

**Vol. 5, No. 2 (2013)**

## **General Articles**

Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law  
*Alejandro Rodiles*

Without (State) Immunity, No (Individual) Responsibility  
*Giovanni Boggero*

## **International Legislation and Jurisprudence**

“All’s Well That Ends Well” or “Much Ado About Nothing”?:  
A Commentary on the *Arms Trade Treaty*  
*Marlitt Brandes*

The *Lubanga* Case of the International Criminal Court: A  
Critical Analysis of the Trial Chamber’s Findings on Issues  
of Active Use, Age, and Gravity  
*Michael E. Kurth*

## **Conceptional Roots and Potentials of International Investment Treaties**

Americanization of the BIT Universe: The Influence of  
Friendship, Commerce and Navigation (FCN) Treaties on  
Modern Investment Treaty Law  
*Wolfgang Alschmer*

The Possible Future of Promoting and Protecting European  
Investments in Sub-Saharan Africa  
*Lars Schönwald*



# GoJIL | Goettingen Journal of International Law

Goettingen Journal of International Law (GoJIL)  
c/o Institute for International and European Law  
Platz der Göttinger Sieben 5  
37073 Göttingen  
Germany  
info@gojil.eu  
www.gojil.eu  
ISSN 1868-1581

---

The Goettingen Journal of International Law is published Open Access and three times per year by Goettingen Law School students.

Submissions: The General Call for Papers focuses on topics of international law including related fields such international criminal law, international humanitarian law and international economic law. A submission's eligibility is not contingent upon its specific legal methodology, meaning that e.g. historical or economic approaches are welcome. Submissions are classified as a general article consisting of about 15,000 words, an article on current developments consisting of about 6,000 to 15,000 words, or a report (e.g. on judgments or recent case law).

The views expressed in all contributions to the GoJIL are those of the individual authors and do not necessarily represent the views of the Board of Editors.

Except where otherwise noted, all contributions are licensed under the Creative Commons Licence Attribution – No Derivative Works 3.0 Germany and protected by German Intellectual Property Law (UrhG).

### **Advisory Board**

Prof. Dr. KAI AMBOS (University of Goettingen, Judge at the State Court), Prof. Dr. THOMAS BUERGENTHAL, LL.M. (George Washington University, former Judge of the International Court of Justice), Prof. Dr. CHRISTIAN CALLIESS, LL.M. (Freie Universität Berlin), Prof. Dr. GEORG NOLTE (International Law Commission, Humboldt University of Berlin), Prof. Dr. Dr. h.c. ANGELIKA NUSSBERGER, M.A. (European Court of Human Rights, University of Cologne), Prof.

Dr. ANDREAS L. PAULUS (Federal Constitutional Court, University of Goettingen), Prof. Dr. Dr. h.c. mult. DIETRICH RAUSCHNING (University of Goettingen), Prof. Dr. WALTER REESE-SCHÄFER (University of Goettingen), Prof. Dr. FRANK SCHORKOPF (University of Goettingen), Prof. Dr. BRUNO SIMMA (University of Michigan, former Judge at the International Court of Justice), Prof. Dr. PETER-TOBIAS STOLL (University of Goettingen)

### **Scientific Advisory Board**

Dr. HELMUT AUST, MLE (Humboldt University of Berlin), Dr. STEFANIE BOCK (University of Goettingen), MATTHÄUS FINK, MLE (University of Goettingen), Dr. CHEN GE (University of Cambridge), KATJA GÖCKE, LL.M. (University of Goettingen), Dr. MATTHIAS GOLDMANN, LL.M. (Max Planck Institute for Comparative Public Law and International Law, Heidelberg), Dr. THOMAS KLEINLEIN (University of Frankfurt/Main),

MATTHIAS LIPPOLD (University of Goettingen), CLEMENS MATTHEIS (University of Goettingen), Dr. SVEN MISSLING (University of Goettingen), Dr. NIELS PETERSEN (Max Planck Institute for Research on Collective Goods, Bonn), MAJA SMRKOLJ, LL.M. (European Court of Human Rights), Dr. IGNAZ STEGMILLER (University of Gießen), TOBIAS THIENEL, LL.M. (Lawyer, Kiel), MARKUS WAGNER, J.S.M. (University of Miami)

### **Editorial Board**

Editors-in-Chief: CHRISTIAN JELINSKY, JAN-HENRIK HINSELMANN

Managing Editors: KATRIN BENSLEDER, FRANZISKA BERG, GEORG SCHÄFER

Editors: ANN-CHRISTIN BÖLTER, PETJA IVANOVA, DAVID LAHUSEN, KATHARINA LAZAR, FREDERIKE MIELKE, NOELIA NUNEZ, ANNIKA MALEEN POSCHADEL, DOMINIK PRIETZ, RHIAN MORITZ, NILS SCHLÜTER, TORBEN SCHLÜTER, FRANZISKA THANIEL, INGA WITTE, ENRICO ZIENKE

### **Native Speaker Board**

NEELA BADAMI, ELIZABETH CAMPBELL, DEEPALOK CHATTERJEE, RAHUL MENON, PAUL PRYCE, ERIK M. TIKANNEN

**Vol. 5, No. 2 (2013)**

**Contents**

Editorial

Editorial .....	327
Acknowledgments .....	331

General Articles

Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law <i>Alejandro Rodiles</i> .....	333
Without (State) Immunity, No (Individual) Responsibility <i>Giovanni Boggero</i> .....	375

International Legislation and Jurisprudence

“All’s Well That Ends Well” or “Much Ado About Nothing”?: A Commentary on the <i>Arms Trade Treaty</i> <i>Marlitt Brandes</i> .....	399
---	-----

The *Lubanga* Case of the International Criminal Court:  
A Critical Analysis of the Trial Chamber's Findings on  
Issues of Active Use, Age, and Gravity  
*Michael E. Kurth* ..... 431

## Conceptual Roots and Potentials of International Investment Treaties

Americanization of the BIT Universe: The Influence of  
Friendship, Commerce and Navigation (FCN) Treaties  
on Modern Investment Treaty Law  
*Wolfgang Alschner*..... 455

The Possible Future of Promoting and Protecting European  
Investments in Sub-Saharan Africa  
*Lars Schönwald*..... 487

**Vol. 5, No. 2 (2013)**

## **Editorial**

Dear Readers,

The Crimean crisis represents one of diplomacy's greater challenges in recent history. The demeanor of the parties involved raises numerous questions of international law already extensively commented on in respective blogs.<sup>1</sup> Furthermore, the superpowers' pursuit of evident political and geo-strategical interests exposes yet again what may be perceived as the powerlessness of public international law.

Likewise, it has crystallized the United Nations Security Council's (UN SC) inability to effectively resolve conflict in a temporarily multi-polar world order, as far as its permanent members are concerned. However, despite the poor prospects of a profound reform of the UN SC, hope still rests with the

<sup>1</sup> See, e.g., A. Peters, 'Sense and Nonsense of Territorial Referendums in Ukraine, and Why the 16 March Referendum in Crimea Does Not Justify Crimea's Alteration of Territorial Status Under International Law', *EJIL: Talk!* (16 April 2014), available at <http://www.ejiltalk.org/sense-and-nonsense-of-territorial-referendums-in-ukraine-and-why-the-16-march-referendum-in-crimea-does-not-justify-crimeas-alteration-of-territorial-status-under-international-law/> (last visited 16 April 2014); N. Krisch, 'Crimea and the Limits of International Law', *EJIL: Talk!* (10 March 2014), available at <http://www.ejiltalk.org/crimea-and-the-limits-of-international-law/> (last visited 16 April 2014); D. Wischart, 'The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention?', *EJIL: Talk!* (4 March 2014), available at <http://www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/> (last visited 16 April 2014); G. H. Fox, 'Intervention in the Ukraine by Invitation', *Opinio Juris* (10 March 2014) available at <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-intervention-ukraine-invitation/> (last visited 16 April 2014); R. McCorquodale, 'Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law', *Opinio Juris* (10 March 2014), available at <http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/> (last visited 16 April 2014).

Council's non-permanent members. The influence of these members on the organ's decision-making process is examined in the first general article of this issue.

Precisely, 'Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law' by *Alejandro Rodiles* offers an insight into the set of juridical tools at the disposal of UN SC non-permanent members and their contributions to the promotion of the 'international rule of law'. The author holds that greater legitimacy and thus greater efficiency of the Council – by virtue of not least greater transparency, favouring a 'culture of justification' – has indeed improved its general adherence to the 'international rule of law'.

Completing the 'General Articles' section, *Giovanni Boggero* undertakes to add new theoretical arguments to the rationale of State immunity. In 'Without (State) Immunity, No (Individual) Responsibility', the right to State immunity is identified as an integral precondition for the prosecution of individual perpetrators. As such, it is argued that upholding State immunity for human rights violations should not logically lead to the impunity of State officials acting on behalf of the respective State.

The ensuing section of international legislation and jurisprudence comprises another pair of articles:

*Marlitt Brandes*' "All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the *Arms Trade Treaty*' examines and comments on the *Arms Trade Treaty* as adopted by the UN General Assembly. Brandes especially focuses on the analysis of the legal value of the provisions enshrined by recourse to their scope, implementation and substantive obligations entailed, which have been devised to help victims of international human rights and humanitarian law violations. Although allegations of ambiguity providing for potential loopholes may not be discarded entirely and both ratification and comprehensive enforcement of major supplier States remains uncertain, the treaty's progressive nature cannot be gainsaid.

Following, in 'The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity', *Michael E. Kurth* takes a closer look at the first judgment of the ICC. While analyzing the most significant questions raised in the decision, the author

infers that, certain “blind spots” notwithstanding, the ruling of The Hague’s Court was precedential in nature, especially with regard to the issues of child soldiering and sentencing.

GoJIL Volume 5, No. 2 concludes with a focus on conceptional roots and potentials of international investment treaties.

Tracing the evolutionary path of investment protection treaties leads *Wolfgang Alschner* back to the concept of Friendship, Commerce and Navigation treaties, as initially concluded in 1778, in the midst of the American War of Independence. ‘The Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law’ detects how, following its interim demise, conceptually distinct FCN treaties largely influence the very essence of contemporary bilateral investment treaties (BITs). Formerly short, simple and specialized agreements increasingly encompass provisions covering investment-related issues such as pertaining to intellectual property rights, trade, labour or the environment.

Lastly, in ‘The Possible Future of Promoting and Protecting European Investments in Sub-Saharan Africa’, *Lars Schönwald* examines how and in which ways the outdated level of protection of European investors in Sub-Saharan Africa (SSA) can be improved. By looking at the participating parties of a new investment treaty, already existing standard clauses as well as possible new concepts, the author concludes that there should be more than one EU–SSA international investment agreement comprising the future provisions as only this would guarantee a consistent and effective common commercial policy and regard the tight linkage to international trade and development.

We hope that these thoroughly selected articles provide for yet another worthwhile read to our readership.

The Editors



## **Acknowledgments**

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:

- All members of the GoJIL Advisory Board and Scientific Advisory Board
- The Law Faculty of the University Goettingen
- The Institute for Public International Law and European Law, Goettingen
- The Goettingen University Press
- The Goettingen Society for the Promotion of International Law



## **Non-Permanent Members of the United Nations Security Council and the Promotion of the International Rule of Law**

Alejandro Rodiles\*

### Table of Contents

A. Introduction .....	334
B. Different Types of Non-Permanent Members .....	339
C. Non-Permanent Members and the Promotion of the <i>International Rule of Law</i> .....	342
D. The Rule of Law in the Security Council.....	347
I. A (Re)newed Commitment to the International Rule of Law at the UN .....	347
II. Thematic Debates on the Rule of Law .....	349
E. Explaining the Tool-Kit: Subsidiary Organs and Rotating Presidencies .....	355
I. The Al-Qaida and Taliban Sanctions Regime .....	356
II. The Informal Working Group on Documentation and Other Procedural Questions (IWG) .....	362
III. The Rotating Presidencies of the SC .....	366
F. Conclusions.....	371

\* Research Fellow at the Law Faculty of Humboldt-University, Berlin. During Mexico's latest non-permanent membership in the UN Security Council (2009 to 2010), Alejandro Rodiles served as the legal adviser of the Mexican Mission to the United Nations, in New York. The views expressed here do not necessarily reflect those of the Mexican Foreign Ministry. This article is a revised and elaborated version of a conference talk delivered at the Institute of Public International Law and European Law of the University of Goettingen. The author thanks the participants of that conference for a fruitful discussion. Special thanks are due to Andreas L. Paulus. The author also wishes to thank Helmut P. Aust and Konrad G. Bühler for very helpful comments. All mistakes are the sole responsibility of the author.

## Abstract

Non-permanent members of the United Nations Security Council experience clear and well-known limits. Yet, there are certain tools at their disposal which, beyond lucky political constellations, allow them to exercise a more systemic influence on the Council's work and outcomes. These tools are of a juridical nature, often established and developed through the organ's practice, but their efficient use depends primarily on diplomatic expertise and imagination channeled through informal venues. The present article shows how said tools have been used in the case of the promotion of the 'international rule of law'. However contested the concept and restricted its practical consequences on the organ's functions, the evolution of its promotion within the Security Council is both a demonstration of and a further vehicle for non-permanent members' influence on this body. That this in turn serves to legitimate the Council under its current configuration can be seen critically. However, it seems important to underline that the UN Security Council's efficiency depends ever more on the legitimacy that non-permanent members can best imprint on it. In a non-polar world, this tendency can be expected to increase.

## A. Introduction

An increased 'global responsibility' and the accompanying risk of assuming high political costs in the face of inescapable limitations, make it understandable why some States' foreign policy communities are divided regarding the convenience of aspiring to a temporary seat on the United Nations Security Council (SC).<sup>1</sup> To downplay the limits that non-permanent members of the SC (NPM)<sup>2</sup> experience would be gullible, at best. Beyond their diminished formal powers according to Article 27 *Charter of the United Nations* (UN Charter),<sup>3</sup> they have to get accustomed to an organ which works very differently and in relative isolation from the rest of the Organization, and when they begin to do so, their term already nears the end. This article does not intend to hide these hurdles,

<sup>1</sup> Other considerations of a more politico-economical character may play a role too, though there are less visible in the public debates on the pros and cons of a State's application for a Security Council (SC) candidacy. For example, findings on correlations between the increase of U.S. and UN aid allocation to States currently in the SC have been made. See I. Kuziemko & E. Werker, 'How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations', 114 *Journal of Political Economy* (2006) 5, 905.

<sup>2</sup> Also called 'elected Council members' or 'elected ten' ('E10').

<sup>3</sup> *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI [UN Charter].

quite to the contrary. It could, nevertheless, be read as an argument *contra* those who oppose their countries' participation in the SC, but this contribution will not dwell on this issue. In trying to show that despite all the difficulties there are some very useful instruments at the disposal of NPM, this article does certainly intend to contribute to some awareness-raising in this regard. Most important, however, is the proposition that the promotion of the rule of law within the SC has been mostly an achievement of NPM, and that with it, these States have found and tuned a vehicle at their own service. Since rule of law promotion by NPM deals mostly with the international level, it also favors the openness of the SC towards the wider membership of the United Nations (UN) and facilitates a certain degree of legal control of the Council's actions.

This 'achievement' can be critically questioned by regarding it mainly as a means to legitimate the Council under its current structures. After all, imprinting a few vague rule of law standards on the Council's work would not make a real difference in its practice; in turn, the whole 'rule of law talk' could be quite useful for refreshing its image, helping it thus to continue imposing its own standards. Ultimately, the whole enterprise would be in service of the permanent five (P5), and NPM which question the Council's legitimacy under its current configuration would have every reason not to do anything that does not aim at transforming this body radically. There is indeed some plausibility underlying this argument. However, States also have a clear interest in playing the game even under uneven rules, and cannot afford to wait aside until radical transformation occurs. Shaping rules and structures, however modestly, and contributing to their gradual change are often preferred, for equally valid reasons. That most States follow the latter, moderate approach, has not only to do with the tremendous obstacles any significant SC reform faces, but is also related to a wide acceptance of the existing system as a whole and certain unpreparedness for major change on behalf of even those who favor it in principle.

It should be clarified that this article is not about SC reform.<sup>4</sup> The role of NPM is, however, inevitably linked to the Council's structure and therefore

<sup>4</sup> Reform plans and debates around the different proposals began in the early 1990s. See B. Fassbender, *UN Security Council Reform and the Right of Veto, A Constitutional Perspective* (1998), 221-275; B. Fassbender, 'On the Boulevard of Broken Dreams: The Project of a Reform of the UN After the 2005 World Summit', 2 *International Organizations Law Review* (2005) 2, 391, 400; I. Hurd, 'Myths of Membership: The Politics of Legitimation in UN Security Council Reform', 14 *Global Governance* (2008) 2, 199, 205; T. Rensmann, 'Reform', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, Vol. I, 3rd ed. (2012), 25, 63-64, paras 125-134 [Simma *et al.*, UN Charter Commentary, Vol. I].

does necessarily throw some questions related to said reform. It should also be mentioned that although arguments are shared in the sense that the current configuration of the Council does not match the state of affairs of today's world,<sup>5</sup> this article focuses on how and to what extent NPM can make a difference within the structure as it is – and as it will probably continue to be for quite some time. Articles 108 and 109 *UN Charter* endow the P5 with the power to block any significant reform of the SC – and of any of the principle organs of the UN – which would necessarily require a formal amendment of the *UN Charter*.<sup>6</sup> Changes in the system, on the other hand, occur from time to time through other, less rigid, legal means, especially through 'practice'.<sup>7</sup> Change is

<sup>5</sup> An early and pointed articulation of this can be found in M. Seara Vázquez, 'The UN Security Council at Fifty: Midlife Crisis or Terminal Illness?', 1 *Global Governance* (1995) 3, 285. It is useful to recall the report of the Secretary-General (SG), *In Larger Freedom*, which states that "a change in the Council's composition is needed to make it more broadly representative of the international community as a whole, as well as of the geopolitical realities of today" (General Assembly (GA), *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN Doc A/59/2005, 21 March 2005, 42, para. 168).

<sup>6</sup> Apart from the discussions about the viability of amending the Charter through recourse to 'informal' venues, i.e., basically practice, or subsidiarily to the law of treaties (*Vienna Convention on the Law of Treaties*, 23 May 1969, Arts 39-41, 1155 UNTS 331, 341-342 [VCLT]). See also G. Witschel, 'Article 108', in B. Simma *et al.* (eds), *The Charter of the United Nations: A Commentary*, Vol. II, 3rd ed. (2012), 2199, 2204-2205, paras 8-11), it is clear that any institutional change to the principle organs, as well as any reform "affecting the institutional balance within the UN" (Rensmann, *supra* note 4, 30, para. 13, with further references) would require a formal amendment according to Arts 108 & 109 *UN Charter*.

<sup>7</sup> Admittedly, 'practice' is a rather vague expression, but it is intentionally left open in this context in order to highlight its function as a vehicle through which change can be achieved and legally recognized in various forms, be it as matter of treaty interpretation in terms of Arts 31 (3) (b) & 32 VCLT; as being part of the "rules of the organization" (VCLT, Art. 5, *supra* note 6, 334). See also *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1985, Art. 2 (j), UN Doc A/CONF.129/15, 25 ILM 543, 547 [VCLT-IO] and the International Law Commission's (ILC) *Draft Articles on the Responsibility of International Organizations*, 3 June 2011, Art. 2 (b), UN Doc A/66/10, 54, 54) or as a case of *desuetudo*. The practice of an organization is not always easily differentiated from the practice of the parties to the constituent treaty of that organization, and there are good reasons for not trying to impose *a priori* divisions in this regard. In the present case, an 'established practice' of the SC can be viewed as a rule of the Organization, a subsequent practice of a *UN Charter* provision, or both. For a different view, see C. Peters, 'Subsequent Practice and Established Practice of International Organizations: Two Sides of the Same Coin?', 3 *Goettingen Journal of International Law* (2011) 2, 617.

thus not that improbable as is often believed, though the step-by-step approach followed in multilateral diplomacy and especially in formal fora often leads to the impatience of outside observers, and consequently jeopardizes the already fragile credibility of multilateral institutions. In this regard, the present text is also an attempt at showing that what often appears as insignificant has sometimes an important potential as part of an incremental multilateral process, which should not be underestimated.

The efficient use of the said legal means for change depends primarily on diplomatic expertise and imagination channeled through informal venues. When NPM refer with a certain irony to themselves as 'permanent members of the General Assembly (GA)', they do not only allude to their limitations within the Council but also to their potential strengths derived from good communication and coordination with their 'natural' allies in the GA. As we shall see in the case of the promotion of the international rule of law, 'groups of friends'<sup>8</sup> and other informal platforms of coordination, which tend to be open to all UN member States, play a significant role in supporting NPM in their efforts to influence the Council's outcomes, and sometimes also in introducing changes to its ways of procedure, i.e., changes that transcend the temporary participation of NPM. This indicates that, at least in some cases, it might take more than "five to rule them all",<sup>9</sup> and that the Council's core is not hermetically sealed. It might very well be the case that this cautious openness has been only permitted by the 'guardians of the Council', i.e., the P5 and the SC Secretariat, in some concrete instances and in pure self-interest, but that would still be a clear sign for the increasing need of the P5 to engage constructively with emerging powers and other important actors. A case in point is that of 'contact groups' and other informal diplomatic groupings, like the 'friends of the Secretary-General (SG)',<sup>10</sup> where also non-members of the SC participate, and which

<sup>8</sup> There is some terminological confusion in regard to the term 'group of friends'. In the present article it refers exclusively to informal partnerships of like-minded UN member States, which promote specific issues in the UN. It does not designate the so-called 'friends of the SG'. See *infra* note 10.

<sup>9</sup> Borrowing the phrase from D. L. Bosco, *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (2009).

<sup>10</sup> 'Friends of the SG' refer to informal groups of States that support specific peace efforts of the UN Secretariat. They emerged in the early 1990s with the 'Friends of the SG on El Salvador', which derived from the 'Contadora Group', a joint diplomatic initiative of Latin American States. 'Contact groups' do not usually work in close coordination with the SG, but are rather diplomatic coalitions of interested countries which often work in parallel to the UN, like the P5 + 1 (Germany) on the Iranian nuclear program. On the emergence of these informal venues as a response to the difficulties faced by the SC after

have become something like an extension of the SC, and indeed of its core, in those issues where it is just not viable for the five to rule alone. Another type of informal extension of the Council can be observed in the increasing reliance of the SC subsidiary organs in charge of counterterrorism and non-proliferation of weapons of mass destruction<sup>11</sup> on ‘coalitions of the willing’ created and led by the United States (U.S.) – sometimes in conjunction with a few other partners – such as the Financial Action Task Force (FATF), the Proliferation Security Initiative (PSI), or the more recent Global Counterterrorism Forum (GCTF).<sup>12</sup>

These evolutions go beyond the role of NPM and the purposes of the present article, but they are all indications of how the post-Cold War period and the disorder that we are witnessing today,<sup>13</sup> which might be best characterized as “the age of non-polarity”,<sup>14</sup> have altered the ‘sovereignty’ of the SC, forcing it to adapt to the major shifts in world order. For NPM this represents an opportunity: Non-polarity not only means the augment of the relative strength of several potential NPM, the diminishing power of some of the P5, and eventually the loss of dominance of its most powerful member, the U.S., it also

the end of the bipolar world, see J. Prantl, *The UN Security Council and Informal Groups of States: Complementing or Competing for Governance?* (2006). On the ‘Contadora Group’, see C. H. Heller, ‘Las Gestiones del Grupo Contadora 30 Años Después’, 13 *Foreign Affairs Latinoamérica* (2013) 2, 74.

<sup>11</sup> The three main organs in these closely interrelated areas are the Committee established pursuant to SC Res. 1373, UN Doc S/RES/1373 (2001), 28 September 2001 concerning Counter-Terrorism (CTC), the Committee pursuant to SC Res. 1267, UN Doc S/RES/1267 (1999), 15 October 1999, and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011 concerning Al-Qaida and associated individuals and entities, and the Committee established pursuant to SC Res. 1540, UN Doc S/RES/1540 (2004), 28 April 2004.

<sup>12</sup> On the relationship of FATF and PSI with the SC and the evolution of informal international law, see E. Benvenisti, ‘Coalitions of the Willing and the Evolution of Informal International Law’, in C. Calliess, G. Nolte & P.-T. Stoll (eds), *Coalitions of the Willing: Avantgarde or Threat?* (2007), 1, 4-9, 17-21; A. Rodiles, ‘Coalitions of the Willing: Coyuntura, Contexto y Propiedades: Un Primer Esbozo’, 7 *Anuario Mexicano de Derecho Internacional* (2007), 675, 686-689 & 696-699.

<sup>13</sup> Andrew Hurrell explains how the ending of the post-Cold War era is giving place to a new phase of “tectonic [...] shifting” of the global order, and analyses the role of international law in this regard. See A. Hurrell, ‘International Law 1989-2010: A Performance Appraisal’, in J. Crawford & S. Nouwen (eds), *Select Proceedings of the European Society of International Law: Third Volume, International Law 1989-2010: A Performance Appraisal* (2012), 3, 3 *et seq.*

<sup>14</sup> For a precise account of this notion, see R. N. Haass, ‘The Age of Nonpolarity: What Will Follow U.S. Dominance’, 87 *Foreign Affairs* (2008) 3, 44. See also C. A. Kupchan, *No One’s World: The West, The Rising Rest, and the Coming Global Turn* (2012).

stands for continuously changing power constellations in international affairs.<sup>15</sup> A global (dis)order without a center of gravity or even poles, but with several and flexible nodes connecting varying actors according to their current strength on the issues at hand, considerably increases the bargaining power of those that were left outside the centers; these centers include the core of the SC, which is being softened by these evolutions. Today, NPM have more possibilities of forming powerful *ad hoc* alliances on several issues among them, as well as with some permanent members, who rely more and more on the former, and this tendency is likely to increase. In short, non-polarity might very well translate in a growing potential for NPM to influence mechanisms and outcomes of the most important organ of the UN, which in order to remain vital in world affairs needs to respond to these changes and challenges.

In the following pages, the contribution will first present some of the characteristics of NPM, the major differences among them according to their degree of participation, as well as the environment in which they perform (B.). After that, the article will explain what the promotion of the ‘international rule of law’ by NPM means and how it differs from other kinds of rule of law activities traditionally carried out by the UN and the SC in particular (C.). A closer look to the concrete measures promoted by NPM within the Council in order to strengthen its adherence to the rule of law, especially the organization of thematic debates on the matter, will follow (D.). Before concluding, some of the legal and diplomatic tools through which NPM successfully facilitate legal control and introduce incremental changes will be further analyzed (E.).

## B. Different Types of Non-Permanent Members

It is of course too vague to speak of ‘non-permanent members’ in general terms without due regard to the huge diversity among them. Independently from regional and country specificities, there are those who follow a clear policy of continuity regarding their participation in the Council, those who only occasionally form part of it, and the ones in the middle who return to the table every once in a while. According to the ‘candidacy-policy’ of each State (and its success) one might speak of ‘frequent-NPM’, ‘recurrent-NPM’, and ‘occasional-NPM’, although it is clear that the lines among these categories are not always clear cut, let alone for the fact that some States became UN members

<sup>15</sup> This distinguishes ‘non-polarity’ from ‘multi-polarity’, i.e., the idea of a more stable and ordered redistribution of power.

only at a later point in time.<sup>16</sup> Still, this proposed classification might prove to be useful as it implies important differences not only in regard to increased quantitative probabilities to impact certain outcomes, but also in connection to the qualitative possibilities to shape processes in the long run. Returning to the SC while certain issues are still on the top of the agenda increases the probabilities of continuity in the defense of one's postures and interests, which is further strengthened through the cumulative acquaintance of a know-how of the Council's 'ways of proceeding', including of its powerful Secretariat.

While 'occasional' and, to a lesser extent, 'recurrent NPM' spend usually a year or so in getting familiar with working methods and practices, 'frequent-NPM' do not only rely on a richer 'institutional memory'<sup>17</sup> but can eventually appoint the same experienced diplomats, who do also benefit from personal contacts – an indispensable tool for permanent and non-permanent members alike. Foreign ministries of all kinds of NPM have to reinforce their permanent missions in New York, assigning extra posts and sometimes hiring extra personnel. Nonetheless, 'frequent-NPM' can often rely on a continued structure in regard to the SC, which, although obviously reduced during the time when they are not acting members, functions as a follow-up mechanism of the Council's work. This allows them to exert more influence from the outside through constant, informed, and more focused participations in open debates, letters to the SC, and other channels of communication between the SC and non-members; more important from their perspective, it already prepares the ground for their next participation. Prospects of returning within a foreseeable future to the table help to counter the eroding importance that NPM experience in the last two months of their two-year term, something which is due both to

<sup>16</sup> It is no coincidence that two States aspiring for permanent seats, i.e., Brazil and Japan, lead the list of countries elected to the SC with ten times each, followed by Argentina with nine, and Colombia, India, and Pakistan with seven times each. In those cases, we can safely speak of 'frequent-NPM'. Canada and Italy, with six times respectively, and Germany with five but only since 1973, are certainly very close, but might also be part of those States with a less steady but still significant presence in the SC over the years, and which varies between 4 and 6 memberships. Here, we can also find Australia, Belgium, Netherlands, Panama, and Poland with five participations, as well as Chile, Denmark, Egypt, Mexico, Nigeria, Norway, Peru, Philippines, Spain, Turkey, and Venezuela with four memberships each. SC, 'Countries Elected Members of the Security Council', available at <http://www.un.org/en/sc/members/elected.shtml> (last visited 31 January 2014).

<sup>17</sup> On the importance of the 'institutional memory' of the SC and the disadvantages NPM experience in this regard, see K. Mahbubani, 'The Permanent and Elected Council Members', in D. M. Malone (ed.), *The UN Security Council: From the Cold War to the 21st Century* (2004), 253, 260.

the fact that negotiations on certain issues already begin to take place between the P5, the five other States which still have a year to go, and the new elected five, who attend Council meetings as a sort of observers during November and December each year, as well as to the lack of incentives for those leaving without prospects of continuity in the near future. These discontinuities do affect all three types of NPM,<sup>18</sup> though 'frequent-NPM' are in a slightly better position to forge new alliances with newcomers as their chances of having already worked with some of them in the Council in the past are obviously higher.

In regard to the promotion of the rule of law within the Council, there are differences among NPM too. However, these differences have more to do with specific attitudes of individual States concerning the diffusion of rule of law aspects at the national level than to their participation policies towards the SC. This relates to the tensions between the rule of law at the national and international levels and to the contested nature of the concept of the 'rule of law' in international affairs, which the article will address in the next section (C.). For now, suffice to mention that many NPM have adopted the promotion of the rule of law as an important tactic in multilateral diplomacy. Most of these States form part of the 'Friends of the Rule of Law', an informal group of like-minded UN Member States that emerged around 2005 from an Austrian initiative and promotes rule of law activities in and around the UN.<sup>19</sup> Although this group is considerably large (about 30 States) and has participants from every region, it is not representative of the wider membership. For instance, 'frequent-NPM' such as Brazil, India, and Japan are not part of this group. Nevertheless, when it comes to promoting the adherence of the SC to basic rule of law principles, most NPM become 'friends' by necessity regardless of their membership in this

<sup>18</sup> For example, in 2009, Austria, Costa Rica, and Mexico had a strong cooperation on human rights, international humanitarian law, and other rule of law related aspects. Unfortunately for Austria and Mexico, Costa Rica's term ended on 31 December 2010 when the other two States had still a year to go. A positive effect of this was, however, an even stronger partnership between the Austrian and Mexican delegations on said issues. For an overview of how these partnerships worked in regard to the negotiations that resulted in the adoption of SC Res. 1904, UN Doc S/RES/1904 (2009), 17 December 2009 establishing the Ombudsperson of the Al-Qaida sanctions regime, see K. T. Huber & A. Rodiles, 'An Ombudsperson in the United Nations Security Council: A Paradigm Shift?', *Anuario Mexicano de Derecho Internacional* (Tenth Anniversary Special Edition) (2012), 107, 121-127 [Huber & Rodiles, An Ombudsperson in the SC].

<sup>19</sup> See K. G. Bühler, 'The Austrian Rule of Law Initiative 2004 - 2008: The Panel Series, the Advisory Group and the Final Report on the UN Security Council and the Rule of Law', 12 *Max Planck Yearbook of United Nations Law* (2008), 409, 413-414 [Bühler, Austrian Rule of Law Initiative 2004 - 2008].

or that group: It is in their self-interest to work together in favor of a more transparent and inclusive Council that operates in a less unpredictable manner.

