analysis or weigh importance to the fact that the investor commenced construction nearly four years after the enactment of *Real Decreto 611/2007;* neither wondered why the 7 % tax from 2012 had such a huge impact on the investor's finance or that its service coverage ratio was nearly 1.[176] This reflection is not to controvert the Tribunal's analysis of the evidence or its decision, but simply calls attention to the necessity to evaluate the facts according to the *expert's level of care* standard, in order ensure that decisions do not foster inefficient investments in a market that has proven to be risky and requires the participation of the most competent firms.

The contribution of the investor's mismanagement to the loss should influence the decision by excluding liability when the loss is completely attributed to the investor or lowering the compensation when the loss is partially attributed to him. In MTD, the arbitrators ruled that Chile was liable to pay damages but only in a proportion of 50 % since the other 50 % was a consequence of the investor's bad decision to buy land that was earmarked for agricultural use.[177] Similarly, in Oxy v. Ecuador the compensation was reduced 25 % because the investor provoked the termination of the contract by not asking the authorities for the approval for a farm-out agreement.[178]

173 D. Lacalle, 'La mayor quiebra solar, el fin de la burbuja de deuda', El Español, 25 April 2016, available at http://www.elespanol.com/economia/20160424/119868015_13.html (last visited 21 December 2017) (Translation by the author).

174 *Eiser*, *supra* note 13, para. 415.

175 *Ibid*., para. 414.

176 *Eiser*, *supra* note 13, para. 144.

177 *MTD Equity Sdn. Bhd. and MTD Chile S. A. v. Republic of Chile*, Final Award, ICSID Case No. ARB/01/7, 25 May 2004, para. 243, available at https://www.italaw.com/sites/default/files/case-documents/ita0544.pdf (last visited 21 December 2017).

178 *Occidental Petroleum Corporation*, *supra* note 166, paras. 669-670.

F. Conclusion

The modifications to the RES in Spain ended by erasing any differences with respect to the general scheme for conventional energies. In *Charanne*, the loss was considered not to be substantial enough to constitute an expropriation, neither were the changes in the 2010 regulation regarded as sufficiently drastic to frustrate the investor's legitimate expectations. Contrarily, the reforms to the RES adopted from 2012 to 2014 were considered by the Tribunal in *Eiser* to be against the investor's legitimate expectations, since they abruptly dispossessed the investment of its value by changing the core characteristics of the RES. Even though the Decisions arrive at opposing conclusions concerning the liability of Spain, the two decisions complement each other. The dogmatic approach they have is, in general terms, the same and *Eiser* even claims to be aligned with *Charanne*. The difference in the ruling originates in the different set of measures that were evaluated in each of the cases.

It is too soon to predict what will be the outcome of the 30 pending cases on RESs against Spain. However, the paper identifies some of the features that influenced both Decisions. The analysis of expropriation in *Charanne* shows that the *expected value of cash-flow* is relevant as far as it impacts the value of the shares, but it is not by itself subject to expropriation under the *ECT*. Concerning the FET, we have found that both decisions agree on the conclusion that the representations only create legitimate expectations when they take the form of stability clauses or any similar direct expressions from the host government. Additionally, both decisions concur in the assumption that a measure is disproportionate when it is "[…] capricious or unnecessary […]" or "[…] suddenly and unpredictably eliminates the essential characteristics of the existing regulatory framework."[179]

Although the legal concepts that support *Charanne* and *Eiser's* rulings follow prior decisions from investor-State arbitration Tribunals, this paper demonstrates, by presenting the parties' elaboration, how the arguments to defend either the claimant's or the defendant's position can find convincing support in the case law. Moreover, the performance of a purely legal analysis in section 4 argues that restricting specific commitments to stability contracts or similar representations could be contradictory and against the principle of good faith. Furthermore, we claim that the approach of the Tribunal regarding necessity, as an element of proportionality, appears to apply the very low standard of non-arbitrariness and that the test of proportionality lacks a proper weighing

[179] *Charanne*, supra note 12, para 517.

of all the interests, leaving the impression that the decision is made on a pure sense of justice.

The universe of legal elaborations that was described in section 3, as well as the critics of the Tribunal's interpretations from a purely legal perspective presented, in section 4, provide enough elements to find within this universe what is the *best possible law* to foster the aim of levelling global warming.

The *ECT* integrates the global climate change law instruments and promotes RESs. Accordingly, our pragmatic approach assumes that the *ECT* entails reinforced stability for the RESs. This reinforced stability suggests that the disputes related to RESs under *ECT* should be resolved by applying the sole effect doctrine, a broad interpretation of representations, the *less harmful measure* standard, and the analysis of proportionality in the context of climate change. However, as this reinforced stability might be counterproductive if it fosters the inefficiency of the investor, we suggest that the investor should be required to perform his operations according to the *expert's level of care* standard.