### C. Non-Permanent Members and the Promotion of the *International Rule of Law*

The ‘rule of law’ is a “multi-faceted ideal”<sup>20</sup> with no determinate meaning but several conceptions. The concept is thus a disputed one. On the international plane its applicability has been questioned.<sup>21</sup> It is indeed true that this ideal as it has evolved within national legal and political systems cannot be easily transposed to international relations.<sup>22</sup> Take, for instance, the ‘UN definition’ as articulated by one of the promoters of the rule of law within the Organization, former SG Kofi Annan:

“The ‘rule of law’ is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>23</sup>

This enumeration of ideals is just too broad to reflect what most States are actually willing to accept today at the international level. Even if read as a programmatic enunciation of goals to be achieved in the long term, it would still

<sup>20</sup> J. Waldron, ‘The Concept and the Rule of Law’, 43 *Georgia Law Review* (2008) 1, 1, 6.

<sup>21</sup> In this sense, see M. Wood, ‘The Law of Treaties and the UN Security Council: Some Reflections’, in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention* (2011), 244, 247 (note 14).

<sup>22</sup> See R. Higgins, ‘The Rule of Law: Some Sceptical Thoughts’, in R. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, Vol. II (2009), 1330, 1334 [Higgins, The Rule of Law].

<sup>23</sup> SC, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616, 23 August 2004, 4, para. 6.

be too loaded with domestic analogies in order to be functional in the foreseeable future, showing some of the inherent difficulties of articulating the concept in the international realm.<sup>24</sup> In addition to its disputed definitional properties – or intension, i.e., the sufficient and necessary elements that would define its meaning, according to the classical theory of concepts<sup>25</sup> – there is, following Jeremy Waldron, this other level of complexity which refers to “the several values which arguably might be served by the Rule of Law”.<sup>26</sup> Here, we are confronted with the potential instrumentality of the concept, which again raises serious doubts regarding its very meaning. As the representative of India put it during the annual debate in the Sixth Committee of the GA on its agenda item on ‘The Rule of Law at the National and International Levels’,<sup>27</sup> this notion is

“often advanced as a solution to the abuse of government power, economic stagnation and corruption [...] considered essential to the promotion of democracy, human rights, free and fair markets and to the battle against international crime and terrorism [as well as] an indispensable component for promoting peace in post-conflict societies. The rule of law might therefore have a different meaning and content depending on the objective assigned to it.”<sup>28</sup>

The instrumentalist uses of the rule of law<sup>29</sup> at the global level are often the subject of what has become known as ‘rule of law promotion’, i.e., the coordinated endeavors of international organizations and agencies as well as of some Western governments to advance on a transnational plane certain values

<sup>24</sup> For a similar reading, see S. Chesterman, ‘I’ll Take Manhattan’: The International Rule of Law and the United Nations Security Council’, 1 *Hague Journal on the Rule of Law* (2009) 1, 67, 68.

<sup>25</sup> For a good overview, see E. Margolis & S. Laurence, ‘Concepts’, in E. N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (2012), available at <http://plato.stanford.edu/archives/fall2012/entries/concepts/> (last visited 31 January 2014).

<sup>26</sup> J. Waldron, ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’, 21 *Law and Philosophy* (2002) 2, 137, 158.

<sup>27</sup> See *infra* note 47.

<sup>28</sup> GA, *Sixth Committee: Summary Record of the 7th Meeting*, UN Doc A/C.6/61/SR.7, 7 November 2006, 13, para. 74; also quoted in Higgins, ‘The Rule of Law’, *supra* note 22, 1337.

<sup>29</sup> On the different uses of the ‘rule of law’ especially in regard to economic and development policies, see A. Santos, ‘The World Bank’s Uses of the “Rule of Law” Promise in Economic Development’, in D. M. Trubek & A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (2006), 253.

such as free trade, democracy, and – more recently – security.<sup>30</sup> The World Bank and the UN, on the one hand, and the U.S., the European Union (EU), and some European countries, on the other, are the most prominent promoters of the ‘rule of law’ in this sense of the term. The measures undertaken under this strategic use of the ‘rule of law’ notion concern primarily the delivery of financial aid and development assistance on behalf of the donor-States and institutions just mentioned to the recipient States in the ‘developing’ world or the ‘global south’, which in turn are required to undertake substantial legal and economic reforms domestically. As Stephen Humphreys mentions, these reforms deal “with serious stuff: the deliberate re-engineering, at a legal-structural level, of the economic, political and social basics of countries throughout the world”.<sup>31</sup> It is therefore no surprise that the whole ‘rule of law talk’ has awakened some suspicion among the States usually addressed as recipient countries in regard to the actual goals behind the invocation of this notion. Due regard to national needs and realities has been an increasing demand by these States, which has led the GA to call for enhanced dialogue among donors, recipients, and other actors involved, “with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership”.<sup>32</sup>

As this situation shows, UN rule of law activities are basically part of a transnational enterprise which focuses on the promotion of certain values within States, mostly from the south. This divide between donors and recipients, between the ‘west’ and the ‘rest’, reflects the distinction between the rule of law at the national and the international levels, i.e., between “the rule of international law and the *internationalisation* of the rule of law”, as Sundhya Pahuja adequately frames it.<sup>33</sup> It has been a traditional preoccupation of less powerful States to strengthen the role of international law in world affairs.<sup>34</sup> Here, international law clearly fulfils functions too: Formal procedures serve a less unequal access to decision-making, and normative principles between States help alleviate the existing asymmetries in international relations. These functions of international law are, however, closer to the reasons why one expects law to

<sup>30</sup> On this transnational enterprise, see the excellent study of S. Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (2010).

<sup>31</sup> *Ibid.*, 8.

<sup>32</sup> GA Res. 67/197, UN Doc A/RES/67/197, 14 January 2013, 2 (op. 8).

<sup>33</sup> See S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), 172-185 (emphasis added).

<sup>34</sup> *Ibid.*, 173-179, especially in regard to the UN Decade of International Law-initiative launched by the Non-Aligned Movement (NAM) and proclaimed in GA Res. 44/23, UN Doc A/RES/44/23, 17 November 1989.

rule anyway, i.e., to achieve equality (before the law) and constraints to (the exercise of) sheer power. In other words, international law is not just promoted to serve as *a* means for advancing particular substantive values, but is conceived as *the* vehicle for achieving some predictability and certainty through formal procedures (secondary rules) that permit the continuous construction of a common language (or frame of reference) for recognizing what counts and what not as obligations (primary rules); or to put it dryly: as the way to refer expected parameters of behavior to an objective sphere of validity, and not just to the subjective will of (a few) States.<sup>35</sup>

Rule of law contestation in the international realm is usually described as the dispute between the ‘thinner’, or formalistic accounts, on the one hand, and the ‘thicker’ or substantive versions, on the other. Whilst the latter are presented in the language of human rights and democracy and are usually attached to western nations and international bureaucracies, it is sometimes conceded that in order to avoid deeper divisions in the ‘international community’, it might be wiser to stick to the former for a while, i.e., as long as the ‘rest’ is not ready for the substance. However, this very same division is seldom articulated as the tensions that do exist between the rule of law at the national and the international levels, i.e., the struggle between the functions of international law, and where the ‘thinner versions’ concern very thick issues on the law which governs between States and at the institutional level of international organizations. It is this ‘thinner version’ to which the author refers in regard to the role of NPM. As a brief account on the history of rule of law debates in the SC will show,<sup>36</sup> and despite some regresses in recent times, it has been the merit of these States to focus on the international rule of law in the Council, especially on the exigency that it shall itself abide by international law. Before turning to this evolution, it is appropriate to make a short remark on the role of dialogue and its relation to the so-called ‘thicker’ and ‘thinner’ versions of the rule of law.

<sup>35</sup> These lines rely on Lauterpacht’s refutation of the political exemption according to the interests of sovereign States to submit their disputes to legal settlement, i.e., the argument in favor of the function of law as “the subjection of the totality of international relations to the rule of law” (H. Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *The British Yearbook of International Law* (1946), 1, 19 (capital letters omitted); as well as H. Lauterpacht, *The Function of Law in the International Community* (1933) [2012], and the Introduction by M. Koskenniemi, xxix); Hart’s notion of law as the unity between primary and secondary rules (H. L. A. Hart, *The Concept of Law*, 2nd ed. (1994) [1997], 94-99); and Kelsen’s ‘*objektiver Geltungsgrund*’ (H. Kelsen, *Reine Rechtslehre*, 2nd ed. (1960), 2-15, 200-204).

<sup>36</sup> See *infra*, section D.

One thing that is not disputed about the concept of the ‘rule of law’ is that its meaning is highly disputed, leading thus to its characterization as an “essentially contested” one.<sup>37</sup> But, as Waldron reminds us, the idea of ‘essentially contested concepts’ as conceived by philosopher Walter Bryce Gallie, does not refer to fruitless disputes about a concept’s meaning; quite the contrary, it “implies recognition of rival uses [...] as not only logically possible and humanly ‘likely’, but as of permanent potential critical value to one’s own use or interpretation of the concept in question”.<sup>38</sup> This notion is of great value when confronted with claims about the unviability of the rule of law in the international realm;<sup>39</sup> at the end, the dialogue among States – and other actors – becomes in itself an intrinsic element of the rule of law. Accordingly, the debates at the UN do not (and should not) aspire to a definition of the ‘rule of law’, neither at the international nor at the national levels, but to a sort of conceptual rapprochement through contestation. This has been acknowledged by several State representatives during the respective debates in the Sixth Committee of the GA as well as in the SC.<sup>40</sup> The common ground that enables this process

<sup>37</sup> See R. H. Fallon Jr., “‘The Rule of Law’ as a Concept in Constitutional Discourse”, 97 *Columbia Law Review* (1997) 1, 1, 7; Waldron, *supra* note 26.

<sup>38</sup> W. B. Gallie, ‘Essentially Contested Concepts’, 56 *Proceedings of the Aristotelian Society* (1955-1956), 167, 193, also cited in Waldron, *supra* note 26, 151. For Ernst-Wolfgang Böckenförde, ‘*Rechtsstaat*’ belongs, together with other fundamental juridical concepts, to the category of ‘*Schleusenbegriffe*’, i.e., ‘floodgate concepts’ which cannot be defined once and for all but are open to the ‘flood’ of changing political and constitutional ideas. Hence, only through the knowledge of their historical evolution, a more systemic understanding can be achieved. The evolutions Böckenförde has in mind are the history of the rival uses of the concept such as the ‘liberal’ versus the ‘social’ ‘*Rechtsstaat*’; the understanding is thus dialectical and not far away from the idea underlying ‘essentially contested concepts’. It is interesting to see how Böckenförde and Waldron arrive at a similar observation. For the former, the historical evolution shows the persisting perplexity of the ‘*Rechtsstaatsbegriff vis-à-vis* political power as it postulates the primacy of law but does not explain the conditions of its own existence. Waldron, on his part, mentions that “the Rule of Law is a form of contestation which amounts to an on-going debate among jurists and political theorists about the practicability of law being in charge in a society”. See E.-W. Böckenförde, ‘Entstehung und Wandel des Rechtsstaatsbegriffs’, in E.-W. Böckenförde, *Recht, Staat, Freiheit: Studien zur Rechtsphilosophie, Staatstheorie und Verfassungsgeschichte*, 2nd ed. (2006), 143, 143-144, 168-169; Waldron, *supra* note 26, 157.

<sup>39</sup> Cf. Wood, *supra* note 21, 247 (note 14).

<sup>40</sup> On States’ positions expressed in this regard in the Sixth Committee, see S. Barriga & A. Alday, ‘The General Assembly and the Rule of Law: Daring to Succeed? The Perspectives of Member States’, 12 *Max Planck Yearbook of United Nations Law* (2008), 381, 397-403. For the views expressed in the SC, see A. Rodiles, ‘México y la Promoción del Estado de Derecho en el Consejo de Seguridad’, in R. Dondisch (ed.), *México en el Consejo de*

in the first place is necessarily ‘thin’, since it has indeed to accommodate all the different views. It is not much more than the principled equality already entailed in the concept’s contestation, and nothing less than the *sine qua non* for arriving at any ‘thicker’ version, if the latter is to reflect any substantive agreement and not just particular views on substance.

## D. The Rule of Law in the Security Council

### I. A (Re)newed Commitment to the International Rule of Law at the UN

The SC has traditionally engaged in two kinds of rule of law activities: the promotion of legal reform within States which have been affected by armed conflict or are facing other problems of political stability;<sup>41</sup> and those which are aimed at ensuring respect for international law, especially international humanitarian law (IHL) and human rights law (IHR), by the parties to an armed conflict. Some do understand the latter kind of activity as encompassing not only compliance with IHL and IHR in conflict and post-conflict situations but generally as the idea of the strengthening of international law by the Council, including its measures on counter-terrorism and non-proliferation of weapons of mass destruction. In her capacity as former President of the International Court of Justice (ICJ), Rosalyn Higgins explained this as “the idea of embedding international law into many of the contemporary activities overseen by the Security Council [...] and increasing the level of compliance with the rules of international law”.<sup>42</sup> Be that as it may, while the former clearly concerns the rule of law at the national level, the latter can be characterized as promotion of the rule of international law. However, a fundamental aspect of this latter

*Seguridad de la ONU: La Historia tras Bambalinas* (2012), 199, 203-204 [Rodiles, México y la Promoción del Estado de Derecho].

<sup>41</sup> See further H. P. Aust & G. Nolte, ‘International Law and the Rule of Law at the National Level’, in M. Zürn, A. Nollkaemper & R. Peerenboom (eds), *Rule of Law Dynamics in an Era of International and Transnational Governance* (2012), 48, 53-57. See also the remarks by the former Legal Adviser of the Mexican Ministry of Foreign Affairs (Ambassador Joel Hernández), ‘Taking Stock: The UN Security Council and the Rule of Law’ (28 October 2010), available at <http://www.unrol.org/files/Ambassador%20Joel%20Hern%C3%A1ndez%20on%20the%20SC%20and%20RoL.pdf> (last visited 31 December 2013).

<sup>42</sup> SC, *Verbatim Record of the 5474th Meeting*, UN Doc S/PV.5474, 22 June 2006, 6 [SC, *Verbatim Record of the 5474th Meeting*]. Although she did not relate this directly with the rule of law, her remarks were on the frame of a SC rule of law debate.

notion was traditionally left aside: its institutional dimension.<sup>43</sup> Concerns about respect for international law by the Council itself were first introduced to the discourse through the insistence of NPM, and this was only possible after the rule of international law was heavily undermined by the U.S. and its coalition partners with the invasion of Iraq in 2003. The general indignation that this war provoked, favored the momentum for a strong call to respect the international rule of law; it was under this ambiance that the *World Summit Outcome* of 2005 was negotiated.<sup>44</sup>

The commitment of the heads of State and government to “an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States”<sup>45</sup> may sound like another general statement with no real teeth, but it has been followed by a series of initiatives which remind of those of the kind of the “decade of international law”<sup>46</sup> promoted by the Non-Aligned Movement (NAM) and adopted by the GA at the ending of the Cold War. First, there are the annual debates at the Sixth Committee of the GA regarding ‘the rule of law at the national and international levels’, which go back to an initiative that was born in the framework of the Friends of the Rule of Law and spearheaded by Liechtenstein and Mexico.<sup>47</sup> This initiative has also led to a recent high level meeting of the GA on the rule of law, celebrated in autumn 2012, and the adoption of a declaration by heads of State, government, and delegation.<sup>48</sup> Although it can be argued that the overall tone of the declaration is more focused on the rule of law at the national level, it is

<sup>43</sup> For some States within the ‘Friends of the Rule of Law’, like Austria, the ‘institutional level’ represents a third layer of the rule of law, which should be promoted along the national and international levels. On this see Bühler, ‘Austrian Rule of Law Initiative 2004 - 2008’, *supra* note 19, 414.

<sup>44</sup> See Humphreys, *supra* note 30, 155. See also Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 200-201.

<sup>45</sup> GA Res. 60/1, UN Doc A/RES/60/1, 24 October 2005, 29, para. 134 (a).

<sup>46</sup> GA Res. 44/23, *supra* note 34 (capital letters omitted). On this initiative, see Pahuja, *supra* note 33, 173-179.

<sup>47</sup> Following a request by the Permanent Representatives of Liechtenstein and Mexico (see GA, *Request for the Inclusion of an Item in the Provisional Agenda of the Sixty-first Session: The Rule of Law at the National and International Levels*, UN Doc A/61/142, 22 May 2006), the topic was introduced to the *Programme of Work* of the 61st session of the 6th Committee in 2006, and has since been debated annually at this forum. See GA Res. 61/39, UN Doc A/RES/61/39, 18 December 2006 and subsequent resolutions. On the origins of this initiative within the ‘Friends of the Rule of Law’, see Bühler, ‘Austrian Rule of Law Initiative 2004 - 2008’, *supra* note 19, 416.

<sup>48</sup> GA Res. 67/1, UN Doc A/RES/67/1, 30 November 2012.

interesting to observe how the “voluntary pledges” on rule of law commitments that States are encouraged to deliver can also deal with multilateral measures aimed at enhancing international cooperation, “including regional and South-South cooperation”.<sup>49</sup>

## II. Thematic Debates on the Rule of Law

In the SC, thematic debates on the rule of law have been held since 2003. The first one took place following an initiative by a P5, the UK, who has played an outstanding role in rule of law promotion by the SC and has been an important and constructive partner of NPM in this subject. However, it must also be stressed that the UK traditionally focuses on the rule of law in conflict and post-conflict situations, i.e., on the kind of UN mainstream rule of law activities aimed and carried out at the national level. The debate of 24 September 2003 was chaired by the former Foreign Secretary Jack Straw, and focused on how to harness the work of the UN, especially the SC, in relation with peacekeeping operations, the respect for IHL, in particular the protection of civilians during armed conflict, and with international criminal justice.<sup>50</sup> Still, a NPM, Mexico, took the opportunity to question a series of practices of the SC in regard to the law on the use of force, mentioned the need to debate about the principle of proportionality that the SC should observe in its actions under Chapter VII of the *UN Charter*, and strongly advocated a more extensive use of Chapter VI measures.<sup>51</sup> The 2003 debate was a public meeting, but not an open debate, i.e., non-members did not have the opportunity to be invited to participate upon their request.<sup>52</sup> It was, however, agreed to convene a new, open debate on the same item, only a few days later, in order to have the views of all UN Member States who wished to participate and of “other parts of the United

<sup>49</sup> *Ibid.*, 6, para. 42. The pledges so far delivered can be consulted at [http://www.unrol.org/article.aspx?article\\_id=170](http://www.unrol.org/article.aspx?article_id=170) (last visited 31 January 2014).

<sup>50</sup> See SC, *Verbatim Record of the 4833rd Meeting*, UN Doc S/PV.4833, 24 September 2003 [SC, Verbatim Record of the 4833rd Meeting] and the resulting presidential statement (SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2003/15, 24 September 2003) [SC, Presidential Statement, UN Doc S/PRST/2003/15].

<sup>51</sup> See SC, *Verbatim Record of the 4833rd Meeting*, *supra* note 50, 9-10. On the principle of proportionality and SC actions, see S. Talmon, ‘The Security Council as World Legislature’, 99 *American Journal of International Law* (2005) 1, 175, 184-185.

<sup>52</sup> See UN, *Provisional Rules of Procedure of the Security Council*, UN Doc S/96/Rev.7 (1983), 9, Rule 48 [UN, Provisional Rules of Procedure of the SC] and SC, *Note by the President of the Security Council*, UN Doc S/2010/507, 26 July 2010, 6-7, para. 36 [SC, Presidential Note, UN Doc S/2010/507].

Nations system”.<sup>53</sup> The meeting of 30 September 2003, and the following five SC debates on the rule of law, i.e., 2004, 2006, 2010, and the two organized in 2012 have been held under an open format. At least in the case of the 2010 debate organized by Mexico, it was explained from the very beginning of the informal negotiations that a debate on the rule of law in the SC can, almost by definition, only be open to the wider membership.<sup>54</sup> It is hence regrettable that the latest meeting on this subject, held on 30 January 2013 under the chairmanship of Pakistan,<sup>55</sup> was conducted as a briefing by the Secretariat without any outcome, followed by informal consultations of the whole, where non-Council members are not invited and no official record is made available.<sup>56</sup>

In October 2004, again under British leadership, the SC discussed a report of the SG on transitional justice and the rule of law in conflict and post-conflict societies.<sup>57</sup> Despite the agenda item, Mexico insisted, this time as an invited non-member, to direct its remarks on the Council’s adherence to international law, recalling the words of former SG Kofi Annan, who mentioned that “[t]hose who seek to bestow legitimacy must themselves embody it; and those who invoke international law must themselves submit to it”.<sup>58</sup> This tone marks the approach taken in the next rule of law debate, which took place in June 2006 and was convened by a NPM, Denmark, under the title ‘Strengthening International Law: Rule of Law and Maintenance of International Peace and Security’.<sup>59</sup>

The organization of this debate responded directly to the recognition of the rule of law at the international level underscored in the *2005 World Summit Outcome*; in a sense, it was a measure aimed at implementing the commitments of the heads of State and government by bringing the discussions on the need to observe international law to the most important organ of the UN, which due to its political nature and its all-important primary responsibility has traditionally not felt compelled to contrast its actions and ways of proceeding with the exigencies

<sup>53</sup> SC, *Presidential Statement*, UN Doc S/PRST/2003/15, *supra* note 50, 1 (para. 3).

<sup>54</sup> See Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 210.

<sup>55</sup> SC, *Verbatim Record of the 6913th Meeting*, UN Doc S/PV.6913, 30 January 2013.

<sup>56</sup> See SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 5, paras 20-27.

<sup>57</sup> See *supra* note 23.

<sup>58</sup> GA, *Official Records of the 3rd Plenary Meeting (59th Session)*, UN Doc A/59/PV.3, 21 September 2004, 3. Although Annan made this Statement in connection with those States in the former Commission on Human Rights who invoked the rule of law but did not always practice it at home, his remarks also followed a critical passage on the Council’s fairness. For Mexico’s statement, see SC, *Verbatim Record of the 5052nd Meeting*, UN Doc S/PV.5052 (Resumption 1), 6 October 2004, 33-34.

<sup>59</sup> SC, *Verbatim Record of the 5474th Meeting*, *supra* note 42.

of the rule of law. The decision taken by the Danish presidency of the Council was also in line with an ambitious initiative on the 'UN Security Council and the Rule of Law', launched by Austria in 2004 and which was attracting a lot of attention by the time the Danish debate was announced. It consisted of the creation of an 'advisory group', which became the Friends of the Rule of Law, the convening of a series of panel discussions among diplomats, representatives from NGOs, and scholars on the role of the SC in strengthening a rules-based international system, and a resulting *Final Report and Recommendations*, finalized by Simon Chesterman and published as a UN document in 2008.<sup>60</sup> Austria's initiative influenced the evolution of the subject in the SC in a significant way. It was based on the idea expressed in the GA by former Foreign Minister Benita Ferrero-Waldner that for smaller and medium sized countries in particular, an international order based on the rule of law is of paramount importance.<sup>61</sup> All this is not to "demonize' the Council".<sup>62</sup> It is of course true that its primary responsibility demands a great deal of efficiency, which in turn presupposes flexibility and a certain dose of ad-hocism. But the SC abuses this privilege and has made ad-hocism its normal way of procedure, preventing "the development and subsequent enforcement of consistent patterns of normative standards and policies".<sup>63</sup> Recognizing and understanding the Council's primary responsibility does not mean to uncritically accept its self-perception as being through and through 'the master of its own decisions', as is so often underlined by the P5 and the SC Secretariat.

In addition to issues related to conflict and post-conflict situations, which were not abandoned, the discussions during the Danish debate and its outcome introduced several aspects related to the respect for international law by the Council, including a general commitment to the *UN Charter* and international law, the recognition of the role of law in fostering stability and order in international relations, and a commitment to support peaceful settlement of disputes in accordance with Chapter VI, including an emphasis on the role

<sup>60</sup> Austrian Federal Ministry for European and International Affairs & Institute for International Law and Justice, New York University School of Law, *The UN Security Council and the Rule of Law: The Role of the Security Council in Strengthening a Rules-Based International System*, UN Doc A/63/69-S/2008/270, 7 May 2008. See also Bühler, 'Austrian Rule of Law Initiative 2004 - 2008', *supra* note 19.

<sup>61</sup> Bühler, 'Austrian Rule of Law Initiative 2004 - 2008', *supra* note 19, 411.

<sup>62</sup> Cf. Wood, *supra* note 21, 247-248.

<sup>63</sup> A. Bianchi, 'Ad-hocism and the Rule of Law', 13 *European Journal of International Law* (2002) 1, 263, 270.

of the ICJ, following Article 36 *UN Charter*.<sup>64</sup> Most striking at that time, the presidential statement (PRST) negotiated under the coordination of the Danish delegation contains an element, which should begin to change many things in the SC: the pledge to ensuring ‘fair and clear procedures’<sup>65</sup> regarding the listing and delisting of individuals and entities in the frame of the various sanctions regimes.<sup>66</sup>

The 2006 debate can be viewed today as a sea change in regard to the rule of law in the SC, as it shifted its focus from the internationalization of the rule of law to the international rule of law. The three thematic debates that followed on the subject, organized in 2010 by Mexico, in January 2012 by South Africa, and in October 2012 by Guatemala, continued the path taken by Denmark – though, as we shall see below, the South African debate showed a slight tendency to refocus on transnational rule of law promotion. The Guatemalan debate, on its part, dealt entirely with international criminal justice, concretely with the International Criminal Court (ICC) and its relationship with the SC, and how it can support the latter in upholding the rule of law.<sup>67</sup> Highlighting the importance of the ICC in the international order entails aspects of both, rule of law promotion at the national and international levels.

As opposed to the open debate organized by Guatemala, where no action was taken, the debates from 2010 and January 2012 produced each a statement by the president of the SC. Both echo the PRST adopted at the Danish debate, by restating the commitments of the Council to international law and the *UN Charter*, with an emphasis on Chapter VI and the role of the ICJ in the peaceful settlement of disputes. They do also include a paragraph on the need to ensure ‘fair and clear procedures’ in the case of targeted sanctions.<sup>68</sup> Some

<sup>64</sup> *UN Charter*, Art. 36, *supra* note 3.

<sup>65</sup> The term was coined by the heads of State and government in the *2005 World Summit Outcome* (GA Res. 60/1, *supra* note 45, 26, para. 109) and refers to due process rights of designated targets on SC sanctions lists. For an overview of the usage of this term of art in the UN, see Huber & Rodiles, ‘An Ombudsperson in the SC’, *supra* note 18, 109 (note 2) and accompanying text.

<sup>66</sup> SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2006/28, 22 June 2006, 2 (para. 5).

<sup>67</sup> See the *Concept Note* attached to the *Letter Dated 1 October 2012 From the Permanent Representative of Guatemala to the United Nations Addressed to the Secretary-General*, UN Doc S/2012/731, 1 October 2012, 2.

<sup>68</sup> See SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2010/11, 29 June 2010, 2 (para. 10) [SC, Presidential Statement, UN Doc S/PRST/2010/11] and SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2012/1, 19 January 2012, 3 (para. 15) [SC, Presidential Statement, UN Doc S/PRST/2012/1].

new interesting elements are introduced. The outcome of the 2010 debate reinforces the call to make greater use of Chapter VI of the *UN Charter* not only by extending to other adjudication instances beyond the ICJ through its call to resort to international and regional courts and tribunals, but also by emphasizing the role of the SG in mediation, according to Article 33 *UN Charter*.<sup>69</sup> Most significant in this regard is the call upon States that have not done so – including the P5 with the notable exception of the UK – to consider accepting the compulsory jurisdiction of the ICJ. Two more aspects deserve mention. First, S/PRST/2010/11 takes note of the review conference to the *Rome Statute*<sup>70</sup> of the ICC, held in Kampala, Uganda, just a few weeks before the said presidential statement entered into its final rounds of informal negotiations. What might look like a vague recognition of something the entry-into-force of which is still pending and subject to all sorts of legal questions,<sup>71</sup> is regarded by many as a welcomed and not so self-evident support by the SC for the agreements reached in Kampala, including the definition of the crime aggression.<sup>72</sup> Second, in regard to peacebuilding and peacekeeping operations, the 2010 presidential statement contains the commitment of the SC “to ensure that all UN efforts to restore peace and security *themselves* respect and promote the rule of law”.<sup>73</sup>

The PRST adopted under the South African presidency in January 2012 reiterates some of the elements introduced two years before, like the call to consider the acceptance of the compulsory jurisdiction of the ICJ, and brings in new aspects, such as the recognition of the “importance of national ownership in rule of law assistance activities”,<sup>74</sup> as the GA already did before.<sup>75</sup> On the

<sup>69</sup> *UN Charter*, Art. 33, *supra* note 3. The importance of the role of ‘good offices’ of the SG, including in the mediation of disputes, is another theme highlighted in the *2005 World Summit Outcome* (see GA Res. 60/1, *supra* note 45, 21, para. 76), and has been the subject of another thematic debate coordinated by Mexico in 2009 (see SC, *Verbatim Record of the 6108 Meeting*, UN Doc S/PV.6108 (Resumption 1), 21 April 2009).

<sup>70</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3.

<sup>71</sup> On this, see S. Barriga & L. Grover, ‘A Historic Breakthrough on the Crime of Aggression’, 105 *American Journal of International Law* (2011) 3, 517. For critical views, see K. J. Heller, ‘The Uncertain Legal Status of the Aggression Understandings’, 10 *Journal of International Criminal Justice* (2012) 1, 229; A. Zimmerman, ‘Amending the Amendment Provisions of the Rome Statute: The Kampala Compromise on the Crime of Aggression and the Law of Treaties’, 10 *Journal of International Criminal Justice* (2012) 1, 209.

<sup>72</sup> ICC Review Conference Res. RC/Res.6, 11 June 2010.

<sup>73</sup> SC, *Presidential Statement*, UN Doc S/PRST/2010/11, *supra* note 68, 2 (para. 9) (emphasis added).

<sup>74</sup> SC, *Presidential Statement*, UN Doc S/PRST/2012/1, *supra* note 68, 2 (para. 7).

<sup>75</sup> GA Res. 67/97, *supra* note 32, 2 (op. 8).

other hand, and following the current trend in the SC, it focuses much more on what have become known as “evolving challenges to international peace and security”,<sup>76</sup> including transnational organized crime, drug trafficking, and piracy. This shift deserves attention in the present context. As Humphreys’ thoroughly documented study shows,<sup>77</sup> ‘security and criminal justice’ has been a priority for the UN since the 1990s and since been integrated into the ‘competing mandates’ of several UN agencies, especially the United Nations Development Programme (UNDP), the Department of Peacekeeping Operations (DPKO), and the United Nations Office on Drugs and Crime (UNODC). Despite of – or rather contributing further to – the resulting coordination problems,<sup>78</sup> all of these agencies have learned to take advantage of the notion’s strong appeal, framing their work in terms of the ‘rule of law’. As mentioned above, under British leadership these issues were definitely brought under the ‘rule of law umbrella’ of the SC through the debates and presidential statements of September 2003 and October 2004, and they remain until today for several reasons. Without questioning the appropriateness of this, it can be said that the continuity of these important issues under the rubric of ‘the SC and the rule of law’ has been a trade-off between NPM and the P5, especially the UK, for the inclusion of the rule of law at the international level, particularly the discussions about the submission of the UN and the Council themselves to the rule of law.<sup>79</sup> The consideration by the SC of ‘security and criminal justice’ has evolved and transcended conflict and post-conflict situations as global ‘challenges to peace and security’ have done, or so the narrative goes. Just like ‘rule of law and justice’ became the way of framing ‘criminal justice and security’, so are now those measures aimed at transnational security and law enforcement<sup>80</sup> being articulated under the theme of ‘the promotion and strengthening of the rule of law in the maintenance of international peace and security’.

<sup>76</sup> See, for instance, SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2012/16, 25 April 2012, 1 (para. 2).

<sup>77</sup> See Humphreys, *supra* note 30, 155-162.

<sup>78</sup> Bad coordination – or the lack of it – among UN agencies has become a serious problem that is very often ill-treated with the creation of more agencies, which are supposed to coordinate among the pre-existing ones but usually degenerate in even more inter-agency competition and lack of coordination. UN rule of law work is a case in point.

<sup>79</sup> At least that was the experience of the negotiations of the 2010 debate, which the present author coordinated at the expert level as a member of the Mexican delegation.

<sup>80</sup> Whereby law enforcement measures do often merge with actions that are short-of-war, as the international fights against ‘terrorism’, ‘piracy and armed robbery at sea’, and against ‘crime’ show.

This was not intended when said title was introduced to the agenda item of the SC by Mexico in 2010, despite certain reluctance by Russia, in order to give account of “two different but closely interrelated objectives”: the desire to more strongly embed the rule of law and international law in the daily work of the SC, on the one hand, and the need to increase the level of adherence to the rule of law and international law by the UN and the SC themselves, on the other.<sup>81</sup> In other words, this reflects the need to strike a balance between rule of law promotion by the Council throughout the world and the strengthening of the rule of law within the Council’s work. The 2012 debate and its outcome, S/PRST/2012/1, seems to have slightly inclined in favor of the first objective. This is also visible in its paragraph dealing with peacekeeping and peacebuilding measures, where the commitment of the SC expressed two years before to ensure that UN activities themselves respect the rule of law is deleted.<sup>82</sup> The 2013 briefing organized by Pakistan, followed by a closed and unrecorded meeting, is not precisely a step towards more transparency in the Council’s work. These two debates were convened by NPM, and the decisions and efforts to organize them are important in themselves, also in order to keep the item on the top of the Council’s agenda. It is also clear that at times measures belonging to the first general objective will gain more weight due to political circumstances and current events, and NPM have strong and sometimes legitimate interests in certain of these issues, especially those which affect their (national) security. They should, however, be careful not to let the subject return to be a one-sided enterprise, be it only for their self-interest.

## E. Explaining the Tool-Kit: Subsidiary Organs and Rotating Presidencies

Thematic debates are not the only means through which NPM have favored the international rule of law in the SC. In addition to the day-to-day work, there is the influence NPM can exercise as chairs of the various subsidiary organs. Three examples should suffice here: Austria and Germany chairing the most notorious sanctions regime, the Committee pursuant to SC *Resolutions 1267* (1999) and *1989* (2011) concerning Al-Qaida and associated individuals and entities, and Japan’s work in front of the Informal Working Group on

<sup>81</sup> See the *Concept Note* attached to the *Letter Dated 18 June 2010 From the Permanent Representative of Mexico to the United Nations Addressed to the Secretary-General*, UN Doc S/2010/322, 21 June 2010, 2, 2-3.

<sup>82</sup> SC, *Presidential Statement*, UN Doc S/PRST/2012/1, *supra* note 68, 2 (para. 6).

Documentation and other Procedural Questions (IWG). The work of these subsidiary organs and the contributions of the said NPM cannot be treated here in great detail,<sup>83</sup> but some outstanding achievements should be shortly mentioned since they are clear indicators of how NPM can and have indeed contributed to the respect of the rule of law by the Council.

## I. The Al-Qaida and Taliban Sanctions Regime

The Austrian leadership of the Al-Qaida and Taliban sanctions regime (2009-2010), which was divided during Germany's presidency (2011-2012) into the Al-Qaida and the Taliban sanctions committees,<sup>84</sup> was clearly devoted to improving the rule of law and it was pragmatic at the same time, something shown by Austria's decision not to apply for membership in the 'Like-Minded Group on Targeted Sanctions'<sup>85</sup> during the time it chaired the 1267 Committee. This 'principled pragmatism' proved to be very fruitful as it helped construct confidence between the P5 and the Austrian presidency, without sacrificing a strong coordination with other NPM, especially with Costa Rica and Mexico.<sup>86</sup> An open dialogue with the Group's participants, other interested delegations of the wider membership, NGOs and the press, was also favored by the Austrian delegation. It might sound obvious but it cannot be sufficiently stressed how important it is that those who try to change the Council's vices, be it NPM,

<sup>83</sup> On the Al-Qaida sanctions regime and the role of the Austrian presidency from 2009-2010, see Huber & Rodiles, 'An Ombudsperson in the SC', *supra* note 18. On the IWG and Japan's presidencies, see K. G. Bühler, 'Article 28', in Simma *et al.*, *UN Charter Commentary*, Vol. I, *supra* note 4, 939, 963-965, paras 62-70 [Bühler, Article 28 UN Charter].

<sup>84</sup> See SC Res. 1988, UN Doc S/RES/1988 (2011), 17 June 2011 and SC Res. 1989, UN Doc S/RES/1989 (2011), 17 June 2011. As is well-known, the decision to divide the Committee obeyed political considerations related to the peace and reconciliation process in Afghanistan and the related negotiations with certain fractions of the Taliban. See in particular SC Res. 1988, 7 (operative part 25).

<sup>85</sup> An informal group of like-minded States that advocates the improvement of fair and clear procedures of SC sanctions regimes, from which several important proposals on the subject have emerged and are still emerging. The group consists of Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden, and Switzerland. See 'Statement by the Permanent Representative of Liechtenstein on Behalf of the Group of Like-Minded States on Targeted Sanctions' (10 May 2013), available at [http://www.regierung.li/fileadmin/dateien/botschaften/ny\\_dokumente/2013-5-10\\_Statement\\_Like-Minded\\_Briefing\\_SC\\_Subsiadiary\\_Bodies\\_final\\_1\\_.pdf](http://www.regierung.li/fileadmin/dateien/botschaften/ny_dokumente/2013-5-10_Statement_Like-Minded_Briefing_SC_Subsiadiary_Bodies_final_1_.pdf) (last visited 31 January 2014), 1.

<sup>86</sup> See *supra* note 18.

NGOs or engaged scholars, make an effort to better understand the reasons for the reluctance of the P5, notwithstanding that these are not shared or even vehemently opposed. This often leads to only small, incremental changes in the system, but too much of a confrontational attitude risks stagnation altogether. And this is not only based on the (cynical) observation that NPM might better take the P5 very seriously as nothing goes without them; it is also a strategic argument since understanding their legitimate and not so legitimate needs clearly strengthens the bargaining position of the former.

The Austrian delegation had two important and difficult tasks: First to carry out and complete the comprehensive review of “the [c]onsolidated [l]ist” as mandated by SC *Resolution 1822* (2008);<sup>87</sup> and second to prepare the ground for the informal negotiations on the successor resolution, which became SC *Resolution 1904* (2009) and by which the institution of the Ombudsperson is established.<sup>88</sup> Both tasks were interrelated, or at least this was the way the Austrian presidency dealt with them. The review process had the purpose of discussing each and every entry on the sanctions list. It was conducted thoroughly, evaluating all available information and generating a lot of a pressure on those who had proposed the entry or wished to maintain it to give reasons and discuss them at the Committee; where appropriate, the chairman encouraged new delisting requests. This performed an important function in awareness-raising on all the shortcomings related to fair and clear procedures which showed-up during the review, and thus the pressing need to do something significant in this regard became more than evident. This awareness-raising was further strengthened through other activities initiated and conducted by the Austrian chairmanship, such as a visit of the Committee to Brussels in order to discuss the difficulties the EU was experiencing with regard to sanction’s implementation after the *Kadi I* judgment of the (European) Court of Justice (ECJ)<sup>89</sup> of September 2008.<sup>90</sup>

<sup>87</sup> SC Res. 1822, UN Doc S/RES/1822 (2008), 30 June 2008, 6 (op. 25).

<sup>88</sup> SC Res. 1904, *supra* note 18, 5-6 (op. 20).

<sup>89</sup> In this article, ‘ECJ’ is used as the well-known abbreviation even though its new name, after the Treaty of Lisbon, is simply the ‘Court of Justice’.

<sup>90</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, Joint Cases C-402/05 P & C-415/05 P, [2008] ECR I-6351 [Kadi I]. In the recently delivered *Kadi II* judgment, the ECJ restates some of its fundamental concerns of 2008, noting that “there has been no change [...] which could justify a reconsideration of that position”. See *European Commission and Others v. Yassin Abdullah Kadi*, Judgment of 18 July 2013, ECJ Joint Cases C-584/10 P, C-593/10 P & C-595/10 P, para. 66 (Court decision not yet published) [Kadi II].

The *Tenth Report* of the expert group of the Committee,<sup>91</sup> the Monitoring Team, was also discussed in detail by the Committee in view of the forthcoming negotiations on the successor resolution to *Resolution 1822* (2008). This Report summarizes a series of proposals to reform the sanctions regime previously made by the Like-Minded Group and other delegations, as well as by academic institutions, like the ‘White Paper’ of the Watson Institute for International Studies.<sup>92</sup> Among the several suggestions, the Report recalls a proposal formulated by Denmark in 2006, consisting in the creation of an ombudsperson to review delisting requests.<sup>93</sup> Not least due to intensive lobbying by the Austrian chairman, this proposal was already contained in the first draft presented by the U.S. delegation, and the competences of the Office of the Ombudsperson were further enhanced during the negotiations of *Resolution 1904* (2009), in great part due to the insistence and coordinated efforts of several NPM.

When Germany succeeded Austria as president of the Al-Qaida and Taliban sanctions Committee, in 2011, there were strong demands to strengthen due process elements in the mechanism created in December 2009. Germany, a member of the Like-Minded Group, saw the need for reform, and understood its role in front of the committee, indeed its “main assignment”, as “[h]elping [to] find a consensus for reform”.<sup>94</sup> In line with Austria but choosing different methods and style, Germany was determined to build a bridge between the

<sup>91</sup> SC, *Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team Submitted Pursuant to Resolution 1822 (2008) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities*, UN Doc S/2009/502, 2 October 2009, 3 [SC, Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team].

<sup>92</sup> T. J. Bierstecker & S. E. Eckert, ‘Strengthening Targeted Sanctions Through Fair and Clear Procedures’ (30 March 2006), available at [http://www.watsoninstitute.org/pub/S\\_trengthening\\_Targeted\\_Sanctions.pdf](http://www.watsoninstitute.org/pub/S_trengthening_Targeted_Sanctions.pdf) (last visited 31 December 2013). This report, its update from October 2009 (see T. J. Bierstecker & S. E. Eckert, ‘Addressing the Challenges to Targeted Sanctions: An Up-date of the “Watson Report”’ (October 2009), available at [http://www.watsoninstitute.org/pub/2009\\_10\\_targeted\\_sanctions.pdf](http://www.watsoninstitute.org/pub/2009_10_targeted_sanctions.pdf) (last visited 31 December 2013)), and the study commissioned by the UN Legal Counsel and finalized by Bardo Fassbender in 2006 (see B. Fassbender, ‘Targeted Sanctions Imposed By the UN Security Council and Due Process Rights: A Study Commissioned By the UN Office of Legal Affairs and Follow-Up Action by the United Nations’, 3 *International Organizations Law Review* (2006) 2, 437), were all discussed in panels and meetings organized by interested delegations before the negotiations of SC Res. 1904 (*supra* note 18).

<sup>93</sup> SC, *Tenth Report of the Analytical Support and Sanctions Implementation Monitoring Team*, *supra* note 91, 19, para. 46.

<sup>94</sup> The Permanent Mission of Germany to the United Nations, ‘Introductory Remarks by Ambassador Wittig on the Future of the 1267/1989 Al-Qaida Sanctions Regime’ (4 December 2012), available at <http://www.new-york-un.diplo.de/Vertretung/newyorkv>

Council's core, which in general terms remains reluctant to further reforms of the sanctions regime, and the group of UN members most fervently advocating due process rights. During Germany's presidency, several resolutions on this sanctions regime were adopted. As already mentioned, the Committee was split in two by taking the Taliban to a separate list.<sup>95</sup> The mandates of the Monitoring Team and of the Ombudsperson were extended and revised in June 2011 and December 2012. Particularly in regard to the Ombudsperson, further improvements to fair and clear procedures were achieved by substantially strengthening her competences. By far, the most important measure is the upgrading of the 'observations' she could formulate under *Resolution 1904* (2009) to 'recommendations' on delisting requests.

The original proposal by Denmark consisted of 'recommendations', and although several NPM, including Austria, Costa Rica, Libya, and Mexico, tried to restore this proposal during the negotiations of *Resolution 1904* (2009), it was then strongly opposed by China, Russia, and the U.S., while France and the UK, who under strong pressure at home derived from the EU courts' rulings<sup>96</sup> favored several improvements to the already far-reaching U.S. draft, remained rather silent on the matter. Under the mechanism established in Annex II of the *Resolution 1904* (2009), the Committee decided to approve delisting requests after consideration of the Ombudsperson's observations and according to "its normal decision-making procedures",<sup>97</sup> and if it decided to reject the request, it just needed to convey this to the Ombudsperson "including, as appropriate, explanatory comments".<sup>98</sup> The requirement of giving 'explanatory comments',

n/en/\_pr/speeches-statements/2012/20121204-wittig-1267-1898.html (last visited 31 January 2014).

<sup>95</sup> See *supra* note 84.

<sup>96</sup> In addition to the ECJ's *Kadi I* judgment of 2008 (see *supra* note 90), the General Court of the European Union (GC) delivered in September 2010, i.e., only a few months before the beginning of the negotiations on SC Res. 1904 (*supra* note 18), a new ruling which annulled the EC regulation adopted by the Commission in response to the *Kadi I* judgment in so far as it concerned Mr. Kadi, on the ground that the review carried out by the Commission equalled a mere 'simulacrum' and violated Mr. Kadi's right of defence and effective judicial review. See *Yassin Abdullah Kadi v. European Commission*, Case T-85/09, [2010] ECR II-5177, paras 179-188. It is important to mention that the ECJ dismissed the appeals against the GC in its *Kadi II* judgment of 18 July 2013 (see *supra* note 90). On the judgment of the GC and its reception in the SC prior and during the negotiations of SC Res. 1904 (*supra* note 18), see Huber & Rodiles, 'An Ombudsperson in the SC', *supra* note 18, 136-142.

<sup>97</sup> SC Res. 1904, *supra* note 18, 15, para. 10 (annex II).

<sup>98</sup> *Ibid.*, 15, para. 12.

even only ‘as appropriate’, was not easy to achieve in 2009, but for the above mentioned NPM, it was considered indispensable after their efforts to endow the Ombudsperson with the capacity to make recommendations failed. *Resolution 1989* (2011) not only introduces the notion of ‘recommendations’,<sup>99</sup> it actually gives them normative force: If the Ombudsperson recommends the delisting of an entry, sanctions shall automatically terminate with respect to that individual or entity within 60 days after the Committee completes the consideration of the Ombudsperson’s comprehensive report, “unless the Committee decides by consensus”<sup>100</sup> to retain the entry, or the question is referred to the SC. This has been qualified by the 2012 Watson Report as a “reverse veto”,<sup>101</sup> and it indeed represents a very high threshold that supposes considerable political costs for any Council member who wishes to override a recommendation of the Ombudsperson. And ‘political costs’ can be at least as effective as a deterrent as a formal determination of non-compliance. If this measure actually amounts to a “*de facto* judicial review” might be questioned though, especially in light of the fact that the effective remedy, as the same Report acknowledges, “continues to be outstanding issue”.<sup>102</sup> In any case, courts of law have begun to make clear that “despite the improvements added [...] the procedure for delisting and *ex officio* re-examination at UN level they do not provide to the person whose name is listed on the Sanctions Committee Consolidated List [...] the guarantee of effective judicial protection”.<sup>103</sup>

It is true that so far no recommendation has been overruled by the Committee or referred to the SC,<sup>104</sup> but as long as the possibility exists, the legal certainty that the issue will be decided by an independent instance is missing, and this is not just a juridical technicality but inherent to the very notion of an effective remedy, and a necessary element of the rule of law (*ubi ius ibi remedium*). Nevertheless, it is important to recall that a too confrontational approach in the Council may rapidly lead to stagnation. The establishment of an independent institution, competent to re-examine the work of a Council’s subsidiary organ

<sup>99</sup> SC Res. 1989, *supra* note 11, 6 (operative part 21).

<sup>100</sup> *Ibid.*, 17, para. 12 (annex II).

<sup>101</sup> S. E. Eckert & T. J. Bierstecker, ‘Due Process and Targeted Sanctions: An Update of the “Watson Report”’, (December 2012), available at [http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012\\_12.pdf](http://www.watsoninstitute.org/pub/Watson%20Report%20Update%202012_12.pdf) (last visited 31 December 2013), 37.

<sup>102</sup> *Ibid.*

<sup>103</sup> So the ECJ in the *Kadi II* decision (*supra* note 90, para. 133), referring to *Nada v. Switzerland*, ECtHR Application No. 10593/08, Judgment of 12 September 2012.

<sup>104</sup> See SC, *Report of the Office of the Ombudsperson Pursuant to Security Council Resolution 2083* (2012), UN Doc S/2013/71, 31 January 2013, 2, 7, paras 28-29.

in such a sensitive issue to States' security concerns was already a paradigm shift, and the progress achieved in just a couple of years in regard to its functions is surprising. The question is not about being too ambitious, but about when and how certain objectives can be better advanced. When *Resolution 1904* (2009) was adopted, there were many talks about putting the idea on the table that the Ombudsperson's mandate should be expanded to all sanctions regimes. According to the political environment at that time, interested delegations decided that it was prudent to wait until the institution's viability could be proven, to all sides involved. In the 2012 high-level meeting's declaration on the rule of law – adopted after the highly doubtful case of Jim'ale, who was put on the Somalia and Eritrea sanctions list the very same day he was released from the Al-Qaida sanctions regime<sup>105</sup> – the GA encourages the SC to further develop fair and clear procedures concerning targeted sanctions, without specifying any particular regime.<sup>106</sup> For the Like-Minded Group, Germany included, this should make the Council “start contemplating on how the benefits of the Office of the Ombudsperson could be extended beyond the Al-Qaida sanctions regime”,<sup>107</sup> and it accordingly presented the proposal formally to the SC in the letter issued on the eve of the negotiations of *Resolution 2083* (2012).<sup>108</sup> The said resolution extends the Ombudsperson's mandate in time (from 18 to 30 months),<sup>109</sup> considerably strengthening her Office, which nevertheless remains only competent for the Al-Qaida sanctions regime. The incremental approach is clear, though, and it is not that unlikely anymore that the desired extension is achieved in the next few years. What this could mean for the SC and the rule of law cannot be overstated. For now, the request remains on the table and is advocated by several States, including Germany, which as NPM successfully chaired the Committee, paying due regard to the expectations in and outside the Council.

<sup>105</sup> SC, ‘Security Council Committee on Somalia and Eritrea Adds One Individual to List of Individuals and Entities’, UN Press Release SC/10545, 17 February 2012, available at <http://www.un.org/News/Press/docs/2012/sc10545.doc.htm> (last visited 31 January 2014).

<sup>106</sup> GA Res. 67/1, *supra* note 48, 5, para. 29.

<sup>107</sup> GA & SC, *Identical Letters Dated 7 November 2012 From the Permanent Representative of Switzerland to the United Nations Addressed to the Secretary-General and the President of the Security Council*, UN Doc A/67/557-S/2012/805, 9 November 2012, 4 (enclosure).

<sup>108</sup> *Ibid.*

<sup>109</sup> SC Res. 2083, S/RES/2083 (2012), 17 December 2012, 6 (operative part 19).

## II. The Informal Working Group on Documentation and Other Procedural Questions (IWG)

Another subsidiary organ highly relevant for the rule of law is the IWG, created in 1993 as a response to criticisms related to the opaqueness of the Council's working methods.<sup>110</sup> Its principle aim is to make the documentation and working methods of the Council more accessible to the wider membership and to formulate recommendations on how to improve transparency and efficiency in the Council's work. It is thus obvious why it is so relevant for actual and potential NPM, and it is also not surprising that one of the States that has best understood the importance of the IWG and engaged most actively in it, is Japan, which together with Brazil has been the most frequent-NPM with ten participations each.<sup>111</sup> Japan has chaired the IWG twice, in 2006 and, as the only country for a whole biennium, from 2009 till 2010. It has been under the Japanese chairmanships of this subsidiary organ that its most significant documents have been issued: the presidential notes from 2006 and 2010.<sup>112</sup> The former represents the first comprehensive document of the IWG consolidating SC practice on the different meetings and their formats, respective outcomes and actions, as well as in regard to the *Programme of Work* of the Council, which is subject to difficult negotiations at the beginning of each month among the political coordinators of the fifteen members' Permanent Missions in New York. It also makes recommendations to enhance transparency and efficiency in regard to the issues just mentioned. A very important measure, which has been fully implemented, is the recommendation to invite new elected members to attend all Council meetings, including of the subsidiary bodies and the informal consultations of the whole, "six weeks immediately preceding their term of membership".<sup>113</sup>

The *Note of the President* of 2010, known as S/2010/507, updates and further codifies the working methods and practices of the SC in relation to the *Programme of Work*, the different meetings and their formats, and it makes

<sup>110</sup> See Bühler, 'Article 28 UN Charter', *supra* note 83, 962-963, paras 61-64.

<sup>111</sup> See *supra* note 16 and accompanying text.

<sup>112</sup> SC, *Note by the President of the Security Council*, UN Doc S/2006/507, 19 July 2006 [SC, Presidential Note, UN Doc S/2006/507] and SC, *Note by the President of the Security Council*, UN Doc S/2010/507, 26 July 2010 [SC, Presidential Note, UN Doc S/2010/507]. As opposed to presidential statements (see *infra* note 134), 'notes by the president' are informal documents of the SC, which nevertheless play an important role as they reflect understandings and intentions of the SC, expressed in 'agreed language', that can serve a sort of 'soft precedent' in future negotiations.

<sup>113</sup> SC, *Presidential Note*, UN Doc S/2006/507, *supra* note 112, 13, para. 61 (annex).

recommendations to improve transparency and efficiency related to said issues, as well as to the work of the subsidiary organs and SC missions. It proposes measures to engage, as appropriate, the broader UN membership in the drafting of resolutions and presidential statements, including through informal consultations with affected States and others that have a special interest, “as well as [...] regional organizations and Groups of Friends”.<sup>114</sup> The reference to ‘groups of friends’ is not only a general recognition of the significant role these informal alliances of like-minded States play in the UN’s treatment of certain issues, and how they influence from outside and in partnership with some of their members who happen to be the in SC the latter’s work on said topics, like the above mentioned cases of the Friends of the Rule of Law and the Like-Minded Group on Sanctions, it also reflects the particular influence of the former ‘Small-Five’ (S5) on the IWG.

The S5 is another creature of the *2005 World Summit Outcome*, originally composed of Costa Rica, Jordan, Liechtenstein, Singapore, and Switzerland, and does also owe a lot of its came-into-being to the personal relationships of the Permanent Representatives of said countries at that time; a genuine ‘group of friends’. It has focused on incrementing transparency and accountability in the working methods of the SC and in furthering the participation of non-Council members in its work. In 2006, the S5 circulated a draft resolution in the GA,<sup>115</sup> which was not put to a vote but is widely regarded as having supported Japan’s efforts in drafting and adopting *S/2006/507*, and influenced its contents.<sup>116</sup> This Group is best known for promoting higher thresholds in the exercise of the veto right, in particular through the demand that the P5 explain, based on the *UN Charter* and applicable international law, the reasons for resorting to it, when they so decide.<sup>117</sup> Other UN members have made suggestions that point in the same direction, like Mexico, who, in a broader sense, has maintained that the

<sup>114</sup> SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 112, 9, para. 43 (annex).

<sup>115</sup> See GA, *Improving the Working Methods of the Security Council: Draft Resolution*, UN Doc A/60/L.49, 17 March 2006.

<sup>116</sup> See Security Council Report, ‘Security Council Working Methods’, *Update Report No. 1* (12 August 2008), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2012%20August%20Working%20Methods.pdf> (last visited 31 January 2014), 3.

<sup>117</sup> See, for instance, the latest draft resolution circulated by the S5 in May 2012. SC, *Enhancing the Accountability, Transparency and Effectiveness of the Security Council*, UN Doc A/66/L.42/Rev.1, 3 May 2012, 4-5 (operative part 19) (annex) [SC, *Enhancing the Accountability, Transparency and Effectiveness of the SC*].

Council should ground and motivate its decisions in international law.<sup>118</sup> By favoring the giving of reasons in its decisions, these proposals could contribute to building a certain kind of SC-case law, as has been suggested elsewhere.<sup>119</sup> The most far-reaching proposal of the S5 requires that the P5 refrain altogether from the use of the veto when this could lead “to block Council action aimed at preventing or ending genocide, war crimes and crimes against humanity”.<sup>120</sup> This proposal has the purpose of making the ‘responsibility to protect’ (R2P) operational, which explains why it is often alluded to as the “responsibility not to veto”.<sup>121</sup> It was presented in a draft resolution in May 2012, which had to be withdrawn due to pressure from most of the P5,<sup>122</sup> and also because other UN members in fact do not like this initiative,<sup>123</sup> arguing that it could potentially affect SC reform plans but arguably because the R2P has caused many divisions inside the UN. Be that as it may, it seems that the S5 came out strengthened of this episode and has reconstituted itself as the ‘Accountability, Coherence and Transparency Group’ or ‘ACT’, a network of 21 States with the same goal as the S5, but a more systematic, ‘multi-tiered’ approach that includes among its principle strategies the continuation of direct interaction with the SC, especially through the IWG.<sup>124</sup>

<sup>118</sup> See SC, *Verbatim Record of the 5474th Meeting*, *supra* note 42, 30.

<sup>119</sup> See B. Fassbender, ‘The Security Council: Progress is Possible but Unlikely’, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012), 52, 59 [Fassbender, *The SC: Progress is Possible but Unlikely*].

<sup>120</sup> SC, *Enhancing the Accountability, Transparency and Effectiveness of the SC*, *supra* note 117, 5 (op. 20) (annex).

<sup>121</sup> See Citizens for Global Solutions (CGS), ‘The Responsibility not to Veto: A Way Forward’ (2010), available at [http://www.globalsolutions.org/files/public/documents/RN2V\\_White\\_Paper\\_CGS.pdf](http://www.globalsolutions.org/files/public/documents/RN2V_White_Paper_CGS.pdf) (last visited 31 January 2014).

<sup>122</sup> France, a strong supporter of R2P, has later on stated that the P5 should “voluntarily and jointly” forego the use of the veto in situations “which pertain to the responsibility to protect”. SC, *Verbatim Record of the 6870 Meeting*, UN Doc S/PV.6870, 26 November 2012, 15 [SC, *Verbatim Record of the 6870 Meeting*].

<sup>123</sup> See C. Lynch, ‘Rise of the Lilliputians’ (10 May 2012), available at [http://blog.foreignpolicy.com/posts/2012/05/10/rise\\_of\\_the\\_lilliputians#sthash.suDLzLxS.dpbs](http://blog.foreignpolicy.com/posts/2012/05/10/rise_of_the_lilliputians#sthash.suDLzLxS.dpbs) (last visited 31 January 2014).

<sup>124</sup> The author thanks Thomas Bierstecker for drawing its attention to this recent evolution in ‘coalition diplomacy’. For more information on ACT, see the factsheet by the Swiss Mission to the UN, ‘ACT: The Accountability, Coherence and Transparency Group Better Working Methods for Today’s UN Security Council’ (May 2013), available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intorg/un/missny/other.Par.0165.File.tmp/ACT%20Fact%20Sheet.pdf> (last visited 31 January 2014).

The presidential notes on the IWG which have followed S/2010/507 contain further measures to implement the former, partly introducing additional recommendations. An interesting suggestion is the putting in place of an informal process of consultations among all Council members and newly elected ones for the purposes of appointing in a more transparent and inclusive manner the new chairpersons of the subsidiary bodies.<sup>125</sup> This process has been conducted so far in closed, almost secrete, negotiations among the interested new members and the P5, with the participation of certain influential heads of the respective expert bodies, and where the P5 are known to have the final say.

As of today, S/2010/507 is not only the frame under which the IWG continues its efforts to enhance transparency and broader participation, but also a reference document for better understanding the work of the Council; it is not an exaggeration to say that the note prepared and negotiated under the Japanese leadership of the IWG is of the greatest utility for those who cannot count, as a result of their permanent presence in the SC, on a comprehensive 'institutional memory' in their archives. From a legal point view and due to the concise 'codification' of SC 'established practice' that it contains, S/2010/507 and other notes of the president emanating from the IWG have to be read into the *Provisional Rules of Procedure* (PRP), as well as some Charter provisions: These documents do actually represent a good source of evidence of the 'rules of the Organization' and of the subsequent practice of certain Charter provisions.<sup>126</sup> For instance, the PRP only speak of "private" and "public" meetings,<sup>127</sup> however, the Council meets under a great variety of formats, which keep evolving over time. On the meetings' format depends a lot of important questions, such as who may be invited, if at all, to attend from outside the SC; who may be allowed to make a statement; will there be official and accessible records; will the agenda of the meetings be made available in advance in the UN Journal, something of especial interest in regard to the subsidiary bodies, which often do pack everything important under the rubric of 'informal consultations'; and, of course, what kind of action can be expected from the meeting. All these issues cannot be discerned from the *UN Charter* and the PRP alone. Article 31 regulates the participation in SC discussions of UN Member States which are outside the Council and not

<sup>125</sup> See SC, *Note by the President of the Security Council*, UN Doc S/2012/937, 17 December 2012.

<sup>126</sup> As mentioned above, the author does not think that these two concepts of the law of treaties can always be differentiated from each other. See *supra* note 7 and accompanying text.

<sup>127</sup> UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, 9, Rule 48 (in particular). On the different formats of SC meetings, see Bühler, 'Article 28 UN Charter', *supra* note 83.

necessarily involved in a dispute.<sup>128</sup> Accordingly, “specially affected” members of the UN may be invited by the SC to participate without a vote, something that is reiterated in the PRP.<sup>129</sup> But, when does this participation entail a right to make a statement and what does ‘specially affected’ actually mean? The practice of the SC and also of the broader UN membership participating in SC discussions has led to a rather broad and flexible interpretation of Article 31, as the establishment of the so-called ‘open debates’, sometimes also known as ‘open thematic debates’, demonstrates. Here, all UN Member States are invited to be present and to make statements if they so require. S/2010/507 mentions in this regard that “non-Council members”, without further classification, “may also be invited to participate in the discussion upon their request”.<sup>130</sup> These institutional evolutions achieved through practice permit to question if the Council is truly in each and every instance ‘the master of its own decisions’ – by which the Council’s core or its gatekeepers are usually meant.

### III. The Rotating Presidencies of the SC

Beyond hollow solemnities, the rotating presidencies of the SC offer an especially valuable tool-kit for non-permanent members given the relative agenda-setting power they entail, including the leading role of SC presidents in the negotiation of the Council’s *Monthly Programme of Work*. In the frame of SC reform plans that aspire to strengthen the role of NPM, it would be worth considering the design of a mechanism that could extend the duration of the rotating presidencies while guaranteeing the participation of each member at some point. The said powers are based on the PRP and have evolved over time through the organ’s practice,<sup>131</sup> and include, if not a prerogative, at least a clear preference to propose the organization of debates on themes that are of special interest to them; the powers of SC presidents entail thus a sort of ‘right of initiative’.<sup>132</sup> As seen above, NPM have played a predominant role in organizing recent debates on the rule of law and, most important, in signaling the direction

<sup>128</sup> *UN Charter*, Art. 31, *supra* note 3.

<sup>129</sup> UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, esp. 7, Rule 37.

<sup>130</sup> SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 7, para. 36 (a) (iii) a.

<sup>131</sup> See UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, esp. 1 & 2, Rules 1-3 & 7. Regarding the *Programme of Work*, see SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 7, paras 38-41.

<sup>132</sup> See Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 212.

these discussions should follow. So-called ‘concept notes’<sup>133</sup> are crucial in this respect as they serve the purpose of specifying the contents of a subject to be discussed and to suggest the specific issues that participants, Council and non-Council members as well as special invitees, should address. These notes are not negotiated as such – though aspects of them are often presented to interested delegations, in and outside the Council, before issuing them, and might be very well the result of consultations within groups of like-minded States of which the Council member holding the rotating presidency, non-permanent or permanent, is a part of. They thus give considerable margin to the delegation of the initiative to prepare the ground for the discussion, and, in a certain way, for the negotiations among SC members on the presidential statement, which is the typical outcome of thematic debates.<sup>134</sup>

Usually, the themes to be discussed already form part of the Council’s agenda, but they can be modified as the evolution of the debates on the rule of law reveal.<sup>135</sup> New topics are not *a priori* excluded, but they normally face much greater resistance, especially from China and Russia, which not without having a point are particularly reluctant to expand the Council’s agenda, and indirectly its mandate – a reluctance which is however not that consistent when dealing with ‘evolving security challenges’, especially in Russia’s case.

An interesting case in this regard is the consideration of climate change by the SC. This has been a priority of a P5, the UK, which managed to bring the subject to the Council for the first time in 2007. The debate took place but many countries expressed their disagreement with the treatment by the SC of this subject, and no outcome could be achieved.<sup>136</sup> Four years later, another European country attaching great importance to the topic, Germany, not only

<sup>133</sup> ‘Concept notes’ on thematic debates in the SC are usually attached to the letters from the Permanent Representatives to the SG, through which the debate is announced to the wider membership. See, for instance, *supra* notes 67 and 81.

<sup>134</sup> ‘Statements by the President of the Security Council’ or ‘PRST’ are formal decisions of the SC and can thus be seen as a case of subsequent practice to Art. 27 *UN Charter*. For an excellent study on the juridical nature and legal implications of presidential statements, see S. Talmon, ‘The Statements by the President of the Security Council’, 2 *Chinese Journal of International Law* (2003) 2, 419. On the negotiation process of these important SC decisions, see Rodiles, ‘México y la Promoción del Estado de Derecho’, *supra* note 40, 211–221.

<sup>135</sup> See *supra*, section D.

<sup>136</sup> SC, ‘Security Council Holds First-Ever Debate on Impact of Climate Change on Peace, Security, Hearing Over 50 Speakers’, UN Press Release SC/9000, 17 April 2007, available at <http://www.un.org/News/Press/docs/2007/sc9000.doc.htm> (last visited 31 December 2013).

organized the second open debate but also delivered a presidential statement. After recognizing the responsibility of other UN organs and fora with regard to climate change, the presidential statement acknowledges the “possible adverse effects of climate change, in the long run, [on] [...] certain existing threats to international peace and security”.<sup>137</sup> Whatever one may think of the appropriateness of the SC dealing with climate change, which the author doubts, it is noteworthy how Germany understood that a classical concern of those outside the Council’s core is that the SC does respect the mandates of other UN organs, especially of the GA. It is of course true that the divisions regarding the treatment of climate change by the SC reflect to a large extent the general political differences on the subject, especially the developed-developing divide, the discrepancy between the European and the U.S. approaches, and the special role of the most affected, coalesced under the ‘Alliance of Small Island States’ (AOSIS).<sup>138</sup> It is thus not a matter between permanent and non-permanent members of the SC, or between the P5 and the rest. Even the differences among those who are skeptical are clear: For Russia, the linkages between the adverse consequences of climate change and international peace and security are not proved – a very different threshold as the one required by the same State in regard to terrorism and organized crime – whereas China relies on a historical argument about the different stages of economic and industrial development and its juridical expression of ‘common but differentiated responsibilities’, underlining at the same time that the Council is not the right forum for guaranteeing an extensive participation that can lead to widely acceptable proposals.<sup>139</sup> Nonetheless, Germany, as NPM, was able to build an admittedly weak consensus in the SC<sup>140</sup> – PRST are adopted by consensus – which can be attributed to its recognition of the importance of other UN organs and mechanism of the system.

The inflation of the Council’s agenda is not unproblematic, including for the rule of law. The episode described above is nevertheless revealing for an aspect which is related to the rule of law and where NPM have played, and have a great

<sup>137</sup> SC, *Statement by the President of the Security Council*, UN Doc S/PRST/2011/15, 20 July 2011, 1 (para. 6).

<sup>138</sup> For further information, see <http://www.aosis.org/> (last visited 31 December 2013).

<sup>139</sup> See SC, *Verbatim Record of the 6587 Meeting*, UN Doc S/PV.6587, 20 July 2011, 9 & 13.

<sup>140</sup> See the statement of the Russian Federation, *ibid.*, 13, signaling its opposition to continue to consider the subject, which was evidenced in February 2013, when Pakistan and the UK had to resort to an ‘Arria-formula meeting’ to deal with climate change. See ‘Arria Formula Meeting on Climate Change’ (14 February 2013), available at <http://www.whatsinblue.org/2013/02/arrria-formula-meeting-on-climate-change.php> (last visited 31 December 2013). On ‘Arria-formula meetings’, see *infra* note 147 and accompanying text.

potential of continue playing a very active role. Bardo Fassbender has argued in favor of a SC that “attaches more importance to collective goods and interests of all peoples inhabiting the earth than to the individual goods and interests of the states represented in the Council”.<sup>141</sup> This has two among other possible readings. First, inasmuch as the SC keeps expanding its functions in order to keep pace with the dynamic nature of global threats to international peace and security, as it has done most notoriously by affecting fundamental rights of individuals through targeted sanctions, it cannot, at the same time, ignore the consequences – legal and political – of its actions. It must therefore grapple with ways to ensure review and accountability; with how it can itself improve respect for human rights and the rule of law. Open thematic debates offer a venue for this by facilitating the advice of independent experts who might be invited according to Rule 39 of its PRP,<sup>142</sup> and, more important, they ‘open’ the Council through dialogue and by actually granting a most suitable means for the reception of its actions by the broader membership, giving thus rise to what Georg Nolte calls the “residual power” of the international community and individual Member States of the UN “to determine the legality of Security Council action”.<sup>143</sup> Statements delivered during said debates are useful indicators of how the parties to the *UN Charter*, beyond those seating at the SC, evaluate the actions and decisions of the latter, including in respect to the purposes and principles of the *UN Charter* and international law. Independently from issues related to the formation of customary law, this not only represents a kind of political checks-and-balances mechanism but can eventually lead to the formation of subsequent practice in regard to *UN Charter* provisions relevant to the Council’s work and actions, or, to the contrary, demonstrate that certain evolutions inside the SC are not shared by the wider membership, and hence do not establish an agreement on a given interpretation of the Charter, in the sense of Art. 31 (3) (b) VCLT.<sup>144</sup> Of course, open thematic debates are not the only fora where States can express their legal views on SC actions, but due to their thematic nature, they facilitate – and are meant to do so – States’ pronouncements on certain issue-areas related to the

<sup>141</sup> Fassbender, ‘The SC: Progress is Possible but Unlikely’, *supra* note 119, 58.

<sup>142</sup> See UN, *Provisional Rules of Procedure of the SC*, *supra* note 52, 7, Rule 39.

<sup>143</sup> G. Nolte, ‘The Limits of the Security Council’s Powers and its Functions in the International Legal System: Some Reflections’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000), 315, 318.

<sup>144</sup> VCLT, Art. 31 (3) (b), *supra* note 6, 340. On subsequent practice, see further ILC, *First Report on Subsequent Agreements and Subsequent Practice in Relation to Treaty Interpretation*, UN Doc, A/CN.4/660, 19 March 2013. See also G. Nolte (ed.), *Treaties and Subsequent Practice* (2013).

Council's work more broadly, i.e., beyond specific actions. Rule of law debates have proved to be particularly valuable in assessing the opinion of the wider membership on questions such as the extent to which the Council met or did not meet clear and fair procedures within its sanctions regimes, and in how far these measures might (still) violate international law.<sup>145</sup> In the frame of thematic debates on working methods, States have expressed their views on such matters as the proper implementation of Articles 31 and 32 *UN Charter*.<sup>146</sup>

It is no surprise that NPM have a greater interest in assessing the legality of the Council's actions than the P5, which also explains their willingness to convene open thematic debates rather frequently. In cases where this has not been possible, NPM have come-up with innovative formats, such as 'Arria-formula-meetings'. A now established practice named after its inventor, Venezuelan Ambassador Diego Arria, these meetings are very informal ('informal/informal' in UN parlance), no official records are made, and they take place outside the Council's conference rooms. They allow SC members to discuss those issues that are not (yet) able to be dealt with in an official Council meeting, and serve for the purpose of inviting non-state actors, apart from UN officials, to participate in the debates.<sup>147</sup> Mexico, for instance, organized an Arria-formula meeting in late 2009 on the impact of SC counter-terrorism measures on human rights with the participation of the International Commission of Jurists, which had previously launched a comprehensive report on the matter.<sup>148</sup>

Another possible way of reading Fassbender's suggestion is that in today's global disorder characterized by an increasing non-polarity,<sup>149</sup> it would be very unwise for the P5 to stick to a self-perception of the Council as the formal international sovereign at their sole service. If the Council is to remain relevant, it needs to incorporate the demands of those outside its core and beyond. This is even more palpable in face of the growing importance of the G-20 and other

<sup>145</sup> During the 2010 debate on the rule of law several States expressed their views on how far SC Res. 1904 (*supra* note 18) addressed due process concerns. See SC, *Verbatim Record of the 6347 Meeting*, UN Doc S/PV.6347, 29 June 2010 and SC, *Verbatim Record of the 6347 Meeting*, S/PV.6347 (Resumption 1), 29 June 2010.

<sup>146</sup> India and Pakistan expressed the view that more needs to be done to implement these UN Charter provisions. See SC, *Verbatim Record of the 6870 Meeting*, *supra* note 122, 11 & 20.

<sup>147</sup> See SC, *Presidential Note*, UN Doc S/2010/507, *supra* note 52, 12, para. 65.

<sup>148</sup> International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (2009).

<sup>149</sup> See *supra* notes 14 & 15 and accompanying text.

manifestations of “institutionalized summitry”.<sup>150</sup> It is not difficult to see why elected members are best-suited to augment the sphere of interests of the SC, and here the contributions of ‘recurrent’ and ‘occasional-NPM’ are especially valuable. But NPM members do not only bring their interests to the table, they do often represent the views of their friends outside the Council, too; be it informal groups of like-minded States or the more traditional G77, the NAM or even regional organizations. This is so because they rely on informal coalitions and standing alliances to augment their stance *vis-à-vis* the P5, but also because as ‘permanent members of the GA’, they are better advised not to forget where their alliances are stronger and more significant in the long run. In the same sense, NPM – as Germany’s handling of climate change in the SC may suggest – are, by necessity, more conscious of the risks that SC encroachment in other UN organs’ mandates entail. This might lead to more prudence while considering which situations and to what extent are “likely to endanger the maintenance of international peace and security”.<sup>151</sup> It is thus not so much about loyalties but about diplomatic calculations, and a greater sensitivity towards the needs and views ‘of the rest’ is above all a matter of identification. Precisely because of this, NPM can be regarded as being a most efficient vehicle to bring the Council closer to ‘collective goods and interests of all peoples’.

## F. Conclusions

There are good reasons for arguing that NPM are key players for incrementally improving the Council’s adherence to the rule of law. This holds true beyond a State’s particular rule of law rhetoric and actual practice, and might be just in their self-interest, since the promotion of transparency and participation within the SC has proven to be a powerful vehicle for guaranteeing, in the long term, non-permanent members’ influence on this body. It really does not need much explanation to understand why NPM are interested in clear working methods over sheer ad-hocism and excessive flexibility, just as it is quite clear that it is more difficult to keep secrets among five than fifteen – or twenty. This not only means greater transparency – the good relationship of many NPM

<sup>150</sup> Borrowing the expression from R. Feinberg, ‘Institutionalized Summitry’, in A. F. Cooper, J. Heine & R. Thakur (eds), *The Oxford Handbook of Modern Diplomacy* (2013), 303. However, the author uses the expression here circumscribed to informal fora, such as the several ‘Gs’ and other summits that take place on a regular basis without being attached to a formal institution, like the ‘Nuclear Security Summit’.

<sup>151</sup> *UN Charter*, Art. 34, *supra* note 3. See also Fassbender, ‘The SC: Progress is Possible but Unlikely’, *supra* note 119, 60.

with the press and NGOs like *Security Council Report* is a good indicator of this<sup>152</sup> – it also favors a ‘culture of justification’, which given the importance of the Council in the international legal order can significantly contribute to “publicness in international law”.<sup>153</sup> The efforts of NPM here described might be deceptively characterized as ‘law-fare’, but this can only be taken seriously if international law is to be abandoned altogether. Otherwise, the strength of the ‘weak’, channeled through demands of objective predictability and procedural fairness, might indeed be a necessary component for the very existence of international law and for avoiding the collapse of a global order, however chaotic this may be today.

The improvements achieved so far through the insistence of NPM on the strengthening of the rule of law at the international level, as opposed to the one-sided transnational enterprise of rule of law promotion within States typically carried out by the UN, are rarely groundbreaking and rather incremental, as so much else in multilateral diplomacy. This is also the result of the need on behalf of NPM to make serious efforts for understanding the reasons for the reluctance of the P5, notwithstanding that these reasons might not be shared or even vehemently opposed. This step-by-step approach reminds of the limits NPM encounter, but should not be underestimated: A vague commitment to respect the *UN Charter* and international law by the Council might cause some arrogant laughter or sincere disappointment, but it can prepare the ground for later expressing a further commitment to fair and clear procedures, which in turn can path the way to effectively integrate due process rights into the sanctions regimes. It is nothing popular to say, but the author does not think that there is much value in introducing certain concepts or formulas to SC resolutions and other documents, which are *en vogue* in academic circles and inflate expectations of activists and in the public, like ‘R2P’, if this, at the end, contributes to unnecessarily upset key decision-takers and fortify divisions in the international community.

By bringing more legitimacy to the Council, NPM do contribute to enhancing its efficiency, and in a non-polar world, the SC depends ever more on this contribution.<sup>154</sup> But this is not entirely unproblematic for those outside the

<sup>152</sup> On this see M. A. Morales, ‘Medios de Comunicación y el Consejo de Seguridad’, in Dondisch, *supra* note 40, 225.

<sup>153</sup> See B. Kingsbury, ‘International Law as Inter-Public Law’, in H. S. Richardson & M. S. Williams (eds), *Moral Universalism and Pluralism* (2009), 167, 178 & 179-183.

<sup>154</sup> See, for example, the remarks by the former Legal Adviser of Mexico (Ambassador Joel Hernández), *supra* note 41.

Council's core. Does legitimacy not reveal itself – again – as a rather conservative force that acts against change?<sup>155</sup> Would this not mean that NPM, through all their work in relation with the rule of law and other related aspects, end-up working in the service of the P5? The question is valid but it loses practical relevance in light of the fact that the vast majority of States is not prepared for a major change of the system. This is not only due to lack of alternatives but very much to the fact that States regard the system as their common construction, however imperfect and unfair in certain of its structures. As long as changes in the system are preferred, non-permanent membership in the SC remains a meaningful and powerful instrument for achieving them, including through practice as a legal means of institutional transformation over time. This article has tried to show how NPM have significantly contributed to changes in the system, especially in regard to the adherence of the Security Council to the international rule of law. From this point of view, increasing the number of permanent members does not seem to be desirable.

<sup>155</sup> Cf. Hurd, *supra* note 4, 203.



## **Without (State) Immunity, No (Individual) Responsibility**

Giovanni Boggero<sup>\*</sup>

### Table of Contents

A. Introduction.....	376
B. Universal Civil Jurisdiction Is in Principle Admissible Only Against State Officials .....	379
C. Functional Immunity Is not Specification of State Immunity.....	382
D. Individual Responsibility of State Officials Differs Greatly From State Responsibility .....	388
E. Conclusion .....	397

\* Ph.D Researcher in Public Law at the University of Eastern Piedmont “Amedeo Avogadro”. I would like to thank Professor Edoardo Greppi (University of Turin) and Professor Alberto Oddenino (University of Turin) for the constant support and advice they provided during the writing of this contribution. Any errors are of course my sole responsibility. Comments welcome: [giovanni.boggero@jp.unipmn.it](mailto:giovanni.boggero@jp.unipmn.it).

## Abstract

The present article is a first attempt to add new theoretical arguments to the rationale of State immunity. The author tries to assert that upholding State immunity for human rights violations should not logically lead to the impunity of State officials acting on behalf of the State. On the contrary, the right to State immunity is an essential precondition for the individual perpetrators to be prosecuted and convicted. To come to this conclusion, the author first finds that universal jurisdiction is a tool to prosecute individuals and not States. On this basis, he argues that functional immunity *ratione materiae* and State immunity should be distinguished. This leads to the consequence that State officials' and State's responsibility are of different nature.

“There is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.”<sup>1</sup>

## A. Introduction

In its judgment *Jurisdictional Immunities of the State*, the International Court of Justice (ICJ) decided upon different submissions put forward by the Federal Republic of Germany against the Italian Republic.<sup>2</sup> In particular, the Court stated that: (1) customary international law still requires that “a State should be accorded immunity in proceedings for torts allegedly committed on the territory of another State by its armed forces and other organs of State in the course of conducting an armed conflict”;<sup>3</sup> (2) customary international law provides that “a State cannot be deprived of immunity by reason of the fact that [its organs are] accused of serious violations of international human rights law or the international law of armed conflict”,<sup>4</sup> i.e. no human rights exception to the rule of State immunity exists; (3) even violations of so-called *jus cogens* norms cannot lead to a denial of State immunity, since no *jus cogens* exception to the rule of State immunity exists under customary international law;<sup>5</sup> (4) State immunity cannot be denied on the basis of a so-called ‘last resort argument’

<sup>1</sup> H. Lauterpacht, *International Law and Human Rights* (1950), 40.

<sup>2</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, ICJ Reports 2012, 99 [Jurisdictional Immunities of the State, Judgment].

<sup>3</sup> *Ibid.*, 135, para. 78.

<sup>4</sup> *Ibid.*, 139, para. 91.

<sup>5</sup> *Ibid.*, 142, para. 97.

either, that is on the basis of the fact that all victims' attempts to seek redress from Germany had previously failed, because whether a State is entitled to immunity is a question separate from "whether the international responsibility of that State is engaged and whether it has an obligation to make reparation".<sup>6</sup>

Despite the fact that the decision of the ICJ provides a partially correct reconstruction of the general international law with regard to the immunity of foreign States from jurisdiction, it nevertheless leaves itself quite open to criticism according to which this view would merely defend the *status quo* and does not offer any hope of a practical solution to the pressing demand for justice made by the relatives of victims;<sup>7</sup> it is, in other words, a defense based exclusively on the risk that a possible denial of State immunity would set off a new diplomatic crisis between the nations of the international community, or lead to the risk of bankruptcy for the States against which jurisdiction has to be exercised for purposes of reparation.<sup>8</sup>

The Court limits itself to expressing "surprise [...] and regret" at the fact that "Germany decided to exclude from the scope of its national compensation scheme most of the claims by Italian military internees on the grounds that prisoners of war were not entitled to compensation for forced labour"<sup>9</sup> and then goes on to admit that it is not "unaware that the immunity from jurisdiction of Germany in accordance with international law may preclude judicial redress for the Italian nationals concerned".<sup>10</sup> Indeed, perhaps, it would have been sufficient if in its final *obiter dictum* the Court had asserted more firmly the need in any case for Germany to fulfill its obligations deriving from its acknowledged international responsibility, or that, as Judge Yusuf suggested in his *Dissenting Opinion*, it had specified, at the very least "an alternative remedy to the victims of the breaches to which it has admitted".<sup>11</sup> The Court, however, merely points out that certain categories of Italian victims are still entitled, even now, to some form of reparation, but it does not go so far as to indicate the forms and

<sup>6</sup> *Ibid.*, 143, para. 100. Further on the judgment's reasoning, see G. Boggero, 'Senza Immunità (dello Stato), Niente Immunità (Dell'Individuo)', *Diritto Pubblico Comparato ed Europeo* (2013) 1, 383, 383-403.

<sup>7</sup> For example, M. Payandeh, 'Staatenimmunität und Menschenrechte', *67 Juristenzeitung* (2012), 948, 958.

<sup>8</sup> I. von Münch, *Rechtspolitik und Rechtskultur: Kommentare zum Zustand der Bunderepublik Deutschland* (2011), 31.

<sup>9</sup> *Jurisdictional Immunities of the State*, Judgment, *supra* note 2, 142-143, para. 99.

<sup>10</sup> *Ibid.*, 144, para. 104.

<sup>11</sup> Dissenting Opinion of Judge Yusuf, *Jurisdictional Immunities of the State*, Judgment, *supra* note 2, 291, 306, para. 53.

costs, as this would have amounted to issuing a positive response to the Italian counterclaim, which it had previously declared inadmissible.<sup>12</sup>

In the light of this act, which is both an expression of powerlessness and an implicit invitation to the two States to engage in negotiations,<sup>13</sup> the international doctrine favorable to maintaining the principle of State immunity<sup>14</sup> is called upon to organize a broader defense of it, capable of justifying its applicative consequences. Hereafter, this author will try to assert that upholding State immunity does not logically lead to the impunity of the perpetrators of human rights violations. On the contrary, the right to State immunity is an essential precondition for them to be prosecuted and eventually punished. To come to these conclusions it is necessary, whenever possible, to disentangle the individual organ of the State from the State itself. In section B., the article will argue that prudence of national courts in admitting universal civil jurisdiction against State officials is the consequence of a widespread belief according to which to admit universal civil jurisdiction against State officials cannot but lead to admitting universal civil jurisdiction against the State itself. In reality, universal jurisdiction, both criminal and civil, is not an institution established to exercise jurisdiction against States but only against individuals; the corollary principle of this false belief is to derive functional immunity of State officials directly from State immunity. In section C., the article will argue that the two concepts are different and should be distinguished. In terms of responsibility this means, as laid out in section D., that the State cannot be held responsible in the same way as individuals. The two types of responsibilities should also be distinguished.

<sup>12</sup> *Jurisdictional Immunities of the State (Germany v. Italy)*, Order of 6 July 2010, ICJ Reports 2010, 310, 321, para. 33.

<sup>13</sup> Cf. Interview with J. Luther, 'Moralische Wiedergutmachung für italienische NS-Opfer', *Deutschlandradio* (9 May 2012), available at [http://www.deutschlandradiokultur.de/moralische-wiedergutmachung-fuer-italienische-ns-opfer.954.de.html?dram:article\\_id=147228](http://www.deutschlandradiokultur.de/moralische-wiedergutmachung-fuer-italienische-ns-opfer.954.de.html?dram:article_id=147228) (last visited 31 January 2014). Immediately after proclamation of the decision, the German Foreign Minister made a statement in which he stressed that Germany had already honored its commitments in the past. Cf. 'Außenminister Westerwelle zum IGH-Urteil in Sachen Deutschland/Italien', *Press Release of the German Federal Foreign Office* (3 February 2012), available at [http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2012/120203-IGH\\_ITA.html](http://www.auswaertiges-amt.de/DE/Infoservice/Presse/Meldungen/2012/120203-IGH_ITA.html) (last visited 31 January 2014).

<sup>14</sup> However, many authors have long proposed reconsidering and even abolishing it. Among these see, for example, H. Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', 28 *British Yearbook of International Law* (1951), 220, esp. 236-237.

## B. Universal Civil Jurisdiction Is in Principle Admissible Only Against State Officials

One of the main assumptions on which the Italian defense based its claim of the existence of a *jus cogens* exception to the rule of State immunity under international law was the practical need of repressing grave violations of international humanitarian law and the law of human rights through the exercise of universal jurisdiction. The proposition that the exercise of universal jurisdiction for crimes against humanity and war crimes is a necessity lacks any analysis of the customary nature of the universality of jurisdiction in civil matters.

Universal jurisdiction is that institution founded on the co-operation among States which makes it possible to prosecute particularly odious crimes, regardless of where they occur and thus eliminating the nexus, considered fundamental until a short time ago, between the State of the jurisdiction and the State in which the crime in question effectively occurred. Overlooking, for the moment, the problems deriving from the choice of crimes effectively punishable by law,<sup>15</sup> serious though they are, the difficulty of guaranteeing the exercise of jurisdiction in a truly universal manner<sup>16</sup> and the risks inherent in interfering in the internal affairs of the State to which the individual charged belongs, it seems important to point out that any exercise of universal jurisdiction has always been ambivalent in nature, both criminal and individual at the same time. It is, in other words, a tool that, though differing in degree depending on the particular national legislation, is motivated by the need to prosecute persons who are socially dangerous for the international community (*hostes humani generis*), to ensure that certain acts will not happen again. It is not an

<sup>15</sup> These include only grave breaches and serious violations of international humanitarian law and law of human rights. As is evident from Art. 40 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission (2001), Vol. II (2), 26, 29 [Draft Articles on State Responsibility], simple violations of *jus in bello* and human rights are excluded, unless they are *gross* and *systematic*. Cf. P. Stammer, *Der Anspruch von Kriegsoffizieren auf Schadensersatz: Eine Darstellung der völkerrechtlichen Grundlagen sowie der Praxis internationaler Organisationen und verschiedener Staaten zur Anerkennung individueller Wiedergutmachungsansprüche bei Verstößen gegen humanitäres Völkerrecht* (2009), 125. Critical on this distinction is K. Oellers-Frahm, 'Redress of War-Related Claims by Individuals: The Example of the Italian Courts', in U. Fastenrath *et al.* (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011), 1055, 1066-1067.

<sup>16</sup> L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (2005), 220 *et seq.*

institution through which to put sovereign States on trial as these, according to international custom, cannot be held criminally liable, or, in the words of the well-known maxim, *societas delinquere non potest*.<sup>17</sup>

As regards individual officials of the State, it is important to bear in mind that the exercise of universal criminal jurisdiction against presumed criminals has only been possible, up to now, when they no longer held their official position in the State (as in the case of *Pinochet I*).<sup>18</sup> In that case, State immunity from jurisdiction could not be challenged, insofar as immunity was denied in relation to *acta jure imperii* committed by a person no longer in office. That is, once the government functions cease, the exercise of jurisdiction against those who performed them is unable to endanger them, or to undermine the independence of the State of which the individual was an official.<sup>19</sup> *Vice versa*, as

<sup>17</sup> See *Prosecutor v. Tihomir Blaškić*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, IT-95-14-T, 18 July 1997, para. 49. Cf. J. Barboza, 'State Crimes: A Decaffeinated Coffee', in L. Boisson de Chazournes & V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber Amicorum Georges Abi-Saab* (2001), 357, and J. Schaarschmidt, 'Die Reichweite des völkerrechtlichen Immunitätsschutz – Deutschland v. Italien vor dem IGH', *Beiträge zum Europa- und Völkerrecht der Universität Halle-Wittenberg No. 5* (2010), 30-31. On the opposition to the international law of the exercise of criminal jurisdiction against States, see H. Fox & P. Webb, *The Law of State Immunity*, 3rd ed. (2013), 89 and the *Draft Articles on State Responsibility*, Commentary to Chapter III, *supra* note 15, 110, 111 (paras 5-6). *Contra* J. Dugard, 'Criminal Responsibility of States', in M. Cherif Bassiouni (ed.), *International Criminal Law*, Vol. 1, 2nd ed. (1999), 239, 246; A. Pellet, 'Can a State Commit a Crime? Definitely, Yes!', 10 *European Journal of International Law* (1999) 2, 425, 433-434.

<sup>18</sup> *Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex Parte Pinochet Ugarte*, United Kingdom House of Lords, Judgment of 25 November, 3 WLR 1456 (H.L. 1998) [Pinochet I]. The reasoning followed in *Pinochet I* was not applied again in *Jones v. Saudi Arabia*, United Kingdom House of Lords, Judgment of 14 June 2006, [2007] 1 AC 270 [Jones v. Saudi Arabia], as the denial of personal immunity for the former head of the Chilean government had to rely on a specific exception to compact law (contained in the *United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Punishments or Treatments*, 10 December 1984, 1465 UNTS 85 [Convention Against Torture]) and not as an ordinary exception of functional immunity.

<sup>19</sup> Thus also Institute of International Law, 'Resolution on the Immunity From Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crime' (2009), Art. III (2), available at [http://www.idi-iil.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf) (last visited 31 January 2014), 2 [Institute of International Law, Resolution on the Immunity From Jurisdiction]: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases." *Contra* ILC, *Second Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/631, 10 June 2010, 19-20, para. 33 [Second Report on Immunity of

demonstrated in the *Arrest Warrant* case, immunity *ratione personae* continues to be guaranteed to individuals still in office.<sup>20</sup> The risk of an abuse of universal jurisdiction for matters of mere political rivalry between States is too great to make it possible for them to reach an *opinio juris* favorable to denial of immunity also for individual officials of the State still in office.

Even more uncertain is the exercise of universal civil jurisdiction which, at the level of international custom, has not been judged up to now as a fundamental corollary of criminal jurisdiction, due to the fact that it touches on different, though possibly related, interests with respect to the criminal case. Any convention on the subject of the repression of crimes against humanity, or any special statutory court, starting with the Court for former Yugoslavia or the Tribunal for Rwanda, fails to deal in any way with the problem of civil suits for reparation of damages<sup>21</sup> and, even if it does, as in the case of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* of 1984,<sup>22</sup> it does so in very generic terms,<sup>23</sup> which cannot be considered as expressing the unequivocal will to declare the exercise of universal civil jurisdiction toward the

State Officials]: “These acts do not cease to be acts of the State because the official ceased to be such and they therefore continue as before to be covered by immunity.” Thus also A. Cassese, ‘When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case’, 13 *European Journal of International Law* (2002) 4, 853, 863.

<sup>20</sup> Thus also relative to the former Chief of the Libyan State Muammar El Gaddafi, whose incrimination was requested for acts of terrorism, before the French courts. The request to exercise criminal jurisdiction was dismissed in 2001 by the Court of Cassation. Cf. French Court of Cassation, Case No. 1414, Decision of 13 March 2000, 105 *Revue Générale de Droit International Public* (2001) 2, 473.

<sup>21</sup> Although some progress has been made (see *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 75, 2187 UNTS 3, 134-135), “it cannot be claimed with certainty that according to the international law in force there is absolute correspondence between the obligation of States to prosecute the perpetrators of international crimes and their obligation to guarantee the rights of the victims to seek redress under their respective legislation”. M. Frulli, *Immunità e Crimini Internazionali: L'Esercizio Della Giurisdizione Penale e Civile nei Confronti Degli Organi Statali Sospettati di Gravi Crimini Internazionali* (2007), 147 (translation by the author).

<sup>22</sup> *Convention Against Torture*, Art. 14, *supra* note 18, 116. See, however, Committee Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Conclusions and Recommendations of the Committee Against Torture: Canada*, UN Doc CAT/C/CR/34/CAN, 7 July 2005, 3 & 4, paras 4 (g) & 5 (f).

<sup>23</sup> Never doubting the existence of the principle of the universality of civil jurisdiction is the Trial Chamber of the First Instance of the International Criminal Tribunal for former Yugoslavia in the decision *Prosecutor v. Furundzija*, which states that “the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia*

individual, much less toward the State.<sup>24</sup> Only the United States, on the basis of the *Alien Tort Statute* of 1789, recognizes the exercise of universal jurisdiction on civil matters, although this is exclusively toward officials of the State and not against the State itself.<sup>25</sup>

The extreme prudence of the national courts in admitting universal civil jurisdiction against individuals, which – as Conforti claims – would be the natural *pendant* of criminal jurisdiction,<sup>26</sup> is based on the strong belief that the civil responsibility of the individual official of the State always and inevitably also implies a civil responsibility of the State.<sup>27</sup> This conclusion derives from the idea that functional immunity of State officials is specification of State immunity (section C.) and that State officials' responsibility in criminal and civil matters overlaps with State responsibility (section D.).

### C. Functional Immunity Is not Specification of State Immunity

The exact relationship between the immunity of States and the functional immunity of the individual officials of the State is, in this current stage of international law, still up for debate. In its *Milde* decision, the First Criminal Section of the Italian Supreme Court of Cassation accepted the majority theory

to disregard the legal value of the national authorising act". *Prosecutor v. Anto Furundzija*, Judgment, IT-95-17/1-T, 10 December 1998, 59-60, para. 155.

<sup>24</sup> Thus also C. Tomuschat, 'Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position Under General International Law', in A. Randelzhofer & C. Tomuschat (eds), *State Responsibility and the Individual* (1999), 1, 11.

<sup>25</sup> *Alien Tort Claims Act 1789*, 28 USC § 1350. On the limits of the exercise of universal civil jurisdiction through the ATS see, among others A. Gattini, 'The Dispute on Jurisdictional Immunities of the State before the ICJ: Is the Time Ripe for a Change of the Law?', 24 *Leiden Journal of International Law* (2011) 1, 173, 186 and J. von Bernstorff, M. Jacob & J. Dingfelder Stone, 'The Alien Tort Statute Before the US Supreme Court in the Kiobel Case: Does International Law Prohibit US Courts to Exercise Extraterritorial Civil Jurisdiction Over Human Rights Abuses Committed Outside of the US?', 72 *Heidelberg Journal of International Law* (2012), 579.

<sup>26</sup> B. Conforti, *Diritto Internazionale*, 8th ed. (2010), 211. The same opinion is also expressed by R. van Alebeek, 'National Courts, International Crimes and the Functional Immunity of State Officials', 59 *Netherlands International Law Review* (2012) 1, 5, 21. Cf. Concurring Opinion of Judge Breyer, *Sosa v. Alvarez-Machain and Others*, Supreme Court of the United States, Judgment of 29 June 2004, Case No. 03-339, (2004) 542 U.S. 692, 760, 763: "Universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well."

<sup>27</sup> Critical of this position also Stammer, *supra* note 15, 124-125.

in doctrine, sustained previously by that same court also in the *Ferrini* and *Lozano* cases, according to which

“functional immunity [...] is the specification of what is the pertinence of the states, as it responds to the need to prevent the prohibition of charging foreign States from being overridden by acting against the person through whom the activity is implemented. [...] [O]ne must, then, agree with those who claim that if functional immunity cannot find application, because the act committed is considered an international crime, there is no valid reason to maintain the immunity of the State.”<sup>28</sup>

It seems that this is a theory that, despite having the support of authoritative experts in doctrine<sup>29</sup> and being shared in case law,<sup>30</sup> reveals shortcomings on many levels. Above all, the theory whereby not granting immunity to the officials of the State would be a way of getting around the prohibition to exercise jurisdiction against the State is a logical *non sequitur*. This is shown by the fact that, in practice, the States themselves have many times waived immunity for individual officials, thereby implicitly admitting that the two immunities differ in nature.<sup>31</sup>

As suggested also by De Sena<sup>32</sup> and Ballardore Pallieri<sup>33</sup>, the error thus lies in wanting to establish, as a general rule, an almost mathematical equation

<sup>28</sup> *Milde*, Italian Supreme Court of Cassation, Case No. 1072, Decision of 21 October 2008, 92 *Rivista di Diritto Internazionale* (2009) 2, 618, 626 [*Milde*, Italian Supreme Court of Cassation]. In this sense also the *Second Report on Immunity of State Officials*, *supra* note 19, 58, para. 94 (b), which says: “State officials enjoy immunity *ratione materiae* from foreign criminal jurisdiction, i.e. immunity in respect of acts performed in an official capacity, since these acts are acts of the State which they serve itself.”

<sup>29</sup> Thus, among others, also Fox & Webb, *supra* note 17, 269-271 and B. Conforti, ‘In Tema di Immunità Funzionale Degli Organi Statali Stranieri’, 93 *Rivista di Diritto Internazionale* (2010) 1, 5, 13.

<sup>30</sup> Not last is the case of *Jones v. Saudi Arabia* (*supra* note 18). Cf. Opinion of Lord Hoffmann in this decision (*ibid.*, 291-306, paras 36-102).

<sup>31</sup> For diplomatic agents other rules of immunity apply. Cf. van Alebeek, *supra* note 26, 12-13.

<sup>32</sup> P. De Sena, *Diritto Internazionale e Immunità Funzionale Degli Organi Statali* (1996), 35 *et seq.*

<sup>33</sup> V. Ballardore Pallieri, *Diritto Internazionale Pubblico*, 8th ed. (1962), 371.

between the actions performed as an official and the actions of the State.<sup>34</sup> As Frulli has shown, the intellectual framework of a similar concept of ‘collective responsibility’ has a Kelsenian imprint: the actions of the official are not attributable to the individual as such, but to the individual as an organ of the State.<sup>35</sup> The individual’s behavior should therefore generally be attributed to the State and only as an exception, to the individual as well. This is a conclusion that is also reached in the *Third Report on Immunity of State Officials From Foreign Criminal Jurisdiction* of the International Law Commission (ILC), which, citing the Condorelli brief of appearance in *Djibouti v. France*, claims that “[s]uch acts, indeed, are to be regarded in international law as attributable to the State on behalf of which the organ acted and not to the individual acting as that organ”.<sup>36</sup> This explains the aforementioned extreme caution used by the courts in admitting civil jurisdiction against the individual State official, as it could automatically imply the exercise of jurisdiction against the State on behalf of which that official is acting. It is interesting to note how organicistic this interpretation is. Even if it is obvious, in a general way, that “[a]ll rational action is in the first place individual action. Only the individual thinks. Only the individual reasons. Only the individual acts”<sup>37</sup> and that therefore “States can only act by and through their agents and representatives”,<sup>38</sup> in the scenario just described, the individual disappears and everything is attributed only to the State.<sup>39</sup>

<sup>34</sup> The Supreme Court of the United States in the case of *Yousuf v. Samantar and Others*, Decision of 1 June 2010, (2010) 130 S. Ct. 2278, 2292, recognized the inapplicability of the rules of the *Foreign Sovereign Immunities Act* (90 Stat. 2891) to the individual officials of the State. This is an important step in view of a distinction between the two types of immunity.

<sup>35</sup> H. Kelsen, *Principles of International Law*, 2nd ed. (rev. & ed. by R. W. Tucker) (1967), 207.

<sup>36</sup> ILC, *Third Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/646, 24 May 2011, 32-33, para. 58 (note 126) [ILC, Third Report on Immunity of State Officials]; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Verbatim Record of the Public Sitting held on Tuesday 22 January 2008, Doc CR 2008/3, 22 January 2008, 9, para. 23.

<sup>37</sup> L. von Mises, *Socialism: An Economic and Sociological Analysis* [1932] (1981), 97.

<sup>38</sup> *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland*, Advisory Opinion, PCIJ Series B, No. 6 (1923), 22.

<sup>39</sup> These concerns are also shared by B. Stephens, ‘Abusing the Authority of the State: Denying Foreign Official Immunity for Egregious Human Rights Abuses’, 44 *Vanderbilt Journal of Transnational Law* (2011) 5, 1163, 1179.

The well-known case of *Princz v. Federal Republic of Germany* is a good example in which the perspective of individual responsibility is entirely overlooked and replaced by the holistic paradigm of collective guilt. In particular, in the *Dissenting Opinion* in the second degree judgment, Judge Wald supports the theory of the implied waiver of immunity by Germany, claiming that ‘Nazi Germany’ could have realized that “it might one day be held *accountable for its heinous actions* by any *other state*, including the United States”.<sup>40</sup> Almost as if those “heinous acts” had not been the work of several commanding individuals and their various executors, but of an imaginary ‘Nazi Germany’ conceived as a physical person capable of weighing the future consequences of its actions!

According to Hannah Arendt, the defense of Adolf Eichmann, for whom immunity was denied, *ratione materiae*, by the Israeli Supreme Court, promptly tried to prove the innocence of the defendant on an argument that we could define as exquisitely Kelsenian, i.e. that Eichmann was nothing but a “tiny cog” of the *Third Reich*.<sup>41</sup> Eichmann was the incarnation of the subordinate bureaucrat, a mere executor of orders from above, convinced that he did not have to answer to himself and to others for his actions. It is the State – claimed the defense – that ordered certain actions, and only it can be held responsible. Now, equating functional immunity and State immunity, on the one hand, and superimposing criminal and civil responsibility on the individual with the international liability of the State, on the other, has the effect of legitimizing, without realizing it, reasonings of this kind. The celebrated *McLeod* case is a textbook example of this proposition: “[w]hether the process be criminal or civil”, said Secretary of State Webster, clarifying the position of the United States in the controversy,

<sup>40</sup> Dissenting Opinion of Judge Wald, *Hugo Princz v. Republic of Germany*, United States Court of Appeals, District of Columbia Circuit, Judgment of 1 July 1994, (1994) 26 F.3d 1166, 33 ILM 1483, 1494, 1502 (para. 88) (emphasis by the author).

<sup>41</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* [1965] (1975), 289. Vasilij Grossman, in his novel ‘Everything Flows’, a ferocious testimony and an implacable denunciation of Stalinism, had Soviet informers on trial speak these words: “Why on earth do you want to accuse little fish like us? Start with the State, judge it. After all, our guilt belongs to it, so judge it.” V. Grossman, *Tutto Scorre* (1987), 79 (cited in accordance with the Italian edition; translation by the author).

“the fact of having acted under public authority, and in obedience to the orders of lawful superiors, must be regarded as a valid defence; otherwise individuals would be holden responsible for injuries resulting from the acts of government, and even from the operations of public war”.<sup>42</sup>

Along the lines of the historic *McLeod* case is the judgment, harshly criticized by Cassese,<sup>43</sup> on the *Lozano* case, in which the U.S. soldier responsible for the death of the agent Nicola Calipari and wounding of the Italian journalist Giuliana Sgrena at a checkpoint in Iraq, was not subject to criminal trial, also on the basis of the qualification of the soldier’s act as coming within the terms of *acta jure imperii*:

“[t]he rule of functional immunity is the natural corollary of the principle, also customarily recognized, of the ‘restricted’ immunity of the States of foreign jurisdiction for civil liability deriving from activities of an official nature, *jure imperii*, materially performed by its officials.”<sup>44</sup>

As Trapp clarifies, the ‘*McLeod* principle’ is thus “one of non-concurrence of responsibility to the effect that when a State is responsible for conduct, the

<sup>42</sup> Cf. *McLeod*, 20 November 1854, FO 83. See *Letter of Mr. Daniel Webster to Mr. Crittenden*, 15 March 1841, 29 *British and Foreign State Papers* (1840-1841), 1139, 1141. During the rebellion against the British in Ontario in 1837, the Canadian rebels occupied an island on the Niagara river, where they were aided by the Americans. To stop the Americans from continuing to give aid to the rebels, the British invaded American territory to destroy the ship (*Caroline*), they had been using to transport supplies and munitions. A few years later, in 1840, an Englishman who had participated in that raid, by the name of McLeod, was arrested while on a visit to New York. By explicit admission of the American Secretary of State, “after the avowal of the transaction [...] authorized and undertaken by the British Authorities, individuals concerned in it ought not [...] to be holden personally responsible in the ordinary tribunals [...] for their participation in it”. See *Letter of Mr. Webster to Mr. Fox*, 24 April 1841, 29 *British and Foreign State Papers* (1840-1841), 1129, 1131.

<sup>43</sup> A. Cassese, ‘The Italian Court of Cassation Misapprehends the Notion of War Crimes: The *Lozano* Case’, 6 *Journal of International Criminal Justice* (2008) 5, 1077, 1087-1089.

<sup>44</sup> *Lozano Case*, Italian Supreme Court of Cassation, Case No. 31171, Decision of 24 July 2008, 91 *Rivista di Diritto Internazionale* (2008) 4, 1223, 1232 (translation by the author).

individual acting on behalf of the State will not be”.<sup>45</sup>

In this connection, it is also important to clarify that the interpretation offered by a certain part of the doctrine and case law,<sup>46</sup> claiming that the functional immunity of the individual official should be denied and the individual subject to criminal proceedings (as well as civil, if necessary), on the basis of the qualification of grave violations of human rights as *ultra vires* acts is equally unacceptable. This qualification, rejected by the predominant case law<sup>47</sup> and also by Italy in the controversy on the *Jurisdictional Immunities of the State*, lends itself to the objection on the basis of which rarely can acts of this nature be committed ‘in a private capacity’. Rather, the use of an *escamotage* of this kind seems useful as an indication or symptom of increasing sensitivity favorable to the identification of the personal responsibility of the individual official, separate and different from that of the State,<sup>48</sup> also in case of the ‘official’ nature of the

<sup>45</sup> K. N. Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (2011), 96. As the *Lozano* case shows, and in contrast with Trapp’s premise, “the movement away from the exclusive responsibility of states” (*ibid.*, 99) is far from complete. Cf. *Prosecutor v. Tihomir Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, IT-95-14-AR108bis, 29 October 1997, 110 ILR 607, 707-708, para. 38.

<sup>46</sup> Cf. Joint Separate Opinion of Judges Higgins, Kooijmans & Buergenthal, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, 3, 63, 88-89, para. 85.

<sup>47</sup> “It is [...] difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity.” *Jones v. Saudi Arabia*, *supra* note 18, 286, para. 19.

<sup>48</sup> See, e.g., *Charter of the International Military Tribunal*, 8 August 1945, Art. 7, 82 UNTS 279, 288: “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.” This provision was later taken up in the Statutes of all the international tribunals established during the 20th century. In one decision, the Tribunal of Nurnberg, quoting Art. 228 of the *Versailles Treaty* and an *obiter dictum* in the case *Ex Parte Quirin and Others*, Supreme Court of the United States, Judgment of 31 July 1942, (1942) 317 U.S. 1, reiterated that “[t]he authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings”. *In Re Goering and Others*, International Military Tribunal (Nuremberg), Judgment of 1 October 1946, published in *Trial of Major War Criminals* (1947), Vol. I, 171, 223 [In Re Goering and Others, International Military Tribunal]. For a criticism, C. Damgaard, *Individual Criminal Responsibility for Core International Crimes* (2008), 98-105. In the *Eichmann* case, the Israeli Supreme Court denied the functional immunity of the defendant insofar as “those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission”. *Attorney-General of the Government of Israel v. Eichmann*, Israel Supreme Court, Judgment of 29 May 1962, 36 ILR 277, 308, 309-310, para. 14. Cf.

actions committed.<sup>49</sup>

The question is not, in this case, in what capacity, official or otherwise, the individual committed a certain criminal action, but simply whether he, given a moral choice, decided to perform a grave violation of international humanitarian law or human rights law. In following the doctrine criticized here, Frulli thus suggests guaranteeing, in any case, immunity for acts *intra vires*.<sup>50</sup> The risk of such a position is to partially identify individual-official activity with State activity, in the fear that one could violate the doctrine of the *Act of State*. Actually, for any type of criminal act, there is never a complete overlap between the State's activity and the activity carried out by the individual, considering that judgment impinges, so to speak, on individual's adherence to the act of State and not on the act of State itself, and thus the exercise of jurisdiction against the individual for *jure imperii intra vires* cannot be seen as an improper interference in the internal affairs of the State, exactly as it is not in the case of exercising jurisdiction against an individual for *acta jure imperii ultra vires*.

#### D. Individual Responsibility of State Officials Differs Greatly From State Responsibility

It should be in the specific interest of those who appeal to an ethics of principles and claim a greater role of the individual in international society to reject the aforementioned abstractions of 'specification' and 'collective guilt', holding the individual responsible for his actions even when he acts in the role of State agent. To say it in the words of Cassese,

also the statement by Prof. C. Tomuschat at a hearing held on 12 September 2011 in the case *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Verbatim Record of the Public Sitting held on Monday 12 September 2011, Doc CR 2011/17, 27 (para. 12). [ICJ, *Jurisdictional Immunities of the State*, Verbatim Record of the Public Sitting held on 12 September 2011].

<sup>49</sup> As Akande and Shah point out: "Whether or not acts of state officials are regarded as official acts does not depend on the legality, in international or domestic law, of those acts. Rather, whether or not the acts of individuals are to be deemed official depends on the purposes for which the acts were done and the means through which the official carried them out." D. Akande & S. Shah, 'Immunities of State Officials, International Crimes and Foreign Domestic Courts', 21 *European Journal of International Law* (2010) 4, 815, 832.

<sup>50</sup> Frulli, *supra* note 21, 57-58.

“trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, not all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators. Victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have paid for their crimes.”<sup>51</sup>

This is not dissimilar from the reasoning of the judges of the International Court of Justice (ICJ) Shi and Vereschetin in their *Joint Declaration* on the case of *Bosnia Herzegovina v. Yugoslavia*: “[t]here can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs”.<sup>52</sup> *Vice versa*, recognition of a criminal or civil responsibility of the State *under international law* exposes States to the risk that the court will merely ‘use’ a defendant – for whom, after the final condemnation, it does not even request or obtain extradition<sup>53</sup> – so that the indemnity is effectively paid exclusively by the State of which he is a citizen.<sup>54</sup>

Pointing to the potential parallel between the responsibility of the State and the criminal or civil responsibility of the juridical person, in particular the *corporation*, typical of internal legal orders, serves no purpose.<sup>55</sup> In this connection, Posner and Sykes submit, indeed, that the international responsibility of the State, in particular when aggravated by grave human rights

<sup>51</sup> A. Cassese, ‘Reflections on International Criminal Justice’, 61 *Modern Law Review* (1998) 1, 1, 6.

<sup>52</sup> Joint Declaration of Judges Shi & Vereshchetin, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports 1996, 595, 631, 632; H. Shawcross, ‘Let the Tribunal Do its Job’, *The New York Times* (22 May 1996), A17.

<sup>53</sup> Seventeen defendants sentenced to life imprisonment for Nazi massacres have never been extradited, including Milde. Germany has, in fact, refused repeatedly to arrest them. Cf. N.N., ‘Stragi Naziste: 17 Ergastolani non Scontano la Pena’, *La Stampa* (29 May 2011), available at <http://www.lastampa.it/2011/05/29/esteri/stragi-naziste-ergastolaninon-scontano-la-pena-HV3Vvy6wzKK5igbqDg5tNL/pagina.html> (last visited 31 January 2014).

<sup>54</sup> Likewise, Gattini, *supra* note 25, 191: “It would be inequitable to make the prospect of gaining civil damages from a foreign state dependent upon whether or not the individual defendant still happens to be alive.”

<sup>55</sup> Of a ‘legal person’ mention is made, for example, by J. Bröhmer, *State Immunity and the Violation of Human Rights* (1997), 30. Cf. Barboza, *supra* note 17, esp. 365.

violations,<sup>56</sup> resembles the *vicarious responsibility* of the *corporation*, by virtue of the fact that the individual officials of the State, like the employees or workers of the company, “will not bear the costs [...] and their personal assets may be far smaller than the harm that they have caused”;<sup>57</sup> moreover “[e]ven though a bureaucratic entity does not maximize profit, it will often face a budget constraint and will prefer not to waste resources”.<sup>58</sup> Basically, what Posner and Sykes are saying is that the institution of civil liability of the State is an efficient mechanism for the prevention of international crimes because, on the one hand, it is able to absorb the costs of the reparations (of war and other events) more easily and, on the other, because it will force the democratic State that does not want to dissipate resources *publicis usibus destinata* to exercise greater control over its agents.<sup>59</sup> These are theoretical analyses that do not take adequately into consideration the fact that the incentives for a State to avoid expenditures to which its taxpayers object may differ depending on the political class in each case, as well as on the historical era. The same can be said for the real ability of the democratic State to control its subjects effectively in order to prevent the commission of international crimes. The authors themselves are skeptical of the fact that “a prospect of reparations after the end of conflict will necessarily discipline states during conflict”.<sup>60</sup> A mechanism based on the civil liability of the State as a life preserver in case of the insufficiency of private assets would risk producing a *moral hazard* in the individual officials of the State who, aware of being called upon to respond – in the worst cases jointly with the State of which they are citizens and in the best (according to the ‘*McLeod* principle’) of not having to respond at all – will actually have an incentive to commit violations of international humanitarian or human rights law.<sup>61</sup>

Aside from these observations concerning the different nature of the State as a subject of international law, with respect to the corporation, it should be said that international law, and therefore also State responsibility, is neither civil nor criminal, but *sui generis*, and this is made clear in the *First Report on State Responsibility* of the ILC, mentioning Kelsen himself: “the law of international

<sup>56</sup> Cf. B. I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (2009), 17.

<sup>57</sup> E. A. Posner & A. O. Sykes, ‘Economic Analysis of State and Individual Responsibility Under International Law’, 9 *American Law and Economics Review* (2007) 1, 72, 87.

<sup>58</sup> *Ibid.*, 89.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, 100.

<sup>61</sup> Similar considerations are found in F. Rosenfeld, ‘Individual Civil Responsibility for the Crime of Aggression’, 10 *Journal of International Criminal Justice* (2012) 1, 249, 261.

responsibility is neither civil nor criminal, and that it is purely and simply international".<sup>62</sup> The distinction between individual responsibility and State responsibility is particularly clear if one considers that "the element of *faute* is not a necessary condition to determine liability of a State under contemporary international law"<sup>63</sup> and that "the defenses for the law of individual responsibility generally are wider".<sup>64</sup> This means that a State is sometimes responsible to another under international law, even in the absence of a finding of the elements of guilt or malice of the agent who is the author of the act,<sup>65</sup> or in other words, as Nollkaemper writes, "[t]he conduct of a State as a legal person is assessed against an objective standard".<sup>66</sup> This discrepancy in the test of the two liabilities is explained precisely in the light of the fact that under international law, the responsibility of the State has an entirely different nature and is independent of individual criminal and civil responsibility,<sup>67</sup> because "[t]he State is in international law not legally responsible for the act itself, but for its own failure to comply with obligations incumbent upon it in relation to acts of the private person".<sup>68</sup> Thus, "[t]he law of State responsibility belongs to a separate branch of international law and does not depend on nor imply the legal responsibility of

<sup>62</sup> ILC, *First Report on State Responsibility*, UN Doc A/CN.4/490/Add.1, 1 May 1998, 7-8, para. 53. See also Kelsen, *supra* note 35, 196.

<sup>63</sup> P. Dumberry, 'The Controversial Issue of State Succession to International Responsibility Revisited in Light of Recent State Practice', 49 *German Yearbook of International Law* (2006), 413, 418. Cf. also A. Nollkaemper, 'Concurrence Between Individual Responsibility and State Responsibility in International Law', 52 *International and Comparative Law Quarterly* (2003) 3, 615, 630.

<sup>64</sup> Nollkaemper, *supra* note 63, 635.

<sup>65</sup> *Selmouni v. France*, ECtHR Application No. 25803/94, Judgment of 28 July 1999, 26-27, para. 87.

<sup>66</sup> Nollkaemper, *supra* note 63, 617.

<sup>67</sup> Thus also Stephens, *supra* note 39, 1180-1181. Cf. Opinion of Lord Hutton, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet and Others*, United Kingdom House of Lords, Judgment of 24 March 1999, 38 ILM 581, 627, 640 [Pinochet III]: "This distinction between the responsibility of the state for the improper and unauthorised acts of a state official outside the scope of his functions and the individual responsibility of that official in criminal proceedings for an international crime is recognised in Article 4 and the commentary thereon in the 1996 draft Report of the International Law Commission." The report mentioned here is the *Draft Code of Crimes Against Peace and Security of Mankind*, Yearbook of the International Law Commission, Vol. II (2) (1996), 17, para. 50. Similar conclusions are found in the *Draft Articles on State Responsibility*, Art. 58, *supra* note 15, 30.

<sup>68</sup> R. Jennings & A. Watts, *Oppenheim's International Law*, Vol. 1, 9th ed. (1992), 501 (note 13).

individuals”.<sup>69</sup>

There is no intention here to propose doing away with the international responsibility of the State for the commission of *acta jure imperii* in violation of imperative norms,<sup>70</sup> but only to stress the impossibility of superimposing or juxtaposing<sup>71</sup> two different types of responsibility, individual criminal and civil responsibility, on the one hand, and the international responsibility of the State, on the other. The latter remains firmly in place even in the absence of the exercise of jurisdiction by a court.<sup>72</sup> Indeed, on a closer look, determination of the international responsibility of a State is not even one of the tasks of the national courts<sup>73</sup> which, on the basis of international law, are called upon to judge only on the responsibility of a criminal and civil nature of individuals. This, however, does not mean that starting from the same wrongful act it may not be possible to postulate, in accordance with the provisions of the ILC,<sup>74</sup>

<sup>69</sup> E. van Sliedregt, *Individual Criminal Responsibility in International Law* (2012), 5.

<sup>70</sup> Rather, as pointed out also in the *Draft Articles on State Responsibility*, Art. 7, *supra* note 15, 26, “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions”. Thus also *Convention Respecting the Laws and Customs of War on Land*, 18 December 1907, Art. 3, 36 Stat. 2277, 2290, whereby “[a State] shall be responsible for all acts committed by persons forming part of its armed forces”. Only in the measure in which it is proven that the act committed by the official agent of the State has a private nature or is committed by a subject in his position as a private citizen, then it will not be possible to attribute the responsibility to the State to which that individual belongs. *Draft Articles on State Responsibility*, Commentary to Art. 7, *supra* note 15, 46-47, paras 7-9. The occurrence of such a condition is unlikely in case of war. Cf. Stammeler, *supra* note 15, 44.

<sup>71</sup> *Contra* Borsari, according to whom “the ontological jumble” between the responsibility of the individual and the responsibility of the state would be “inevitable”. R. Borsari, *Diritto Punitivo Sovranazionale Come Sistema* (2007), 444 (translation by the author).

<sup>72</sup> Similarly Frulli, *supra* note 21, 160 who states: “We have to reiterate that, even if we think the state cannot be brought to judgment before a civil court on the internal plan, it is responsible for the actions performed by its organs acting *ultra vires* in violation of international law” (translation by the author).

<sup>73</sup> The *Draft Articles on State Responsibility* (*supra* note 15) do not clarify who has jurisdiction. In general, we can say that the International Court of Justice (ICJ) can decide for the cases in which it has jurisdiction, or otherwise other international courts that the State has authorized by means of an agreement to resolve disputes on this subject.

<sup>74</sup> ILC, *Third Report on Immunity of State Officials*, *supra* note 36, 32-33, para. 58: “[A] ttributing to the State actions performed by an official in an official capacity does not mean that they cease to be attributed to that official.”

a dual responsibility or, better to say, a “dual attribution of responsibility”.<sup>75</sup> Rather, the same international custom shows that “a limited number of acts can lead both to State and individual responsibility”.<sup>76</sup> The point is not, actually, whether the State should or should not be charged with any responsibility, but what type of responsibility should be attributed to it, or, whether it is acceptable that an international custom should develop favorable to the recognition of the criminal and civil responsibility of the State for international crimes.

This ontological jumble of different types of responsibilities<sup>77</sup> derives from an excessively holistic approach to reality and produces paradoxical consequences. If, for example, Chile were effectively responsible for the atrocities against the opposers of the regime, why the decision to try General August Pinochet and why not sue the Chilean State for damages? Perhaps because, aside from the fact that State immunity would probably have been recognized,<sup>78</sup> it would have seemed sinful more than twenty years after the wrongful deeds to demand reparation from the Chilean taxpayers who, from the standpoint of criminal law could not be said to be responsible for the crimes committed by the government of General August Pinochet.<sup>79</sup> The danger, in short, is that of a paradoxical redistributive effect, or “churning”, as the Hungarian philosopher Anthony de Jasay<sup>80</sup> calls it, whereby in this particular case, those relatives of the tortured victims who had not taken their case to court might in theory

<sup>75</sup> Nollkaemper, *supra* note 63, 620.

<sup>76</sup> *Ibid.*, 618-619.

<sup>77</sup> In ILC, *Preliminary Report on Immunity of State Officials From Foreign Criminal Jurisdiction*, UN Doc A/CN.4/654, 31 May 2012, 5, para. 17, the different nature of the two responsibilities is not made clear, claiming that “there could scarcely be objective grounds for asserting that one and the same act of a an official was, for the purposes of State responsibility, attributed to the State and considered to be its act, and, for the purposes of immunity from jurisdiction, was not attributed as such and was considered to be only the act of an official”.

<sup>78</sup> Cf. Opinion of Lord Hutton, *Pinochet III*, *supra* note 67, 640: “Chile is responsible for acts of torture carried out by Senator Pinochet, but could claim state immunity if sued for damages for such acts in a court in the United Kingdom.”

<sup>79</sup> Lord Hoffmann also grasps this contradiction in *Jones v. Saudi Arabia* observing that: “It would be strange to say [...] that the torture ordered by General Pinochet was attributable to him personally for the purposes of criminal liability but only to the State of Chile for the purposes of civil liability.” Opinion of Lord Hoffmann, *Jones v. Saudi Arabia*, *supra* notes 18 & 30, 299, para 68.

<sup>80</sup> A. de Jasay, *The State* (1998), 254-266. Cf. the statement of Prof. Christian Tomuschat at the hearing of 12 September 2011: “When talking about the responsibility of a State, one really talks about the responsibility of a people, many members of which may also have been the victims of the same régime that caused injury through breaches of international

have been required to indemnify, as taxpayers of the Chilean State, the victims who had.<sup>81</sup> As Barboza neatly sums it up: “[c]reating State Crimes would mean to introduce a type of responsibility where the innocent are punished together with the guilty”.<sup>82</sup> Even Nollkaemper is aware of the problem and, for the cases of international crimes committed “by a small group of leaders of a State”, he wonders whether it is “still useful to strive for separate responsibility of the state”.<sup>83</sup> Actually, the manner in which Nollkaemper poses the question is not entirely correct, if it is true that he himself, shortly after, says that “it would be odd [...] to consider that a president of a state should have to be imprisoned for many years, whilst leaving in place the structures that made possible and facilitated his acts”.<sup>84</sup> The international responsibility of the State remains secure even in this case, therefore, until it has guaranteed a reparation which, in a case like this, will consist of stopping the wrongful acts or in eliminating the norms that authorize or facilitate those acts. What will be lacking, however, by reason of the recognition of the principle of immunity, will be a civil or criminal responsibility of the State.

In this connection, the words written by Hannah Arendt in 1963 still apply today, that is

“a thing called collective guilt does not exist and much less is there a thing called collective innocence. If this were not so, no one would be guilty or innocent. Naturally this is not to deny that there is such a thing as political responsibility. This, however, is independent from that which can be done by an individual who belongs to the

law.” ICJ, *Jurisdictional Immunities of the State*, Verbatim Record of the Public Sitting held on 12 September 2011, *supra* note 48, 27 (para. 12).

<sup>81</sup> The potential clash between the person who commits the misdeed and the person who is effectively called to respond in monetary and patrimonial terms is amplified, among other things, following the succession between States, as in the case of the *Third Reich* and the *Bundesrepublik*. This led to the proposal by Stern, to cut the cord of succession in case of violations of the rules of *jus cogens*. B. Stern, ‘Responsabilité Internationale et Succession d’Etats’, in Boisson de Chazournes & Gowlland-Debbas, *supra* note 17, 327, 353 *et seq.* Actually “the solution depends on the different factors and circumstances involved [...] on the type of succession of States”. Dumberry, *supra* note 63, 419-420.

<sup>82</sup> Barboza, *supra* note 17, 369.

<sup>83</sup> Nollkaemper, *supra* note 63, 625.

<sup>84</sup> *Ibid.*

group, and therefore cannot be judged in moral terms, or subjected to the scrutiny of a criminal court”.<sup>85</sup>

The responsibility of the State *under international law* will never be either civil or criminal, but simply international. Even the International Military Tribunal of Nuremberg was clear on this point, stating that “[c]rimes are committed by men, and not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.<sup>86</sup> And in criminal procedures with civilians bringing charges, in which a State is the defendant, it cannot be said that the substance changes.<sup>87</sup> Quite the contrary, sometimes the civil reparation is ideally transformed into a sort of fine, a ‘punishment’ to inflict on the State to which the official/executor belonged.<sup>88</sup>

Following Nollkaemper’s reasoning, the exercise of jurisdiction against a single individual may then serve also as a form of reparation to the victims, as occurred, for example, in the *Rainbow Warrior* case.<sup>89</sup> In this connection, the International Court of Justice (ICJ) could, therefore, have ordered Germany to

<sup>85</sup> Arendt, *supra* note 41, 297-298.

<sup>86</sup> *In Re Goering and Others*, International Military Tribunal, *supra* note 48, 223.

<sup>87</sup> Thus also Posner, & Sykes, *supra* note 57, 96, according to which “the distinction between ‘civil’ and ‘criminal’ penalties for corporations and states is a meaningless one”.

<sup>88</sup> As emphasized also by Chiavario: “Behind the apparent battle ‘for damages’ demands of authentic justice in broader terms often, and almost inevitably, make an appearance and there may even be more or less admitted pressure to obtain revenge through the public hand: while the former are perfectly understandable, the latter are certainly not to be condoned.” M. Chiavario, *Diritto Processuale Penale, Profilo Istituzionale* (2007), 197 (translation by the author). On the undoubtedly more effective nature of the civil procedure, rather than the criminal, toward a State, see Fox & Webb, *supra* note 17, 93. Even the Military Court of Appeals of Rome, in its decision condemning Max-Josef Milde, highlights the unquestionably “afflictive character” of the reparation imposed on Germany. *Milde*, Military Court of Appeals of Rome, Decision No. 72/2007 (copy on file with author). And effectively, the Italian Constitutional Court in its Decision of 14 July 1986, Case No. 184, *Informazione Previdenziale* 1987, 664 states that “it is impossible to deny or consider unreasonable the fact that civil liability for an illicit act is able to provide not only for the restoration of the property of the damaged party, but among other things, at times, also and at least in part and additionally, may serve to prevent and punish the illicit act, as it does in the case of reparation for damages unrelated to property resulting from a crime. Alongside criminal responsibility, civil responsibility can very well fulfill a preventive and sanctioning role” (translation by the author).

<sup>89</sup> Nollkaemper, *supra* note 63, 636 and thereafter *contra* see ILC, *Fifth Report on State Responsibility*, UN Doc A/CN.4/291 and Add 1 & 2, Yearbook of the International Law Commission (1976), Vol. II (1), 3, 33, para 101.

fulfill its obligation as identified by the primary rules of international law, to punish the individual officials of the State, authors of war crimes and crimes against humanity against Italian civilians and military personnel, in particular by making their extradition to Italy possible.<sup>90</sup> In the past, in fact, there had been some pronouncements by national and international tribunals with which the principle of State immunity was saved while, at the same time, the exercise of criminal jurisdiction and, in the United States, civil jurisdiction as well,<sup>91</sup> was guaranteed against the guilty parties. In this way, for example, it occurred for the much-criticized *Al-Adsani* case to be heard, where immunity was recognized for the State (Kuwait), but not *ratione materiae* for the individual officials of the State, guilty of torture of the plaintiff in the suit. The English Courts gave the applicant leave to serve the proceedings on the individual defendants.<sup>92</sup> This is justified on the basis of the fact that international custom does not envisage the obligation to recognize the functional immunity from civil jurisdiction of the individual State officials for grave violations of human rights.<sup>93</sup>

<sup>90</sup> Nollkaemper, *supra* note 63, 638.

<sup>91</sup> Stephens mentions a single case outside the United States, in which civil jurisdiction was exercised against an individual official of the State, specifically in the *Milde* case. In it, however, this choice seemed due more than anything else to the need to oblige the Federal Republic of Germany to respond jointly with the defendant. After the charge relative to the order of reparation by Germany following the decision of the ICJ had fallen, it could be said that the decision of the Italian judges was *a fortiori* innovative. Cf. Stephens, *supra* note 39, 1177 and on the *Milde* criminal case see also G. Boggero, 'Giustizia per i Crimini Internazionali di Guerra Nella Strage di Civitella?', in Procura Generale Militare Presso la Corte di Cassazione (ed.), *Casi e Materiali di Diritto Penale Militare* (2013), 277.

<sup>92</sup> *Al Adsani v. United Kingdom*, ECtHR Application No. 35763/97, Judgment of 21 November 2001, 4, paras 14-15. Quite surprisingly, in the case *Jones and Other vs. United Kingdom* the European Court of Human Rights decided – it is not clear how deliberately – not to take into account what the English courts had held in the *Al-Adsani Case* and applied the rationale of State immunity also to immunity *ratione materiae*. See *Jones and Others vs. United Kingdom*, ECtHR Application No. 34356/2006 & 40528/2006, Judgment of 14 January 2014, paras 199-215. See also P. Webb, 'Jones v. UK: The Re-Integration of State and Official Immunity', *EJIL: Talk!* (14 January 2014), available at <http://www.ejiltalk.org/jones-v-uk-the-re-integration-of-state-and-official-immunity/> (last visited 31 January 2014).

<sup>93</sup> Stephens, *supra* note 39, 1175 and Institute of International Law, 'Resolution on the Immunity From Jurisdiction', Art. III (1), *supra* note 19, 2. According to Focarelli there appears to be a tendency in act "to transplant the legal regime of functional immunity operating in [...] [international tribunals] to the domestic sphere". C. Focarelli, *International Law as Social Construct: The Struggle for Global Justice* (2012), 388-389.

## E. Conclusion

The safeguard of fundamental human rights, in times of war as in times of peace, cannot but pass through an exercise of universal jurisdiction, both criminal and civil, against those really responsible for their violation: individuals. *De lege ferenda*, therefore, the applicability of functional immunity for the individual – aside from temporary immunity *ratione personae* and provisions of exception to conventional rules – should not be recognized, whatever the act committed by the accused and/or defendant, including *acta jure imperii*. The *puissance publique* of the State would effectively remain immune and inappellable at the jurisdictional level, while only the single commission of the ‘act of dominion’ by the individual would be subject to jurisdiction and judgment of criminal and/or civil responsibility.<sup>94</sup> Since there can be no superimposition between the organ of the State and the State to which it belongs, there can thus also be no application *ex officio* of immunity for the individual-organ as there is for the State.<sup>95</sup> Only the awareness that “a person and his conduct cannot be split from each other” and that the latter “cannot be transferred to another person, whether physical or moral”<sup>96</sup> can persuade doctrine and jurisprudence of the logical necessity to exercise criminal and civil jurisdiction for grave violations of international humanitarian law and human rights law exclusively against individuals while, however, holding firm to the right of immunity for States.<sup>97</sup>

<sup>94</sup> Of the same opinion also Stephens, *supra* note 39, 1179: “Both the state and the official can be held responsible for an act committed in the exercise of state authority, and an official can be denied immunity even if the state is deemed to be immune.” And also: “And in both situations, a decision to deny immunity to the individual is separate from whether the State itself is immune—a distinction that reflects the different policy issues underlying state and official immunity.” *Ibid.*, 1182.

<sup>95</sup> Thus also Frulli, *supra* note 21, 60.

<sup>96</sup> Barboza, *supra* note 17, 364.

<sup>97</sup> Also sharing the ratio of a choice of this kind would seem to be the case of C. I. Keitner, ‘Officially Immune?: A Response to Bradley and Goldsmith’, 36 *Yale Journal of International Law Online* (2010), 1, 12: “National courts can, in appropriate circumstances, impose legal consequences for such conduct. This is true even though the State might also bear responsibility, and even though the State itself might be immune from suit in a foreign court.” Similar conclusions appear also to be reached by the Rapporteur of the Netherlands Society of International Law. Cf. M. M. T. A. Brus, ‘No Functional Immunity of State Officials for International Crimes: A Principled Choice With Pragmatic Restrictions’, *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht* [Announcements of the Dutch Society of International Law] No. 138 (2011), 37, esp. 64-65. See van Alebeek, *supra* note 26, 34 (note 147) and Institute of International Law, ‘Resolution on the Immunity From Jurisdiction’, Art. IV, *supra* note 19, 2, according to which the denial

of functional immunity is not of any effective prejudice “to the issue whether and when a State enjoys immunity from jurisdiction before the national courts of another State in civil proceedings relating to an international crime committed by an agent of the former State”.

# **“All’s Well That Ends Well” or “Much Ado About Nothing”?: A Commentary on the *Arms Trade Treaty***

Marlitt Brandes\*

## Table of Contents

A. Introduction.....	400
B. Background.....	402
C. Scope .....	406
I. Categories of Arms.....	406
II. Definition of Trade .....	407
III. Ammunition/Munitions and Parts and Components .....	408
IV. Concluding Remarks on Scope .....	409
D. Substantive Obligations.....	409
I. Prohibitions of Transfer.....	409
II. Export and Export Assessment .....	416
1. Assessment of Risks of the Export .....	416
2. Consideration of Mitigation Measures.....	420
3. Decision on the Export Authorization .....	421
4. Other Factors to Be Considered in the Assessment .....	421
III. Other Substantive Obligations .....	422
IV. Concluding Remarks on Substantive Obligations.....	424
E. Implementation and Compliance .....	424
F. Conclusion.....	428

\* PhD candidate and Research Associate at the Walther Schücking Institute for International Law, University of Kiel, Germany. The author would like to thank Prof. Dr. Nele Matz-Lück, LL.M., Erik van Doorn as well as the anonymous reviewer for valuable comments on an earlier version of the article.

## Abstract

To date no international treaty comprehensively regulates the international trade in conventional arms. In 2012 and 2013, two conferences were convened under the auspices of the United Nations to adopt an 'Arms Trade Treaty' putting an end to this state of affairs. Both failed to reach consensus on the final treaty draft before them. Nevertheless, on 2 April 2013, the UN General Assembly adopted the final draft submitted by the President of the second conference and the *Arms Trade Treaty* (ATT) is now open for signature and will enter into force after its fiftieth ratification. This article analyzes the legal value of the provisions enshrined in the ATT by concentrating on its scope, substantive obligations, and implementation. It concludes that while much criticism is in order with regard to ambiguous language and potential loopholes in the treaty, it still represents progress as it will provide for written obligations which States Parties must follow when deciding on arms transfer authorizations. Whether the treaty will actually help victims of violations of international human rights and humanitarian law on the ground, however, depends on its ratification by major supplier States and on how far States Parties will be willing to go when implementing and enforcing its provisions.

## A. Introduction

According to the former UN Secretary-General Ban Ki-moon it was "a victory for the world's people" and "the culmination of long-held dreams and many years of effort".<sup>1</sup> On 2 April 2013, only days after the failure of the UN Final Conference on the *Arms Trade Treaty* (Final Conference) to reach consensus on the draft text submitted by its President Peter Woolcott, the UN General Assembly adopted the draft by a vast majority.<sup>2</sup> In contrast to the Final Conference, which was required to decide by unanimity,<sup>3</sup> the UN General

<sup>1</sup> UN Secretary-General, "Arms Trade Treaty Will Generate 'Much-Needed Momentum' for Other Global Disarmament, Non-Proliferation Efforts, Secretary-General Says", UN Press Release SG/SM/14919-DC/3426, 2 April 2013, available at <http://www.un.org/News/Press/docs/2013/sgsm14919.doc.htm> (last visited 31 January 2014).

<sup>2</sup> GA Res. 67/234 B, UN Doc A/RES/67/234 B, 11 June 2013.

<sup>3</sup> Cf. GA Res. 67/234 A, UN Doc A/RES/67/234 A, 4 January 2013 and United Nations Conference on the Arms Trade Treaty, *Provisional Rules of Procedure of the Conference*, UN Doc A/CONF.217/L.1, 7 March 2012, 8, Rule 33 [Provisional Rules of Procedure].

Assembly was able to decide by a majority of the members present and voting in accordance with Article 18 (3) *Charter of the United Nations* (UN Charter).<sup>4</sup>

Up to this point and despite its dreadful consequences, no common and binding international rules have been put in place to control the international trade in conventional arms. This is particularly relevant to the trade in small arms and light weapons (SALW) which fall outside of the scope of most international agreements on specific weapons but account for the majority of civil casualties in current conflicts.<sup>5</sup> Each year, half a million people are killed at the hands of SALW.<sup>6</sup> Former UN Secretary-General Kofi Annan therefore asserted that small arms “could well be described as ‘weapons of mass destruction’”.<sup>7</sup> The *Arms Trade Treaty* (ATT)<sup>8</sup> aims to close the regulatory gap by establishing common standards upon which all States Parties base their conventional arms transfers.

The ATT will enter into force ninety days after its fiftieth ratification.<sup>9</sup> At the signing event, several States emphasized the importance of a prompt entry into force of the treaty and pledged to ratify it as fast as possible.<sup>10</sup> 115 States have signed the ATT and 31 have already ratified it as of writing.<sup>11</sup> These are all signs for support for the ATT from the international community. However, it remains to be seen how soon other States will fulfill their promises. With a view to the seven year long negotiation and drafting process, it seems at least questionable whether States will now rush to ratify the ATT. Also, albeit universal ratification is desirable, the treaty’s success will largely depend on its ratification by major arms suppliers such as the United States, Russia, Germany, France, and China

<sup>4</sup> *Charter of the United Nations*, 26 June 1945, Art. 18 (3), 1 UNTS XVI.

<sup>5</sup> Graduate Institute of International and Development Studies, *Small Arms Survey 2005: Weapons at War* (2005), 248.

<sup>6</sup> SC, *Small Arms: Report of the Secretary-General*, UN Doc S/2002/1053, 20 September 2002, 2, para. 4.

<sup>7</sup> UN Secretary-General, *We the Peoples: The Role of the United Nations in the 21st Century* (2000), 52.

<sup>8</sup> *Arms Trade Treaty*, UN Doc A/CONF.217/2013/L.3, 27 March 2013 [ATT]. The ATT opened for signature on 3 June 2013.

<sup>9</sup> Art. 22 (1) ATT.

<sup>10</sup> See, e.g., the statement of the Permanent Representative of France to the United Nations (Gérard Araud), available at <http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/france.pdf> (last visited 31 January 2014), 3. See also the statement of the Permanent Representative of Burkina Faso to the United Nations (Der Kogda), available at <http://unoda-web.s3.amazonaws.com/wp-content/uploads/2013/06/Burkina-Faso.pdf> (last visited 31 January 2014), 2, para. 2.

<sup>11</sup> See United Nations Office for Disarmament Affairs (UNODA), ‘Status of the Arms Trade Treaty’, available at <http://disarmament.un.org/treaties/t/att> (last visited 2 May 2014).

which account for over seventy percent of the global arms trade.<sup>12</sup> Even if the ATT enters into force in the next couple of months and major supplier States ratify it, its regulatory value remains doubtful. The general euphoria among States, scholars, and non-governmental organizations following the adoption of the UN General Assembly Resolution quickly diminished as critics voiced concern about the compromise reached by the Conference. It is the purpose of this article to discuss whether the ATT upon entry into force will be able to live up to the great expectations attached to its realization.

In order to understand both the accomplishments and the deficiencies of the ATT, it is necessary to first shed light on the background and the historic development of the ATT (B.). Thereafter, the main points of criticism are addressed. First, the scope of the ATT is examined (C.). Second, the article considers the quality of substantive obligations States Parties will face upon ratification of the treaty (D.). Third, the provisions on implementation of and compliance with the treaty are analyzed (E.). The article concludes with an overall assessment of the ATT (F.).

## B. Background

Multilateral efforts to control the international arms trade date back to the end of the nineteenth century. The *Brussels Act* of 1890<sup>13</sup> was designed both to combat slave trade and to regulate the transfer of arms to colonial territories.<sup>14</sup> In the inter-war period, the international community undertook several attempts to establish binding rules on arms transfers. Mainly due to the opposition of the United States neither the *St. Germain Convention* of 1919,<sup>15</sup> designed to

<sup>12</sup> A list of the top arms suppliers is available at <http://armstrade.sipri.org/armstrade/page/toplist.php> (last visited 31 January 2014). For the market share of the top 5 arms exporters, see Stockholm International Peace Research Institute, 'Market Share of Top 5 Arms Exportes', available at <http://www.sipri.org/research/armaments/transfers/measuring/at-images/Market%20share%20of%20top%20%205%20arms%20exports.png> (last visited 31 January 2014).

<sup>13</sup> *General Act for the Repression of the African Slave Trade*, 2 July 1890, Arts 8-10, 27 Stat. 886, 894-896.

<sup>14</sup> K. Krause & M. K. MacDonald, 'Regulating Arms Sales Through World War II', in R. D. Burns (ed.), *Encyclopedia of Arms Control and Disarmament*, Vol. 2 (1993), 707, 712. See in detail R. Yakemtchouk, 'Les Antécédents de la Réglementation Internationale du Commerce d'Armes en Afrique', 13 *Revue Belge de Droit International* (1977) 1& 2, 144, 151-161.

<sup>15</sup> *Convention for the Control of the Trade in Arms and Ammunition, and Protocol*, 10 September 1919, 7 LNTS 331.

prevent arms exports to territories under colonial control or League mandates,<sup>16</sup> nor the *Geneva Arms Traffic Convention* of 1925,<sup>17</sup> building upon the latter but allowing exports to non-signatories,<sup>18</sup> entered into force.<sup>19</sup> The events leading to the Second World War also put an end to a *Draft Convention*<sup>20</sup> proposed by the United States in 1934.<sup>21</sup> In the 1950s and 1960s emphasis was generally placed on the non-proliferation of weapons of mass destruction.<sup>22</sup> During the Cold War, export control regimes such as the Coordinating Committee on Export Controls (COCOM) were established to prevent arms traffic between the blocs while transfers amongst members of the same bloc remained unregulated.<sup>23</sup> In this regard, the *Tripartite Declaration* of 1950<sup>24</sup> between France, the United Kingdom, and the United States was an exception directed at the regulation of arms sales to the Middle East.<sup>25</sup>

It was only after the end of the Cold War that the regulation of the international trade in conventional arms was put back on the agenda of the international community. At this time, the invasion of Kuwait by Iraq made

<sup>16</sup> Krause & MacDonald, *supra* note 14, 714.

<sup>17</sup> *Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War*, 17 June 1925, 6 LNOJ 1117.

<sup>18</sup> D. R. Stone, 'Imperialism and Sovereignty: The League of Nations' Drive to Control the Global Arms Trade', 35 *Journal of Contemporary History* (2000) 2, 213, 221.

<sup>19</sup> Krause & MacDonald, *supra* note 14, 717.

<sup>20</sup> *Draft Articles for the Regulation and Control of the Manufacture of and Trade in Arms and the Establishment of a Permanent Disarmament Commission*, League of Nations Doc Conf. D. 167, 20 November 1934.

<sup>21</sup> D. G. Anderson, 'The International Arms Trade: Regulating Conventional Arms Transfers in the Aftermath of the Gulf War', 7 *American University Journal of International Law and Policy* (1991) 4, 749, 764.

<sup>22</sup> E. Kytömäki, 'Promoting Discussion on an Arms Trade Treaty – European Union-UNIDIR Project: Final Report', available at <http://www.unidir.ch/files/medias/pdfs/final-report-eng-0-145.pdf> (last visited 31 January 2014), 32. Examples for the regulatory successes with regard to weapons of mass destruction are the *Treaty on the Non-Proliferation of Nuclear Weapons*, 1 July 1968, 729 UNTS 161 [NPT]; the *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 10 April 1972, 1015 UNTS 163; and the *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, 3 September 1992, 1974 UNTS 45.

<sup>23</sup> M. Bromley, N. Cooper & P. Holtom, 'The UN Arms Trade Treaty: Arms Export Controls, the Human Security Agenda and the Lessons of History', 88 *International Affairs* (2012) 5, 1029, 1033.

<sup>24</sup> *Tripartite Declaration Regarding the Armistice Borders*, 25 May 1950, 22 Department of State Bulletin 886.

<sup>25</sup> Bromley, Cooper & Holtom, *supra* note 23, 1034.

the potential outcome of an unregulated international arms trade tragically apparent.<sup>26</sup> In 1991, the five permanent members of the UN Security Council agreed on the *P5 Guidelines for Conventional Arms Transfers*,<sup>27</sup> a set of criteria upon which they would base their arms export decisions. Later that year, the UN General Assembly adopted a resolution establishing the UN Register of Conventional Arms (UN Register) which was to promote transparency in the trade of conventional weapons.<sup>28</sup> The UN Disarmament Commission adopted guidelines for international arms transfers in 1996.<sup>29</sup> However, participation in the Register is inconsistent<sup>30</sup> and all of the abovementioned instruments are of a non-binding nature. Another soft law mechanism is the *Wassenaar Arrangement* of 1995,<sup>31</sup> which built upon the COCOM system but removed its adversarial nature.<sup>32</sup> At the same time, the UN also started targeting the issue of SALW, which led to the adoption of a *Programme of Action* at the UN Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects in 2001.<sup>33</sup>

The adoption of the *Programme of Action* was largely attributable to successful campaigning by non-governmental organizations<sup>34</sup> and the process leading to the negotiation of the ATT was equally promoted by civil society.<sup>35</sup> In

<sup>26</sup> GA, *Study on Ways and Means of Promoting Transparency in International Transfers of Conventional Arms*, UN Doc A/46/301 annex, 9 September 1991, 2, 49-50, para. 149; Anderson, *supra* note 21, 752.

<sup>27</sup> UN, 'Guidelines for Conventional Arms Transfers' (18 October 1991), available at [http://archives.sipri.org/contents/expcon/unp5\\_london91.html](http://archives.sipri.org/contents/expcon/unp5_london91.html) (last visited 31 January 2014).

<sup>28</sup> GA Res. 46/36 L, UN Doc A/RES/46/36L, 9 December 1991.

<sup>29</sup> GA, *Guidelines for International Arms Transfers in the Context of the General Assembly Resolution 46/36 H of 6 December 1991: Report of the Disarmament Commission*, UN Doc A/51/42, 22 May 1996.

<sup>30</sup> See in detail P. Holtom, L. Béraud-Sudreau & H. Weber, 'Reporting to the United Nations Register of Conventional Arms', *SIPRI Fact Sheet* (May 2011), available at <http://books.sipri.org/files/FS/SIPRIFS1105.pdf> (last visited 31 January 2014).

<sup>31</sup> *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Guidelines and Procedures, Including the Initial Elements* (as amended and updated in 2001, 2003, 2004, 2007, and 2011), available at <http://www.wassenaar.org/guidelines/docs/Guidelines%20and%20procedures%20including%20the%20Initial%20Elements.pdf> (last visited 31 January 2014).

<sup>32</sup> Bromley, Cooper & Holtom, *supra* note 23, 1035.

<sup>33</sup> United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in all its Aspects*, UN Doc A/CONF.192/15, 20 July 2001, 7 [Programme of Action].

<sup>34</sup> Bromley, Cooper & Holtom, *supra* note 23, 1037.

<sup>35</sup> *Ibid.*, 1038.

1997, a group of Nobel Peace Laureates led by the former Costa Rican President Óscar Arias Sánchez published an *International Code of Conduct on Arms Transfers*,<sup>36</sup> which was developed into a *Framework Convention on International Arms Transfers* in 2001.<sup>37</sup> In the following years, a network of non-governmental organizations initiated the *Control Arms* campaign advocating for a maximalist ATT.<sup>38</sup>

It took several years for the UN to react. In 2006, the UN General Assembly adopted a resolution calling on the UN Secretary-General to establish a working group of governmental experts to examine the feasibility of a comprehensive and legally binding instrument on the conventional arms trade.<sup>39</sup> The report of the group of governmental experts<sup>40</sup> was endorsed by the UN General Assembly and it established an open-ended working group to continue with the task in 2008.<sup>41</sup> Following another report by the latter, the UN General Assembly in 2009 decided to convene a UN Conference on the ATT (First Conference) in 2012 to elaborate a treaty “on the highest [...] possible standards”.<sup>42</sup> It also decided that the First Conference should be held on the basis of consensus.<sup>43</sup> This was to be decisive for the outcome of the Conference in 2012. Several States, among them major suppliers of conventional weapons such as the United States and Russia, rejected a revised draft of the ATT on 27 July 2012. As a result, the First Conference collapsed. Nevertheless, the UN General Assembly voted to convene the Final Conference on the ATT in 2013 to be governed by the same rules of procedure as the First Conference.<sup>44</sup> When the Final Conference failed to reach consensus on the draft treaty again due to the negative votes of Syria, North Korea, and Iran, a group of over a hundred States took the draft treaty to

<sup>36</sup> *Nobel Peace Laureates’ International Code Of Conduct On Arms Transfers* (29 May 1997) (copy on file with author).

<sup>37</sup> *Framework Convention on International Arms Transfers* (2001), available at [http://www.seesac.org/sasp2/english/publications/2/4\\_1\\_Framework.pdf](http://www.seesac.org/sasp2/english/publications/2/4_1_Framework.pdf) (last visited 31 January 2014).

<sup>38</sup> For details see Control Arms, ‘The Story so Far’, available at <http://www.controlarms.org/en/about-controlarms/> (last visited 31 January 2014).

<sup>39</sup> GA Res. 61/89, UN Doc A/RES/61/89, 18 December 2006.

<sup>40</sup> GA, *Report of the Group of Governmental Experts to Examine the Feasibility, Scope and Draft Parameters for a Comprehensive, Legally Binding Instrument Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, UN Doc A/63/334, 26 August 2008, 2.

<sup>41</sup> GA Res. 63/240, UN Doc A/RES/63/240, 8 January 2009.

<sup>42</sup> GA Res. 64/48, UN Doc A/RES/64/48, 12 January 2010, 3, para. 4.

<sup>43</sup> *Ibid.*, 3, para. 5. See also *Provisional Rules of Procedure*, *supra* note 3, 8, Rule 33.

<sup>44</sup> GA Res. 67/234 A, *supra* note 3.

the UN General Assembly for vote. Here, a majority of 154 States voted in favor of the Resolution, Syria, North Korea, and Iran declared themselves against it again and 23 States abstained from voting.<sup>45</sup>

## C. Scope

A central point of discussion throughout the negotiation process was the scope of the treaty. Not only were States of different opinions about which arms should be covered by the ATT. Controversy also existed as to what was meant by 'trade'. Furthermore, States disagreed on whether to include ammunition and parts and components in the treaty's scope.

### I. Categories of Arms

According to Article 2 (1) ATT, the treaty applies to conventional arms within eight listed categories. Among them are the seven categories of the UN Register, i.e. battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships as well as missiles and missile launchers. Article 5 (3) ATT clarifies that national definitions of any of the categories shall not cover less than the descriptions used in the UN Register at time of entry into force of the ATT.

SALW, only an optional category under the UN Register, form the eighth category under Article 2 (1) ATT. While some States had been opposed to SALW being included in the ATT's scope from the beginning of the negotiations, the draft treaty text of 2012 already incorporated them and this was upheld during the negotiations at the Final Conference. With regard to SALW, Article 5 (3) ATT states that national definitions shall not cover less than the descriptions used in relevant UN instruments at the time of entry into force of the ATT. In this respect, one can draw on the *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons* according to which SALW means

“any man-portable lethal weapon that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch

<sup>45</sup> A detailed record of the vote is available at <http://www.un.org/disarmament/update/20130402/ATTVotingChart.pdf> (last visited 31 January 2014).

a shot, bullet or projectile by the action of an explosive, excluding antique small arms and light weapons or their replicas”.<sup>46</sup>

More precisely, it defines small arms as “weapons designed for individual use” and light weapons as “weapons designed for use by two or three persons serving as a crew”.<sup>47</sup>

When comparing with the final draft of 2012,<sup>48</sup> the scope of the ATT has been reduced. While Article 2 (A) (1) of the 2012 draft ATT stated that the treaty should apply “at a minimum” to all conventional arms within the eight categories,<sup>49</sup> thereby leaving room for other already existing categories of conventional weapons as well as those still to be developed, the scope of the ATT now appears to be defined conclusively. Admittedly, an Indian proposal to expressly limit the treaty’s application to the eight categories mentioned in Article 2 was not considered and Article 5 (3) ATT encourages States Parties to apply its provisions to the broadest range of conventional arms.<sup>50</sup> However, proposals to ‘future proof’ the ATT by way of periodic reviews of the treaty’s scope were not considered in the final treaty text. Whether States will voluntarily apply the ATT’s provisions to armaments other than those listed in Article 2 ATT remains to be seen. With a view to a comprehensive application of the treaty, the deletion of ‘at a minimum’ still constitutes a setback.

## II. Definition of Trade

Article 2 (2) ATT stipulates that the term ‘transfer’ is used for all “activities of the international trade” within the ATT and is composed of “export, import, transit, trans-shipment and brokering”.<sup>51</sup> In spite of claims by many States that the treaty should also explicitly cover non-commercial transfers such as gifts,<sup>52</sup>

<sup>46</sup> *International Instrument to Enable States to Identify and Trace, in a Timely and Reliable Manner, Illicit Small Arms and Light Weapons*, GA Decision 60/519, UN Doc A/60/88 annex, 27 June 2005, 6, 7, para. 4 [International Tracing Instrument].

<sup>47</sup> *Ibid.*, 7, para. 4 (a) & (b).

<sup>48</sup> United Nations Conference on the Arms Trade Treaty, *Draft of the Arms Trade Treaty*, UN Doc A/CONF.217/CRP.1, 26 July 2012 [2012 Draft ATT].

<sup>49</sup> *Ibid.*, Art. 2 (A) (1), 3.

<sup>50</sup> M. Brzoska & U. Kühn, ‘Vertrag über den Waffenhandel: Staatenkonferenz 18.-28. März 2013’, 61 *Vereinte Nationen* (2013) 3, 128, 128.

<sup>51</sup> ATT, Art. 2 (2), *supra* note 8, 4.

<sup>52</sup> See United Nations Conference on the Arms Trade Treaty, *Compilation of Views on the Elements of an Arms Trade Treaty: Background Document Prepared by the Secretariat*, UN Doc A/CONF.217/2, 10 May 2012, e.g., 9 (para. 11) (view of Australia), 23 (view of Costa

the text stays silent on the matter, thereby leaving the decision up to the States Parties.<sup>53</sup>

### III. Ammunition/Munitions and Parts and Components

One of the most controversial subjects during the negotiations at both Conferences on the ATT was whether the treaty should cover ammunition/munitions and parts and components. The majority of States took a stand for incorporating both in the treaty's scope but several major supplier States such as the United States persistently argued against it.<sup>54</sup> The main argument for including ammunition/munitions and parts and components in the treaty's scope is that failing to do so would allow for opportunities to circumvent the ATT's provisions on the weapons listed in Article 2 (1) ATT. For instance, restrictions on the export of weapons would be rendered meaningless if States Parties could unconditionally transfer their components to another State where they would be assembled and used.

The compromise reached is laid down in Articles 3 and 4 ATT. According to them, States Parties have to establish and maintain national control systems to regulate the export of both ammunition/munitions fired, launched, or delivered by the conventional arms covered under Article 2 (1) ATT and of parts and components where the export is in a form that provides for the capability to assemble those arms. States Parties are further required to apply the provisions of Articles 6 and 7 ATT<sup>55</sup> prior to the export of such ammunition/munitions and parts and components. Articles 3 and 4 ATT are thus only applicable to the export of ammunition/munitions and parts and components. The ATT does not provide for substantial obligations with regard to the other activities listed in

Rica), 49 (view of Kenya), & 55 (view of Malawi) [United Nations Conference on the Arms Trade Treaty, Background Document]. See also the statement by New Zealand on the President's non-paper of 22 March 2013 at the Final Conference on the Arms Trade Treaty (25 March 2013), available at [http://www.un.org/disarmament/ATT/statements/docs/20130326/20130325\\_NewZealand\\_E.pdf](http://www.un.org/disarmament/ATT/statements/docs/20130326/20130325_NewZealand_E.pdf) (last visited 31 January 2014), 1 as well as 'Final UN Conference on the ATT: Statement Delivered by Ghana on Behalf of 103 States' (25 March 2013), available at [http://www.un.org/disarmament/ATT/statements/docs/Joint\\_Statement\\_ATT\\_25\\_Mar\\_13\\_103\\_Countries.pdf](http://www.un.org/disarmament/ATT/statements/docs/Joint_Statement_ATT_25_Mar_13_103_Countries.pdf) (last visited 31 January 2014), 2 [ATT Conference: Statement Delivered by Ghana].

<sup>53</sup> Brzoska & Kühn, *supra* note 50, 128.

<sup>54</sup> *Ibid.*; S. Casey-Maslen, G. Giacca & T. Vestner, 'The Arms Trade Treaty (2013)' (June 2013), available at <http://www.geneva-academy.ch/docs/publications/Arms%20Trade%20Treaty%203%20WEB%282%29.pdf> (last visited 31 January 2014), 21.

<sup>55</sup> Cf. *infra*, section D. I. & II.

Article 2 (2) ATT, namely the import, transit, trans-shipment, and brokering of ammunition/munitions and parts and components of conventional arms.

#### IV. Concluding Remarks on Scope

The scope of the ATT is a true compromise between the claims of those States and non-governmental organizations that had called for a comprehensive regulation of the international arms trade and those rather reluctant States guided by economic interests, matters of national or international security or sovereignty over arms trade decisions. With a view to the horrendously high death toll caused by SALW, their inclusion in the treaty's scope was an absolute prerequisite for the treaty's success. By at least making Articles 6 and 7 ATT applicable to ammunition/munitions and parts and components, the Final Conference has further ensured that States Parties will not be able to circumvent the treaty's obligations regarding exports of conventional weapons as easily. While the forms of transfer and categories of arms covered by Article 2 ATT do not fully correspond to the realities of the international trade in arms, the wording of the provision leaves room for an extensive interpretation by States Parties. In sum, the scope of the ATT is therefore far from comprehensive but sufficiently broad to serve as a starting point for an efficient regulation of the international trade in arms.

### D. Substantive Obligations

Next to the scope of the ATT, the elaboration of concrete obligations for arms transfers was a focal point at the Conferences on the ATT. It was also the topic on which States' views were divided the most. Discussions focused on which arms transfers should be prohibited by the treaty and which criteria should lead States' decisions on exports of conventional weapons. Other issues were the regulation of other activities covered by Article 2 (2) ATT, the prevention of arms diversion, and the possible inclusion of a prohibition of arms transfers to non-state actors.

#### I. Prohibitions of Transfer

Article 6 ATT contains several absolute prohibitions regarding transfers of conventional arms listed in Article 2 (1) ATT as well as of items covered under Article 3 or 4 ATT.

Article 6 (1) ATT prohibits any transfer which would contradict the States Party's obligations under measures adopted by the UN Security Council acting under Chapter VII *UN Charter*, in particular arms embargoes. Article 41 *UN Charter* provides for the Security Council's right to decide on measures other than the use of armed force in face of a threat to or breach of the peace or an act of aggression according to Article 39 *UN Charter*. Among the measures listed in Article 41 *UN Charter* is the complete or partial interruption of economic relations. The Security Council is using embargoes on arms and related materials as a measure according to Article 41 *UN Charter* on a regular basis.<sup>56</sup> States are bound to accept and carry out decisions of the UN Security Council under Article 25 *UN Charter*. Article 6 (1) ATT therefore does not create a new obligation for States regarding decisions of the UN Security Council under Chapter VII of the *UN Charter* but merely reiterates an already existing obligation.<sup>57</sup>

According to Article 6 (2) ATT, States Parties shall not authorize any transfer infringing on their relevant obligations under international agreements, in particular those relating to the transfer of or illicit trafficking in conventional weapons. Again, the provision does not establish a new prohibition on arms transfers but amounts to nothing more than a confirmation of the relevant obligation under another treaty. There are various restrictions on arms transfers contained in conventions dealing with specific weapons,<sup>58</sup> which fall outside the scope of the ATT and to which Article 6 (2) ATT therefore does not apply. In contrast, the prohibition to transfer cluster munitions<sup>59</sup> is applicable in this context as cluster munitions are conventional munitions designed to disperse or release explosive submunitions<sup>60</sup> usually dropped by combat aircraft in accordance with Article 2 (1) (d) ATT or delivered by artillery, missiles, or rockets

<sup>56</sup> N. Krisch, 'Article 41', in B. Simma *et al.* (eds), *The Charter of the United Nations*, Vol. II, 3rd ed. (2012), 1305, 1312, para. 15.

<sup>57</sup> Cf. Casey-Maslen, Giacca & Vestner, *supra* note 54, 23.

<sup>58</sup> For instance, the transfer of nuclear weapons is forbidden by Art. 1 NPT (*supra* note 22, 171) whereas the transfer of anti-personnel mines is prohibited under the *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, 3 May 1996, Art. 8 (1), 2048 UNTS 93, 138 as well as under the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997, Art. 1, 2056 UNTS 211, 242.

<sup>59</sup> *Convention on Cluster Munitions*, 3 December 2008, Art. 1 (1) (b), 48 ILM 357, 358.

<sup>60</sup> *Ibid.*, Art. 2 (2), 359.

pursuant to Article 2 (1) (c), (g) ATT.<sup>61</sup> The *Firearms Protocol*<sup>62</sup> provides for an obligation of States Parties to criminalize the illicit trafficking in firearms, its parts and components and ammunition.<sup>63</sup> While firearms are within the ATT's scope and the obligation to criminalize illicit trafficking in them is certainly an obligation relating to illicit trafficking within the meaning of Article 6 (2) ATT, it appears questionable whether the authorization of a transfer could be considered a breach of said obligation. A transfer is only considered illicit trafficking under Article 6 (e) *Firearms Protocol* if it is not authorized by any of the States Parties concerned. The authorization of a transfer is therefore decisive for determining whether it is considered illicit trafficking and cannot constitute a violation of the duty to criminalize illicit trafficking itself. Article 6 (2) ATT is framed broadly enough so as to include general human rights treaties as well<sup>64</sup> although to date none of them explicitly prohibits the transfer of conventional arms. Interestingly, restrictions on arms transfers under customary international law were disregarded when drafting Article 6 (2) ATT but they evidently continue to apply next to the ATT as well.<sup>65</sup>

Finally, Article 6 (3) ATT requires any States Party not to authorize a transfer

“if it has knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party”.<sup>66</sup>

<sup>61</sup> For a detailed description of the means of delivery see V. Wiebe, 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law', 22 *Michigan Journal of International Law* (2000) 1, 85, 89.

<sup>62</sup> *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, 31 May 2001, 2326 UNTS 211 [Firearms Protocol].

<sup>63</sup> *Ibid.*, Art. 5 (1) (b), 239.

<sup>64</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 24.

<sup>65</sup> *Ibid.* For instance, the principle of non-intervention may impose restrictions on the international trade in arms. Cf. B. Tavakoli, 'Small Arms, International Restrictions on the Trade in', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 236, 239, para. 14 [Wolfrum, *Encyclopedia of Public International Law*, Vol. IX].

<sup>66</sup> ATT, Art. 6 (3), *supra* note 8, 5.

As the only absolute prohibition on arms transfers the ATT creates by itself, it constitutes one of the ATT's key provisions and has undergone some major changes in the course of the two Conferences on the ATT.

Some of the changes to the provision have considerably enhanced the treaty's potential impact. For instance, Article 3 (3) of the 2012 draft ATT only prohibited arms transfers "for the purpose of" facilitating the commission of any of the listed crimes, thereby requiring an element of express intent on the part of the States Party.<sup>67</sup> Due to the opposition of several States during the negotiations at the Final Conference, the requirement of intent was lifted. Under Article 6 (3) ATT, a States Party must only have knowledge that the arms or items would be used for the commission of any of the listed crimes. While the ATT does not provide for a definition of 'knowledge' itself, one can possibly draw on the one contained in Article 30 (3) *Rome Statute of the International Criminal Court* (Rome Statute), which defines the term as the "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".<sup>68</sup> According to Article 6 (3) ATT the States Party needs to have knowledge of the use of the arms or items at the time of the authorization in order for the transfer to be prohibited. Some delegations had opposed this wording and instead argued for the transfer itself being the relevant time as the situation could change substantially in the meantime.<sup>69</sup> However, this proposal was not considered in the further drafting process. Although Article 7 (7) ATT deals with the situation that a States Party becomes aware of new relevant information after the authorization of an export has been granted, it only encourages – but does not oblige – the States Party to reassess the authorization. Despite this, the threshold

<sup>67</sup> 2012 Draft ATT, Art. 3 (3), *supra* note 48, 4. For an analysis of what was meant by 'for the purpose of', see International Committee of the Red Cross (ICRC), 'ICRC Analysis of Articles 2, 3, 4 and 5 of the July 2012 Draft Arms Trade Treaty' (12 March 2013), available at <http://www.icrc.org/eng/assets/files/2013/icrc-analysis-draft-att.pdf> (last visited 31 January 2014), 3-5 [ICRC, Analysis].

<sup>68</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 30, 2187 UNTS 3, 107 [Rome Statute]. See Casey-Maslen, Giacca & Vestner, *supra* note 54, 24.

<sup>69</sup> For example South Africa and Spain made statements in this regard. In the absence of official records from the Final Conference on the Arms Trade Treaty, see R. Acheson, 'News in Brief', *Arms Trade Treaty Monitor No. 6.7* (26 March 2013), available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.7.pdf> (last visited 31 January 2014), 5, 6 and R. Acheson, 'News in Brief', *Arms Trade Treaty Monitor No. 6.8* (27 March 2013), available at <http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/att/monitor/ATTMonitor6.8.pdf> (last visited 31 January 2014), 7, 7.

for a prohibition of transfers under Article 6 (3) ATT is considerably lower than in the 2012 draft ATT.

As to the crimes for which the arms or items would be used, Article 6 (3) ATT first refers to genocide the definition of which is firmly established in international treaties. According to Article 2 *Genocide Convention* as well as Article 6 *Rome Statute* 'genocide' means

“any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; [and] (e) Forcibly transferring children of the group to another group”.<sup>70</sup>

Furthermore, the International Court of Justice (ICJ) held that “the principles underlying the Genocide Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation” as early as in 1951.<sup>71</sup> It is disputed whether the ICJ herewith found the prohibition of genocide to be part of customary international law or rather to constitute a general principle of law<sup>72</sup> but either way the definition of genocide contained in the *Genocide Convention* is universally accepted and is therefore to be used for the purposes of the ATT.

Second, Article 6 (3) ATT mentions crimes against humanity. Crimes against humanity are “particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation of one or more persons”.<sup>73</sup> They must be committed as part of a widespread or systematic attack directed against a civilian population.<sup>74</sup> Whereas Article 5 *ICTY Statute*

<sup>70</sup> *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 2, 78 UNTS 277, 280 (emphasis omitted); *Rome Statute*, Art. 6, *supra* note 68, 93.

<sup>71</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, 15, 23.

<sup>72</sup> Cf. W. A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (2009), 4.

<sup>73</sup> A. Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (2013), 90.

<sup>74</sup> *Ibid.*, 91. See also *Prosecutor v. Duško Tadić*, Opinion and Judgment, IT-94-1-T, 7 May 1997, 235, para. 648; *Prosecutor v. Tihomir Blaškić*, Judgment, IT-95-14-T, 3 March 2000, 66-67, para. 202.

requires crimes against humanity to be committed in an armed conflict,<sup>75</sup> this does not apply to contemporary customary international law.<sup>76</sup> Article 7 (1) *Rome Statute* contains a list of acts that are able to qualify as crimes against humanity such as murder, extermination, and enslavement. While most of the acts listed in Article 7 (1) *Rome Statute* also constitute crimes against humanity under customary international law, it is unclear whether this is also the case with acts such as enforced prostitution, forced pregnancy, or enforced disappearance.<sup>77</sup> In this respect, it should be pointed out that, according to most commentators, Article 7 (1) *Rome Statute* does not codify customary international law but in certain aspects deviates from it.<sup>78</sup>

Third, Article 6 (3) ATT refers to grave breaches of the *Geneva Conventions* of 1949, attacks directed against civilian objects or civilians protected as such, and other war crimes as defined by international agreements to which the relevant State is a Party. Compared to the 2012 draft ATT which only mentioned “grave breaches of the Geneva Conventions of 1949, or serious violations of [their] common Article 3”,<sup>79</sup> the reference to war crimes in Article 6 (3) ATT has been extended considerably. The inclusion of attacks directed against civilian objects or civilians protected as such was considered particularly important as those acts are typically carried out by way of conventional arms.<sup>80</sup> Next to the *Geneva Conventions* of 1949,<sup>81</sup> which are already expressly mentioned in Article 6 (3)

<sup>75</sup> *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Art. 5, SC Res. 827, UN Doc S/RES/827 (1993), 25 May 1993 (as last amended 7 July 2009) [ICTY Statute].

<sup>76</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, paras 141-142; G. Acquaviva & F. Pocar, ‘Crimes Against Humanity’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. II (2012), 855, 858, para. 13.

<sup>77</sup> Acquaviva & Pocar, *supra* note 76, para. 19.

<sup>78</sup> See, e.g., W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 144; M. Boot, R. Rixon & C. K. Hall, ‘Article 7’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (2008), 159, 170-174, para. 5; Cassese *et al.*, *supra* note 73, 105.

<sup>79</sup> *2012 Draft ATT*, Art. 3 (3), *supra* note 48, 4.

<sup>80</sup> See, e.g., ICRC, ‘Arms Trade Treaty: Statement’ (21 March 2013), available at <http://www.icrc.org/eng/resources/documents/statement/2013/03-21att-arms-availability-statement.htm> (last visited 31 January 2014) [ICRC, Statement].

<sup>81</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [Geneva Convention I]; *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 [Geneva Convention II]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75

ATT, its additional protocols<sup>82</sup> as well as the *Rome Statute, inter alia*, serve to define the other war crimes the provision refers to if the relevant State has ratified them. Article 6 (3) ATT makes no reference to the definition of war crimes in customary international law by which all States Parties to the ATT are bound. The inclusion of customary international law might have provided the article with a more solid basis for uniform interpretation and application. Furthermore, the explicit reference to common Article 3 of the *Geneva Conventions* applicable in non-international armed conflicts has been deleted during the negotiations at the Final Conference. Admittedly, common Article 3 does not regulate the situation of non-international armed conflicts conclusively but outlines the “fundamental standard rules of protection that must be observed in all armed conflicts”.<sup>83</sup> The *Additional Protocol II* was specifically designed to supplement it.<sup>84</sup> However, the deletion of the only specific reference to the law regulating non-international armed conflicts in a world where the vast majority of armed conflicts is not of an international character in the strict legal sense is astonishing.

Finally, Article 6 ATT does not establish a prohibition of arms transfers to non-state actors in spite of claims by several State delegations to this effect.<sup>85</sup> This arguably caused several States to vote against or to abstain in the vote on the draft resolution on the ATT in the General Assembly.<sup>86</sup> Likewise Article 6 ATT does not contain an express prohibition of transfers if the relevant States Party has knowledge that the arms or items would be used to commit systematic human rights violations although many State delegations had called for such a provision.<sup>87</sup> Human rights treaties could therefore only constitute an

UNTS 135 [Geneva Convention III]; and *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 UNTS 287 [Geneva Convention IV].

<sup>82</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3 [Additional Protocol I] and *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609 [Additional Protocol II].

<sup>83</sup> See, e.g., T. Marauhn & Z. F. Ntoubandi, ‘Armed Conflict, Non-International’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. I (2012), 626, 630, para. 18.

<sup>84</sup> *Additional Protocol II*, Art. 1 (3), *supra* note 82, 7.

<sup>85</sup> United Nations Conference on the Arms Trade Treaty, *Background Document*, *supra* note 52, e.g., 4 (Section IV, para. 4) (view of Algeria) & 26 (view of Cuba).

<sup>86</sup> For the explanations of vote of States see GA, *Verbatim Record of the 71st Plenary Meeting (67th Session)*, UN Doc A/67/PV.71, 2 April 2013.

<sup>87</sup> See ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

absolute barrier to arms transfers if they were to be considered as international agreements under Article 6 (2) ATT and would be breached by the transfer. In any event, human rights concerns are relevant to the export assessment under Article 7 ATT.

## II. Export and Export Assessment

Article 7 ATT provides for a multi-step procedure to be followed by States Parties regarding export authorizations.

### 1. Assessment of Risks of the Export

Article 7 (1) ATT stipulates that – if an export is not already prohibited pursuant to Article 6 ATT – each exporting States Party, prior to the decision whether or not to authorize an export, has to assess whether the exported arms or items would contribute to or undermine peace and security (a) or could be used to commit or facilitate serious violations of international humanitarian or human rights law or an act of terrorism or transnational organized crime (b). The provision further provides for the assessment to be carried out in an objective and non-discriminatory manner to which end it shall also include information provided by the importing State in accordance with Article 8 (1) ATT.

Article 7 (1) (a) ATT requires States Parties to assess whether the arms or items to be transferred could contribute to or undermine peace and security. The reference to a possible contribution to peace and security has been a contentious issue during both Conferences on the ATT. Read together with Article 7 (3) ATT, it could lead States Parties to disregard the risk of the usage of exported weapons or items for violations of international law due to their possible contribution to peace and security under Article 7 (1) (a) ATT.<sup>88</sup>

Article 7 (1) (b) ATT obliges States Parties to consider potential negative uses of exported arms but does not further define them. Article 7 (1) (b) (i) ATT refers to serious violations of international humanitarian law. Serious violations of international humanitarian law correspond to war crimes.<sup>89</sup> They consist of a serious infringement of an international rule under customary international or treaty law entailing the individual criminal responsibility of the person breaching the rule.<sup>90</sup> Violations of international humanitarian law are serious if

<sup>88</sup> See *infra*, section D. II. 3.

<sup>89</sup> Cassese *et al.*, *supra* note 73, 65.

<sup>90</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para. 94.

they “endanger protected persons (e.g. civilians, prisoners of war, the wounded and sick) or objects (e.g. civilian objects or infrastructure) or if they breach important values”.<sup>91</sup> This is the case with grave breaches as specified under the four *Geneva Conventions* of 1949<sup>92</sup> and its first *Additional Protocol*<sup>93</sup> respectively, war crimes as defined in Article 8 *Rome Statute* as well as with other war crimes in international and non-international armed conflicts in customary international law.<sup>94</sup> As opposed to Article 6 (3) ATT, the scope of Article 7 (1) (b) (i) ATT is not limited to war crimes as defined by international agreements to which the State is a Party. It therefore also applies to serious violations of customary international humanitarian law, which gives the provision an importance of its own next to Article 6 (3) ATT.

Under Article 7 (1) (b) (ii) ATT, States have to assess the risk of exported weapons being used for serious violations of international human rights law. There is a wide range of human rights protected under international human rights treaties and customary international law that are potentially affected by the international trade in conventional arms and are therefore to be considered in the assessment. They include the right to life, the freedom from torture and other forms of cruel, inhuman or degrading treatment, the rights to liberty and security of person, the freedom from slavery, the freedom of thought, conscience and religion, the freedom of assembly and of expression, as well as the rights to health, education, food, and housing.<sup>95</sup> However, it is unclear what amounts to a ‘serious’ violation of international human rights law as required by the provision. No universally accepted definition of the term has come into existence.<sup>96</sup>

In any event, violations of those human rights that have attained the status of *jus cogens*, i.e. peremptory norms of customary international law from which

<sup>91</sup> ICRC, ‘What Are “Serious Violations of International Humanitarian Law”?: Explanatory Note’ (2012), available at <http://www.icrc.org/eng/assets/files/2012/att-what-are-serious-violations-of-ihl-icrc.pdf> (last visited 31 January 2014) (emphasis omitted) [ICRC, Explanatory Note].

<sup>92</sup> *Geneva Convention I*, Art. 50, *supra* note 81, 62; *Geneva Convention II*, Art. 51, *supra* note 81, 116; *Geneva Convention III*, Art. 130, *supra* note 81, 238; and *Geneva Convention IV*, Art. 147, *supra* note 81, 388.

<sup>93</sup> *Additional Protocol I*, Arts 11 & 85, *supra* note 82, 11-12 & 41-42.

<sup>94</sup> ICRC, ‘Explanatory Note’, *supra* note 91.

<sup>95</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 27.

<sup>96</sup> *Ibid.*

no derogation by treaty is possible,<sup>97</sup> must be considered ‘serious’.<sup>98</sup> Although it is disputed which specific human rights belong to the body of *ius cogens*, it is commonly acknowledged that the “core rights which are directly related to human existence” qualify as such.<sup>99</sup> Among those relevant with a view to the trade in arms are the rights to freedom from torture,<sup>100</sup> slavery,<sup>101</sup> and arguably the freedom from arbitrary deprivations of life.<sup>102</sup> The violations of these rights would therefore always amount to serious human rights violations under Article 7 (1) (b) (ii) ATT.

Nevertheless, there is no indication that serious human rights violations are limited to breaches of peremptory norms of human rights law. With regard to those human rights not forming part of *jus cogens*, violations can still be serious due to the manner in which they have been committed.<sup>103</sup> In this respect, ‘serious human rights violations’ might be tantamount to ‘gross’ or ‘systematic’ violations of human rights, both of which are terms used in various resolutions of UN organs.<sup>104</sup> ‘Gross violations of human rights’ have been described to be

<sup>97</sup> See, e.g., *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 35, 1155 UNTS 331, 341 [VCLT]; J. Crawford, *Brownlie’s Principles of Public International Law*, 8th ed. (2012), 594.

<sup>98</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 27.

<sup>99</sup> C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (2008), 38.

<sup>100</sup> See e.g. *Prosecutor v. Anto Furundžija*, Judgment, IT-95-17/1-T, 10 December 1998, 58-59, para. 153; *Al-Adsani v. the United Kingdom*, ECtHR Application No. 35763/97, Judgment of 21 November 2001, 18-19, paras 59-61; E. de Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law’, 15 *European Journal of International Law* (2004) 1, 97.

<sup>101</sup> See, e.g., L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), 446-447; R. Higgins, ‘Derogations Under Human Rights Treaties’, 48 *British Yearbook of International Law* (1976-1977), 281, 282.

<sup>102</sup> The freedom from arbitrary deprivations of life constitutes the core of the right to life. The latter refers to those deprivations of life which cannot be justified under international human rights law as opposed to legal exceptions to the right provided for by international human rights law such as acts of self-defense or defense of a third person or even (still) the death penalty. It is argued that similar to the core of the prohibition of the use of force, the prohibition of aggression, from which no derogation is possible, the core of the right to life belongs to the body of *jus cogens*. For a detailed analysis, see S. Oeter, ‘Ius cogens und der Schutz der Menschenrechte’, in S. Breitenmoser *et al.* (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber* (2007), 499, 512; Hannikainen, *supra* note 101, 514-519.

<sup>103</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 28.

<sup>104</sup> For instance, the term ‘gross violations of [...] human rights’ is used in the *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*

distinct from ‘simple’ human rights violations due to their nature and scope.<sup>105</sup> The systematic violation of human rights implies a consistent pattern, i.e. a “repeated occurrence of violations over a substantial period of time”, and an element of planning.<sup>106</sup> However, no precise definitions of these terms have been agreed upon either.

In summary, there is no clear-cut definition of ‘serious human rights violations’ in international law. As with ‘gross’ or ‘systematic’ human rights violations, whether a violation of human rights is ‘serious’ pursuant to Article 7 (1) (b) (ii) ATT needs to be determined on a case-by-case basis. Relevant factors may include the frequency of violations, the number of victims, the nature of the breached obligation and the character of the violations, e.g. whether it shows a massive disregard or a general questioning of the human rights concerned.

According to Article 7 (1) (b) (iii) and (iv) ATT, the exporting State has to assess the potential that the transferred arms or items could be used to commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism or transnational organized crime to which it is a Party. Among the relevant treaties relating to terrorism are the *Convention for the Suppression of Unlawful Seizure of Aircraft*,<sup>107</sup> the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*,<sup>108</sup> the

*Law*, GA Res. 60/147 annex, UN Doc A/RES/60/147, 21 March 2006, 2; in ECOSOC Res. 1503 (XLVIII), 27 May 1970; and in *Institution-building of the United Nations Human Rights Council*, Human Rights Council Res. 5/1 annex, 18 June 2007, para. 85. Human rights violations have been qualified as ‘systematic’ in various resolutions of UN bodies. See, e.g., SC Res. 161, UN Doc S/RES/161 (1961), 21 February 1961 and Human Rights Council Res. 23/1, UN Doc A/HRC/RES/23/1, 19 June 2013, 1, para. 1.

<sup>105</sup> V. Dimitrijevic, ‘Dimensions of State Responsibility for Gross Violations of Human Rights and Fundamental Freedoms Following the Introduction of Democratic Rule’, in T. van Boven *et al.* (eds), *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* (1992), 214, 216. Similarly Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, UN Doc E/CN.4/Sub.2/1993/8, 2 July 1993, 6, para. 8.

<sup>106</sup> Cf. C. Medina Quiroga, *The Battle of Human Rights, Gross, Systematic Violations and the Inter-American System* (1988), 13-16.

<sup>107</sup> *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 UNTS 105.

<sup>108</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 UNTS 177.

*International Convention Against the Taking of Hostages*,<sup>109</sup> the *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*,<sup>110</sup> and the *International Convention for the Suppression of Terrorist Bombings*.<sup>111</sup> With regard to acts constituting transnational organized crimes the *United Nations Convention Against Transnational Organized Crime*<sup>112</sup> and its protocols<sup>113</sup> are pertinent.

## 2. Consideration of Mitigation Measures

According to Article 7 (2) ATT, States Parties must consider means to mitigate the risks listed in Article 7 (1) (a) and (b) ATT, “such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States”.<sup>114</sup> A mitigation measure already practiced by many States is the issuance of end-user certificates. They state the final user and the end-use of imported arms and primarily serve to verify that the arms will not be further transferred to a third Party without the exporting State’s consent.<sup>115</sup> However, the risk of forgery is high and often authorities of the exporting State do not examine certificates properly.<sup>116</sup>

<sup>109</sup> *International Convention Against the Taking of Hostages*, 17 December 1979, 1316 UNTS 205.

<sup>110</sup> *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 10 March 1988, 1678 UNTS 201.

<sup>111</sup> *International Convention for the Suppression of Terrorist Bombings*, 15 December 1997, 2149 UNTS 256.

<sup>112</sup> *United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2225 UNTS 209.

<sup>113</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2237 UNTS 319; *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, 15 November 2000, 2241 UNTS 480; *Firearms Protocol*, *supra* note 62.

<sup>114</sup> ATT, Art. 7 (2), *supra* note 8, 6.

<sup>115</sup> M. Bromley & H. Griffiths, ‘End-User Certificates: Improving Standards to Prevent Diversion’, *SIPRI Insights on Peace and Security No. 2010/3* (March 2010), available at <http://books.sipri.org/files/insight/SIPRIInsight1003.pdf> (last visited 31 January 2014), 2.

<sup>116</sup> See in detail *ibid.*

### 3. Decision on the Export Authorization

Article 7 (3) ATT prohibits the authorization of an export should the States Party conclude that there is an “overriding risk” of any of the negative consequences listed in Article 7 (1) ATT.<sup>117</sup> The term ‘overriding risk’ is ambiguous. It could be understood to imply that the negative consequences as outlined in Article 7 (1) (a) and (b) ATT are to be balanced against a potential contribution of the export to peace and security according to Article 7 (1) (a) ATT and against mitigation measures pursuant to Article 7 (2) ATT.<sup>118</sup> Following this reading, a States Party could deem the contribution of the arms transfer to peace and security more important and authorize the export even if there was a very high risk that the arms would be used in violation of international law.

The term has been subject to criticism and intense discussions at the Final Conference with a majority of States urging to replace it with ‘substantial’ or ‘clear’ risk.<sup>119</sup> Having failed to achieve such a change of the wording, some States already declared their intention to interpret ‘overriding’ as ‘substantial’ at the vote on the ATT in the General Assembly.<sup>120</sup> In any case, the exporting States Party is required to conduct the whole export assessment in good faith.<sup>121</sup> Thus it could not simply assert that the risk of negative consequences is outweighed by other considerations but would have to substantiate this allegation in order to authorize the export.

### 4. Other Factors to Be Considered in the Assessment

Article 7 (4) ATT states that the exporting State in making the assessment shall also take into account the risk of the arms or items being used to commit or facilitate serious acts of gender based violence or serious acts of violence against women and children. However, Article 7 (2) and (3) ATT only apply to the risks listed in Article 7 (1) ATT. As a result, States Parties must neither consider mitigation measures with regard to such risk nor are they under an obligation not

<sup>117</sup> ATT, Art. 7 (2), *supra* note 8, 6.

<sup>118</sup> ICRC, ‘Statement’, *supra* note 80.

<sup>119</sup> See, e.g., ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

<sup>120</sup> GA, *Overwhelming Majority of States in General Assembly Say ‘Yes’ to Arms Trade Treaty to Stave off Irresponsible Transfers That Perpetuate Conflict, Human Suffering*, UN Press Release GA/11354, 2 April 2013, available at <http://www.un.org/News/Press/docs/2013/ga11354.doc.htm> (last visited 31 January 2014).

<sup>121</sup> A. Clapham, ‘The Arms Trade Treaty: A Call for an Awakening’, 2 *ESIL Reflections* (2013) 5, available at [http://www.esil-sedi.eu/sites/default/files/Clapham%20Reflection\\_0.pdf](http://www.esil-sedi.eu/sites/default/files/Clapham%20Reflection_0.pdf) (last visited 31 January 2014), 4.

to authorize an export if they determine such risk exists. Many State delegations and non-governmental organizations had advocated for a stronger consideration of the risks of serious acts of gender based violence or violence against women and children in the assessment and called for including them in the factors under Article 7 (1) ATT. Admittedly, serious acts of gender based violence or violence against women and children will often also constitute serious violations of international humanitarian or human rights law resulting in Article 7 (2) and (3) ATT to be applicable.<sup>122</sup> However, it appears unfortunate to provide for a mandatory assessment of the risk of those acts occurring due to an arms export while not attaching any consequences to it.

### III. Other Substantive Obligations

Other substantive obligations are set out in Articles 8 to 11 ATT. While Articles 8 to 10 ATT serve to regulate the other forms of arms transfers as enshrined in Article 2 (2) ATT, Article 11 ATT concerns the prevention of diversion.

Article 8 ATT deals with the import of arms as defined in Article 2 (1) ATT. Article 8 (1) ATT complements Article 7 ATT by obliging importing States to provide appropriate and relevant information to exporting States Parties for their export assessment. According to Article 8 (2) ATT, States shall take measures allowing it to regulate, where necessary, arms imports under its jurisdiction. As it is for the importing States Party to decide on whether regulation is necessary, the provision leaves the State quite an extensive margin of discretion. Article 8 (3) ATT permits an importing States Party which is the final destination of an arms transfer to request information from the exporting State on the progress of an authorization. However, the exporting States Party's obligation to inform the importing State is somewhat limited by Article 7 (6) ATT, which states that appropriate information shall be made available subject to the exporting State's "national laws, practices and policies".<sup>123</sup>

Article 9 ATT stipulates that States Parties shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under their jurisdiction of conventional arms listed in Article 2 (1) ATT. Similarly, Article 10 ATT requires States to take measures, pursuant to their national laws, to regulate brokering for such arms taking place under their jurisdiction. Again, with references to necessity and feasibility of appropriate measures and

<sup>122</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 30.

<sup>123</sup> ATT, Art. 7 (6), *supra* note 8, 6. Casey-Maslen, Giacca & Vestner, *supra* note 54, 32.

national laws, the regulation of transits and brokering activities is to a great extent left to the States Parties' discretion. While this can partly be explained with the technical difficulties to control these activities, the obligations under Articles 9 and 10 ATT still fall short of those enshrined in the *Programme of Action*. For instance, the latter calls for establishing "adequate laws, regulations and administrative procedures to exercise effective control" over the transit of SALW.<sup>124</sup> With respect to brokering, it prescribes the development of adequate national legislation or administrative procedures which "should include measures such as registration of brokers, licensing or authorization of brokering transactions as well as the appropriate penalties for all illicit brokering activities performed within the State's jurisdiction and control".<sup>125</sup> Despite the fact that the *Programme of Action* constitutes a soft law instrument and is therefore not binding upon States, the ATT has not been able to establish rules on transits and brokering as concrete and detailed as those already in place within the *Programme of Action*.

The prevention of diversion is an object of the treaty pursuant to Article 1 ATT and is dealt with in Article 11 ATT. Article 11 (1) ATT stipulates that States Parties shall take measures to that end but fails to define what the term diversion means. It has been described as

"a breakdown in the transfer control chain such that, either before or after arriving at their intended destination, exported weapons are transferred to unauthorized end-users or used in violation of commitments made by end-users prior to export".<sup>126</sup>

Article 11 (2) ATT requires exporting States Parties to assess the risk of diversion thereby making the prevention of diversion another relevant factor within the export assessment. Just as in Article 7 (2) ATT, exporting States Parties also have to consider mitigation measures with regard to diversion. Next to confidence-building measures and jointly developed and agreed programs these include "examining parties involved in the export, requiring additional documentation, certificates, [and] assurances" and the denial of authorization of the export.<sup>127</sup> Article 11 (3) ATT obliges all States Parties to cooperate

<sup>124</sup> *Programme of Action*, *supra* note 33, 10 (Section II., para. 2).

<sup>125</sup> *Ibid.*, 11 (Section II., para. 14).

<sup>126</sup> Graduate Institute of International and Development Studies, *Small Arms Survey 2008: Risk and Resilience* (2008), 156.

<sup>127</sup> ATT, Art. 11 (2), *supra* note 8, 7.

and exchange information with a view to mitigating the risk of diversion but only “pursuant to their national laws” and “where appropriate and feasible”.<sup>128</sup> According to Article 11 (4) ATT, States Parties need to take appropriate measures to address any detected diversion, such as “alerting potentially affected States Parties, examining diverted shipments [...] and taking follow-up measures through investigation and law enforcement”.<sup>129</sup> Article 11 (5) and (6) ATT encourage States Parties to share relevant information with and to report to other States Parties on measures to address diversion. This is complemented by Article 13 (2) ATT encouraging States Parties to report to other States on successful measures in combating diversion.

#### IV. Concluding Remarks on Substantive Obligations

The effectiveness of the ATT in regulating international arms transfers is most dependent on the scope and consequences of the substantive obligations for States Parties provided therein. As has been pointed out above, the only absolute prohibition the ATT establishes by itself is incorporated in Article 6 (3) ATT. However, its scope of application is not comprehensive due to the fact that it does not refer to war crimes under customary international law. With regard to the regulation of exports, the fact that Article 7 ATT only prohibits authorizations where the States Party determines an ‘overriding risk’ of any of the listed negative consequences occurring significantly limits its possible impact. Unfortunately, the regulation of other forms of transfer is dealt with rather superficially and no concrete obligations are provided for. Despite some adjustments to the 2012 draft ATT which have enhanced the scope of the substantive obligations, they are still in large parts imprecise and leave the States Parties a big margin of discretion, which makes it difficult to implement them in a coherent way.

#### E. Implementation and Compliance

Article 5 ATT sets out standards for the implementation of the ATT. Most importantly, Article 5 (2) ATT requires States Parties to establish and maintain a national control system that has to include a national control list. Apart from that, its specific design is left to the States Parties’ discretion. In this context, Article 5 (5) ATT only specifies that States shall “designate competent

<sup>128</sup> *Ibid.*, Art. 11 (3), 7.

<sup>129</sup> *Ibid.*, Art. 11 (4), 7.

national authorities in order to have an effective and transparent national control system”.<sup>130</sup> Pursuant to Article 5 (4) ATT, States Parties have to provide their national control lists to the Secretariat established in accordance with Article 18 ATT, which in turn makes them available to other States Parties. States Parties are encouraged but not obliged to make the national control lists publicly available as well. Article 5 (5) ATT further requires States Parties to “take measures necessary to implement the provisions of [the] treaty”.<sup>131</sup> By contrast, the 2012 draft ATT referred to “all appropriate legislative and administrative measures”<sup>132</sup> thereby entailing a stronger obligation resting on States Parties. In general, it seems questionable if Article 5 (5) ATT as it is now framed has an importance of its own as Article 14 ATT also provides for States Parties to “take appropriate measures to enforce national laws and regulations that implement the provisions of the treaty”.<sup>133</sup>

Article 12 ATT deals with record-keeping by States Parties. According to Article 12 (1) ATT, they must maintain national records of export authorizations or actually conducted exports of conventional weapons covered by Article 2 (1) ATT “pursuant to [their] national laws and regulations”.<sup>134</sup> As has been described with regard to other obligations within the ATT, the reference to national laws and regulations of the States Party concerned significantly limits the scope of its obligation under the provision and has been opposed by several State delegations throughout the Final Conference on the ATT.<sup>135</sup> Article 12 (2) ATT incites States Parties to also keep records on imports and authorized transits or trans-shipments taking place under their jurisdiction. Article 12 (3) ATT further defines what States Parties are encouraged to include in those records, e.g. information on the quantity, value and model/type of authorized transfers. Finally, Article 12 (4) ATT stipulates that records are to be kept for a minimum of ten years. In comparison, the *Firearms Protocol* provides for the same length of record keeping,<sup>136</sup> whereas the *International Tracing Instrument* – albeit being of a non-binding nature – requires States to keep records indefinitely “to the extent possible”.<sup>137</sup>

<sup>130</sup> *Ibid.*, Art. 5 (5), 5.

<sup>131</sup> *Ibid.*

<sup>132</sup> *2012 Draft ATT*, Art. 5 (3), *supra* note 48, 5.

<sup>133</sup> Cf. Casey-Maslen, Giacca & Vestner, *supra* note 54, 22.

<sup>134</sup> ATT, Art. 12 (1), *supra* note 8, 8.

<sup>135</sup> Casey-Maslen, Giacca & Vestner, *supra* note 54, 35.

<sup>136</sup> *Firearms Protocol*, Art. 7, *supra* note 62, 240.

<sup>137</sup> *International Tracing Instrument*, *supra* note 46, 9 (Section IV, para. 12).

Article 13 ATT concerns reporting obligations of States Parties. Pursuant to Article 13 (1) ATT, a States Party needs to provide an initial report to the Secretariat within the first year after entry into force of the treaty for the respective State. In the report, the State has to illustrate measures undertaken in order to implement the ATT, in particular national laws, national control lists, and other regulations and administrative measures. Afterwards, the State shall report on any new measures when appropriate. Article 13 (3) ATT further requires States Parties to report on an annual basis on authorized or actual exports and imports of those conventional weapons covered under Article 2 (1) ATT. However, they may exclude commercially sensitive or national security information from the reports. In the absence of a definition of what is deemed commercially sensitive or national security information, this exception might be interpreted by States Parties broadly and potentially lead to attempts to circumvent the annual reporting obligation. The Secretariat distributes every State report to the other States Parties. However, it is not mandatory to make reports or key information on arms transfers publicly available despite the fact that many State delegations at the Final Conference had called for such an obligation.<sup>138</sup>

According to Article 17 (4) ATT, the Conference of States Parties shall review the treaty's implementation. Among others, the latter is also tasked with considering recommendations regarding the implementation and operation of the treaty and amendments to it in accordance with Article 20 ATT. Apart from specific regulations on the adoption of the Conference's rules of procedure<sup>139</sup> and amendments to the treaty,<sup>140</sup> the ATT does not expand on how the Conference is to reach decisions.

Finally, it is worth mentioning the relationship of the treaty with other international agreements addressed in Article 26 ATT. In accordance with Article 26 (1) ATT, the implementation of the ATT shall not affect States Parties' obligations under existing or future international treaties to which they are Parties provided that those obligations are compatible with the ATT. The respective provision in the 2012 draft ATT was considerably broader and stated that the "implementation of this Treaty shall not prejudice obligations undertaken

<sup>138</sup> 'ATT Conference: Statement Delivered by Ghana', *supra* note 52, 2.

<sup>139</sup> According to Art. 17 (2) ATT, the rules of procedure are to be adopted by consensus at the first session of the Conference of States Parties.

<sup>140</sup> Art. 20 ATT (*supra* note 8, 11) states that "States Parties shall make every effort to achieve consensus on each amendment". In the absence of agreement, the amendment may, *ultima ratio*, be adopted by a three-quarters majority vote of the States Parties present and voting.

with regard to other instruments”.<sup>141</sup> This provision had been opposed by many State delegations and non-governmental organizations due to its ambiguity.<sup>142</sup> On the one hand, it could have been interpreted to mean that the ATT should not “prejudice the application of stricter, more rigorous obligations found under other instruments”.<sup>143</sup> On the other hand, it could have been understood to permit States to circumvent the treaty’s obligations by incurring obligations under other international treaties.<sup>144</sup> In this regard, Article 26 (1) ATT clarifies that only those obligations under another agreement which are consistent with the ATT are not affected by its implementation. It appears self-explanatory that the implementation of the ATT does not prejudice obligations contained in other agreements which are compatible with it as no conflict between the treaties exists in the first place.<sup>145</sup> However, should an obligation contained in another agreement be incompatible with a provision of the ATT, Article 26 (1) ATT *argumentum e contrario* provides for the latter to be implemented nevertheless. It therefore constitutes a conflict clause giving priority to the ATT in that it obliges States Parties to implement the ATT even if this inevitably amounts to a violation of their obligations under another treaty.<sup>146</sup>

Article 26 (2) ATT is almost entirely identical with the second sentence of Article 5 (2) of the 2012 draft ATT. It states that the ATT may not be cited as grounds for voiding defense cooperation agreements concluded between States Parties. Some delegations and non-governmental organizations voiced concern about this provision fearing it could suggest “that arms transfer obligations arising under any existing or future contract concluded under a ‘defence cooperation agreement’ would be exempt from the treaty’s application”.<sup>147</sup> However, such a

<sup>141</sup> 2012 Draft ATT, Art. 5 (2), *supra* note 48, 5.

<sup>142</sup> ‘ATT Conference: Statement Delivered by Ghana’, *supra* note 52, 2.

<sup>143</sup> ICRC, ‘Analysis’, *supra* note 67, 7.

<sup>144</sup> S. Haumer, ‘Die Verhandlungen zu einem Waffenhandelsvertrag’, 25 *Journal of International Law of Peace and Armed Conflict* (2012) 4, 180, 183.

<sup>145</sup> For an in-depth analysis of conflicts between treaties see W. Czapliński & G. Danilenko, ‘Conflict of Norms in International Law’, 21 *Netherlands Yearbook of International Law* (1990), 3; N. Matz-Lück, ‘Treaties, Conflicts Between’, in Wolfrum, *Encyclopedia of Public International Law*, Vol. IX, *supra* note 65, 1096; J. B. Mus, ‘Conflicts Between Treaties in International Law’, 45 *Netherlands International Law Review* (2005) 2, 208.

<sup>146</sup> Cf. on conflict clauses in detail A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (2013), 194-204; Czapliński & Danilenko, *supra* note 145, 12-18; N. Matz, *Wege zur Koordinierung völkerrechtlicher Verträge* (2005), 260-274; N. Matz-Lück, ‘Treaties, Conflict Clauses’, in Wolfrum, *Encyclopedia of Public International Law*, Vol. IX, *supra* note 65, 1093; Mus, *supra* note 145, 214-217.

<sup>147</sup> ICRC, ‘Analysis’, *supra* note 67, 8.

reading runs contrary to both the wording and the object and purpose of the treaty stipulated in Article 1 ATT, namely “to [...] [e]stablish the highest possible common international standards” for regulating the international arms trade.<sup>148</sup> The provision can therefore hardly be interpreted in a way which allows States to circumvent their obligations under the treaty but rather states the obvious, namely that the ATT does not automatically void States Parties’ conflicting defense cooperation agreements.<sup>149</sup>

## F. Conclusion

It is obvious from the foregoing that with the adoption by the General Assembly and the possible entry into force of the ATT the international community has not reached a situation in which “all’s well that ends well”.<sup>150</sup> The scope of the treaty is non-exhaustive and does not cover ammunition/munitions and parts and components in the same way as conventional weapons listed under Article 2 (1) ATT. The substantive obligations the treaty imposes are often drafted in an imprecise or ambiguous way, which potentially allows for States Parties to circumvent them. The provisions on implementation are just as vague and even though the Conference of States Parties is tasked with reviewing the implementation of the ATT, it is only vested with the authority to adopt recommendations regarding it. The formation of the ATT is therefore not the last step in an already very long-lasting process to impose restrictions on the flow of conventional arms but rather the first obstacle the international community has finally overcome.

However, one must only think of the dreadful consequences of the international trade in conventional arms in order to realize that the process leading to the adoption of the treaty can hardly be considered “much ado about nothing”.<sup>151</sup> As big as the shortcomings of the ATT may be, it provides for the first common and binding rules on transfers in conventional arms. It entails minimum standards for the authorization of arms transfers every States Party

<sup>148</sup> ATT, Art. 1, *supra* note 8, 3. According to Art. 31 (1) VCLT (*supra* note 97, 340), which has also obtained customary status, a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

<sup>149</sup> This interpretation is also in line with the provision on the termination or suspension of the operation of a treaty implied by conclusion of a later treaty contained in Art. 59 VCLT (*supra* note 97, 345-346).

<sup>150</sup> W. Shakespeare, *All’s Well That Ends Well* (1601-1608).

<sup>151</sup> W. Shakespeare, *Much Ado About Nothing* (1598-1599).

must adhere to, whether it has previously controlled arms transfers from, to or through its territory or not. This being said, for the ATT to have a significant effect on the international arms trade, it first needs to be ratified by major supplier States. Whether the treaty will further have a profound impact on the flow of arms to perpetrators of violations of human rights and international humanitarian law and consequently will succeed to reduce human suffering, will largely depend on the willingness of States Parties to interpret its provisions in the broadest sense possible and to implement them in this way at the national level.



# **The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity**

Michael E. Kurth

## Table of Contents

A. Introduction.....	432
B. A Milestone in International Criminal Law? .....	433
C. The War Crime of Recruiting Child Soldiers.....	434
I. The Nature of the Conflict in Ituri.....	435
II. Can a Child Join Armed Forces Voluntarily?.....	437
III. National Armed Forces and Groups .....	438
IV. Sexual Slavery and 'Active Use'.....	439
V. Proving the Age of a Child Soldier .....	442
VI. Lubanga's Intent and Knowledge .....	446
D. The Gravity Test of Article 78 (1) <i>Rome Statute</i> .....	448
I. Mitigating and Aggravating Factors .....	449
II. Some General Sentencing Rules .....	451
E. Conclusion.....	452

\* Defense Counsel (Bonn), Dr. iur. (Frankfurt/Main), LL.M. Adv. (Leiden).

## Abstract

The author explores the International Criminal Court's (ICC) very first judgment in the case of *Lubanga*. He examines numerous contentious questions arising from the war crime of recruiting child soldiers, such as children's voluntariness of joining armed forces, the legal assessment of sexual slavery and 'active use', and the intricate task of proving the age of a child soldier. Notwithstanding certain blind spots, it is ultimately inferred that the ICC not only proved to be a functioning institution but also provided a ruling of precedential value, in respect of the issues of both child soldiering and general sentencing.

## A. Introduction

On the 10th of July 2012, the International Criminal Court (ICC) sentenced the former Congolese militia leader Thomas Lubanga Dyilo to 14 years of imprisonment for war crimes,<sup>1</sup> after it had rendered its very first judgment earlier in March 2012.<sup>2</sup> Lubanga was one of many African warlords, who played a role in the seemingly endless conflicts in the eastern part of the Democratic Republic of Congo (DRC), which at times included numerous paramilitary groups and the national armies of Uganda, Rwanda, and the DRC.<sup>3</sup> The defendant was one of the founders of the *Union des Patriotes Congolais* (UPC) and commander-in-chief of their military wing, the *Forces Patriotiques pour la Libération du Congo* (FPLC). The UPC's long-term objective was to gain political and military control over the Ituri district in the northeast of the DRC.<sup>4</sup> The DRC had referred the situation to the ICC in March 2004 based

<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence, ICC-01/04-01/06 (Trial Chamber I), 10 July 2012, 38-39, para. 107 [Prosecutor v. Lubanga, Decision on Sentence].

<sup>2</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06 (Trial Chamber I), 14 March 2012 [Prosecutor v. Lubanga, Judgment].

<sup>3</sup> For a summary of these hostilities which are generally referred to as the Second Congo War, see L. Arimatsu, 'The Democratic Republic of the Congo 1993-2010', in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts* (2012), 146, 167-185.

<sup>4</sup> The UPC/FPLC's principal opponents were the FRPI (*Force de résistance patriotique en Ituri*) led by Germain Katanga and the FNI (*Front des nationalistes et intégrationnistes*) led by Mathieu Ngudjolo Chui who both were tried for war crimes and crimes against humanity at the ICC. On 18 December 2012 Ngudjolo was acquitted of all charges and released from custody on 21 December 2012. See *Prosecutor v. Mathieu Ngudjolo Chui*, Judgment, ICC-01/04-02/12 (Trial Chamber II), 18 December 2012, 197 (dispositive part).

on Article 14 *Rome Statute of the International Criminal Court* (Rome Statute or ICC Statute).<sup>5</sup> Lubanga was arrested in March 2005 and detained by state authorities in Kinshasa for a year before being transferred to The Hague. At the ICC the defendant was charged and eventually found guilty as a co-perpetrator of enlisting and conscripting children under the age of fifteen years<sup>6</sup> into the FPLC and using them to participate actively in hostilities from September 2002 to August 2003.<sup>7</sup> The Trial Chamber could elaborate on several problematic features of the 'new' war crime of child recruitment in the *Rome Statute*: Article 8 (2) (b) (xxvi) and Article 8 (2) (e) (vii). Unfortunately the Judges missed the chance to answer some disputed questions, which have been subject to discussion in legal scholarship.<sup>8</sup> The Dissenting Opinion of Judge Odio Benito is especially not persuasive.

## B. A Milestone in International Criminal Law?

To say, the long awaited first judgment of the ICC is a milestone in the progressive development of international criminal law, is probably expecting too much from too little. One of the reasons is the narrow scope of the charges brought to the Court by the prosecution, limiting the Trial Chambers jurisdiction to the crime of child soldiering. Nonetheless, the judgment and the sentencing decision contain several very remarkable findings on material and procedural law. Numerous obstacles had to be overcome in the ICC's first full trial.<sup>9</sup> The

<sup>5</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 3, 99 [Rome Statute].

<sup>6</sup> On the wide-spread phenomenon of child soldiers see, e.g., M. A. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (2012), 26-60; R. Dallaire, *They Fight Like Soldiers, They Die Like Children* (2010), 104-151; S. von Schorlemer, *Kindersoldaten und bewaffneter Konflikt: Nukleus eines umfassenden Schutzregimes der Vereinten Nationen* (2009), 8-35.

<sup>7</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 591, para. 1358.

<sup>8</sup> M. E. Kurth, 'The Recruitment and Use of Child Soldiers: Some Reflections on the Prosecution of a New War Crime', in C. Stahn & L. van den Herik (eds), *Future Perspectives on International Criminal Justice* (2009), 475; M. Happold, 'Child Recruitment as a Crime Under the Rome Statute of the International Criminal Court', in J. Doria, H.-P. Gasser & M. C. Bassiouni (eds), *The Legal Regime of the International Criminal Court: Essays in Honour of Igor Blishchenko* (2009), 579; M. Cottier, 'Article 8', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd ed. (2008), 275, 466-475, para. 227-234.

<sup>9</sup> For a rare insight into the practical difficulties the Chamber faced, see the account of Presiding Judge A. Fulford, 'The Reflections of a Trial Judge', 22 *Criminal Law Forum* (2011) 1-2, 215.

proceedings were halted twice by the Trial Chamber due to serious concerns in the way the Office of The Prosecutor (OTP) conducted its investigations and breached its disclosure obligations.<sup>10</sup> These important issues of fair trial guarantees have already been subject of several commentaries and will not be discussed again here.<sup>11</sup> Instead, the author will focus his analysis on the *actus reus* of the charged crimes of recruiting and using child soldiers and the *mens rea*. The decisive factors for finding the appropriate sentence for this war crime will also be examined. The sentencing decision of July 2012 establishes some fundamental guidelines when it comes to aggravating and mitigating factors, which will be a point of reference for future cases at the ICC.

### C. The War Crime of Recruiting Child Soldiers

For a successful litigation of a war crime in accordance with Article 8 *Rome Statute* the prosecution must establish beyond reasonable doubt that there was an armed conflict in existence at the time of the offence and there must be a nexus between the criminal conduct and this conflict.<sup>12</sup> While Article 8 (2) (e) (vii) *Rome Statute* covers the recruitment of child soldiers during non-

<sup>10</sup> *Prosecutor v. Thomeas Lubanga Dyilo*, Decision on the Consequences of Non-disclosure of Exculpatory Materials Covered by Article 54 (3) (e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, ICC-01/04-01/06 (Trial Chamber I), 13 June 2008, 41-42, paras 92-95; *Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, ICC-01/04-01/06 (Trial Chamber I), 8 July 2010, 22-23, para. 31.

<sup>11</sup> M. Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (2012), 271-278; L. D. Johnson, 'The Lubanga Case and Cooperation Between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation', 10 *Journal of International Criminal Justice* (2012) 4, 887; K. Ambos, 'The First Judgment of the International Criminal Court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues', 12 *International Criminal Law Review* (2012) 2, 115, 124-128; B. Kuschnik, 'International Criminal Due Process in the Making: New Tendencies in the Law of Non-Disclosure in the Proceedings Before the ICC', 9 *International Criminal Law Review* (2009), 1, 157.

<sup>12</sup> W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2010), 202-209; Cottier, *supra* note 8, 290-295, paras 5 & 6; G. Boas, J. L. Bischoff & N. L. Reid, *International Criminal Law Practitioner Library*, Vol. II: Elements of Crimes Under International Law (2008), 232-243; M. Bothe, 'War Crimes', in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (2002), 379, 388-389.

international armed conflicts, Article 8 (2) (b) (xxvi) *Rome Statute* applies during international armed conflicts.<sup>13</sup> The legal character of hostilities has been the object of extensive discussions in legal scholarship and the jurisprudence of international courts. The mixed nature of many contemporary armed conflicts in times of Failed States or at least States, which lose control over parts of their territory, poses a serious challenge for the proper application of principles of international humanitarian law. The DRC is and was a tricky ‘candidate’ in this regard and the rulings on the legal character of the hostilities in the eastern part of the country have varied significantly. The *Lubanga* case noticeably showed the fading relevance of the dichotomy international/non-international armed conflict in international law.<sup>14</sup>

### I. The Nature of the Conflict in Ituri

First of all, there was a general consent that the FPLC was involved in an armed conflict in Ituri, the Hema-Lendu conflict, which included different opposing rebel groups.<sup>15</sup> The contentious issue was if this conflict was international in nature due to fact that these rebel groups were used as proxies in conflicts, which at times involved Uganda, Rwanda, and the DRC. The Pre-Trial Chamber (PTC) of the ICC had initially qualified the conflict between July 2002 and June 2003 as an international armed conflict owing to the direct involvement of the Uganda People’s Defence Force (UPDF) as an occupying power in Ituri. After the UPDF’s withdrawal the PTC held that the conflict reverted to being of a non-international character until the end of 2003.<sup>16</sup>

<sup>13</sup> While there is a tendency to treat both forms of conflict alike, the *Rome Statute* still codifies the so-called two box approach and not every war crime committed in the context of an international armed conflict is criminalized when committed in an inner-state setting.

<sup>14</sup> See D. Akande, ‘Classification of Conflicts: Relevant Legal Concepts’, in E. Wilmschurst (ed.), *International Law and the Classification of Conflicts: Relevant Legal Conflicts* (2012), 33; G. de Beco, ‘War Crimes in International Versus Non-International Armed Conflicts: “New Wine in Old Wineskins”?’ 8 *International Criminal Law Review* (2008) 1-2, 319; E. Crawford, ‘Unequal Before the Law: The Case for the Elimination of the Distinction Between International and Non-International Armed Conflicts’, 20 *Leiden Journal of International Law* (2007) 2, 441.

<sup>15</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 43-46, paras 71-80.

<sup>16</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 29 January 2007, 70-82, paras 200-237 [*Prosecutor v. Lubanga*, Decision on the Confirmation of Charges].

The Trial Chamber in accordance with *Regulation 55 of the Court*<sup>17</sup> changed this qualification as it ruled that the conflict was of a non-international nature during the time the alleged crimes took place.<sup>18</sup> Though the ‘substantial’ involvement of the national armies of Rwanda and Uganda in Ituri at least for some time is undisputed,<sup>19</sup> the Trial Chamber was of the opinion that neither Rwanda nor Uganda eventually exercised the necessary overall control over the FPLC.<sup>20</sup> The Chamber’s analysis rightly pre-assumes that parallel conflicts of different legal character can take place simultaneously in one region. The result was that the Trial Chamber did not have to decide here if the accused was liable under Article 8 (2) (b) (xxvi) *Rome Statute*, which is solely applicable to international armed conflicts.<sup>21</sup> With this finding, the Trial Chamber eventually confirmed what the OTP had originally charged Lubanga with. Only the PTC had added the charge of child recruitment in an international armed conflict on its own initiative,<sup>22</sup> which resulted in a dispute between the OTP and the PTC over the question of the competence to make such amendments in the charging document. This procedural question was left open as the PTC denied the OTP’s motion for leave to appeal.<sup>23</sup> Thus, the OTP and the defence had to argue national as well as non-international armed conflict when presenting their respective cases.

<sup>17</sup> *Regulations of the Court*, 26 May 2004, Regulation 55, ICC-BD/01-03-11, 22: “In its decision under article 74, the Chamber may change the legal characterisation of facts to accord with the crimes under articles 6, 7 or 8, or to accord with the form of participation of the accused under articles 25 and 28, without exceeding the facts and circumstances described in the charges and any amendments to the charges.”

<sup>18</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 239-260, paras. 523-567.

<sup>19</sup> See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, 168, 279-283, para. 345; *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 76, para. 220.

<sup>20</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 257-258, para. 561. This overall control test was established by the ICTY in the famous *Tadić* Case. See *Prosecutor v. Duško Tadić*, Judgment, IT-94-1-A, 15 July 1999, 58-59, para. 137.

<sup>21</sup> There was never any serious doubt that these hostilities amounted to protracted armed violence of sufficient gravity and duration in accordance with Art. 8 (2) (f) *Rome Statute*.

<sup>22</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 71-82, paras 200-237.

<sup>23</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecution and Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/04-01/06 (Pre-Trial Chamber I), 24 May 2007, 21, para. 76.

## II. Can a Child Join Armed Forces Voluntarily?

The Judges spent much effort on delimiting the different modes of conduct. Under Article 8 (2) (e) (vii) *Rome Statute* the defendant is guilty of a war crime when he enlists or conscripts children under the age of fifteen years into armed forces or groups. Enlistment and conscription encompasses any method of enrollment by formal or informal means. The Trial Chamber confirmed the PTC's finding<sup>24</sup> that enlistment entails accepting and enrolling individuals who volunteer to join the armed forces while conscription implies some form of compulsion.<sup>25</sup> Though the defence of consent was never explicitly raised by Lubanga's counsel, the Trial Chamber discussed the matter and concluded that children under the age of fifteen are eventually unable to give genuine and informed consent.<sup>26</sup> The Judges thereby relied on testimony by an expert witness who stated that children have inadequate knowledge and understanding of the short- and long-term consequences of their actions and therefore lack the capacity to determine their best interests in this particular context.<sup>27</sup> The Judges eventually ruled that the *Rome Statute* criminalizes any form of enrollment of children under fifteen years of age by whatever means due to the fact that this category of victims does not possess the intellectual capacity to give genuine consent.<sup>28</sup> Had the founders of the *Rome Statute* installed a 18-year threshold for potential victims of this war crime, as had been advocated by some States and many NGOs,<sup>29</sup> excluding the defence of consent would have been much more difficult. One can hardly doubt that a 17-year old child is very well capable of making a reasoned choice when joining armed forces. After all, many States allow the recruitment of minors into their military forces at that age.<sup>30</sup> Be that as it may, *de lege lata* there exists no special form of recruiting minors that does not violate Article 8 (2) (b) (xxvi) or Article 8 (2) (e) (vii) *Rome Statute*.<sup>31</sup>

<sup>24</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 85 para. 246.

<sup>25</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 278-279, para. 608.

<sup>26</sup> *Ibid.*, 281-282, para. 617.

<sup>27</sup> See E. Schauer & T. Elbert, 'The Psychological Impact of Child Soldiering', in E. Martz (ed.), *Trauma Rehabilitation After War and Conflict* (2010), 311.

<sup>28</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 282, para 618.

<sup>29</sup> See G. Palomo Suárez, *Kindersoldaten und Völkerstrafrecht* (2009), 117.

<sup>30</sup> See A. Sheppard, 'Child Soldiers: Is the Optional Protocol Evidence of an Emerging "Straight 18" Consensus?', 8 *The International Journal of Children's Rights* (2000) 1, 37, 48.

<sup>31</sup> The traditional initiation of children into a special society in Africa can constitute a war crime if it can be proven that this process is the first part of training for the children

### III. National Armed Forces and Groups

Having excluded the charge of recruitment in an international armed conflict, the Trial Chamber did not have to rule on the extent of the difficult notion of ‘national armed forces’. Its wording suggests that it refers exclusively to the armed forces of a State.<sup>32</sup> The PTC had ruled that for the purpose of international armed conflict, this term may extend to those entities which are not States, as long as they have certain characteristics of a government.<sup>33</sup> Judge Odio Benito in her Dissenting Opinion annexed to the judgment pointed out that the concept of national armed forces was still “a live issue” because the defence had always argued the conflict under consideration was an international one and the problem would probably come up again in the appeals phase.<sup>34</sup> She stressed that such clarifications were necessary for the progressive development of international law.<sup>35</sup> Odio Benito then pointed at the object and purpose of the *Rome Statute*, which aims to protect children from the horrors of warfare as best as possible. Thus, according to her, the nature of the organization of an armed group cannot limit the applicability of Article 8 (2) (e) (vii) *Rome Statute*.<sup>36</sup> The majority merely needed to confirm that the children were recruited into any armed force or group. The term ‘armed forces’ is to be understood as not only including the regular armed forces of a State but any kind of more or less strictly organized group of people carrying weapons under responsible command with the capability to carry out military operations.<sup>37</sup> Accordingly, the term ‘armed

to become fighters in an armed conflict. See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, SCSL-04-14-T, 2 August 2007, 286-287, paras 968-971. Justice Itoe, in his Separate Opinion, argued against this finding on the grounds that such a customary ritual cannot amount to the enrollment into armed forces *per se*. See Separate and Partially Dissenting Opinion of Justice Itoe, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, *supra* this note, A-1, A-7-A9, paras 30-35.

<sup>32</sup> For a discussion of this problem, see R. Graf, ‘The International Criminal Court and Child Soldiers: An Appraisal of the Lubanga Judgment’, 10 *Journal of International Criminal Justice* (2012) 4, 945, 957-958; Palomo Suárez, *supra* note 29, 151-161; Cottier, *supra* note 8, 473-474, para. 232.

<sup>33</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 95-98, paras 272-285.

<sup>34</sup> Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 5, para. 12.

<sup>35</sup> *Ibid.*, 3, para. 7.

<sup>36</sup> *Ibid.*, 5, para. 13.

<sup>37</sup> See K. Ipsen, ‘Combatants and Non-Combatants’, in D. Fleck (ed.), *International Humanitarian Law* (2008), 79, 83-84.

forces' can include different types of paramilitary entities. The Chamber did not have any reason to doubt that this was true for the FPLC.<sup>38</sup>

#### IV. Sexual Slavery and 'Active Use'

The Trial Chamber then elaborated on the third mode of conduct: the active use of child soldiers.<sup>39</sup> The OTP could prove beyond reasonable doubt that child soldiers were deployed on the battlefield at different times during the Hema-Lendu conflict.<sup>40</sup> More problematic were other forms of 'use'. Is the use of children as guards of military objects, bodyguards for commanders, couriers, spies etc. covered by this notion? The PTC had qualified certain activities not directly linked to combat as covered by Article 8 (2) (b) (xxvi), Article 8 (2) (e) (vii) *Rome Statute*, respectively. These include scouting, spying, sabotage, or the use of children at checkpoints, as couriers, bodyguards for commanders, or guards of military objects.<sup>41</sup> Only if the activities were totally unrelated to the hostilities they should not be covered by the *actus reus*.<sup>42</sup> In the judgment concerning the former president of Liberia, Charles Taylor, the Special Court for Sierra Leone (SCSL) also considered the guarding of mines by children to be an activity in this sense. Not so much because the successful mining of natural resources raised revenues to support the war effort ('blood diamonds') but rather because these mines were at constant risk of being attacked by the enemy and put minors in direct danger of hostilities.<sup>43</sup>

The majority of the Trial Chamber in the *Lubanga* case did not provide a comprehensive legal definition on what the notion of 'active use' encompasses but rather made a case-by-case analysis of the specific evidence presented. It held that many of the activities under consideration, such as children acting as bodyguards for commanders of the FPLC or guarding military facilities in the Ituri district, could eventually be qualified as active use in the sense of Article 8 (2) (e) (vii) *Rome Statute*.<sup>44</sup> The domestic housework done by many girl soldiers was seemingly not considered to be dangerous enough to fall under the notion

<sup>38</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 249-250, 253 & 397, paras 543, 550 & 910.

<sup>39</sup> *Ibid.*, 363-399, paras 820-916.

<sup>40</sup> *Ibid.*, 364-368, paras 821-834.

<sup>41</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 90-91, paras 261-263.

<sup>42</sup> *Ibid.*, 91, para. 262.

<sup>43</sup> *Prosecutor v. Charles Taylor*, Judgment, SCSL-03-01-T, 18 May 2012, 517, para. 1459.

<sup>44</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 399, para. 915.

of ‘active use’. This could only be the case when the support provided put her in a position of a potential military target.<sup>45</sup> This ‘exposure test’ on a case-by-case basis is supported by the jurisprudence of the SCSL<sup>46</sup> and in legal scholarship.<sup>47</sup> It is submitted here that such an approach is probably the best solution as it gives the ICC the necessary flexibility when ruling on a specific case.

During the trial several witnesses testified that sexual abuse of child soldiers took place on a regular basis.<sup>48</sup> Especially girl soldiers were held as sex slaves by different commanders, which called them their ‘wives’. The majority of the Trial Chamber considered these acts to be irrelevant in connection to the charge of child soldiering. The situation would have been different if the OTP had also charged Lubanga with rape, sexual slavery, etc. in accordance with Article 8 (2) (e) (vi) *Rome Statute*, which it did not. The Judges rightly did not see themselves competent to close this gap on their own initiative because Article 74 (2) *Rome Statute* does not allow the Trial Chamber to rule beyond what is brought before the Court by the OTP. In her dissent Judge Odio Benito disagreed with these findings. She finds the ICC under an obligation to produce a general definition of the crime of child soldiering and not limit itself to the scope of the charges brought before it.<sup>49</sup> This duty, according to her, can be derived from Article 21 (3) *Rome Statute*, which obliges the ICC to apply the relevant sources of law (the *ICC Statute*, the *Elements of Crimes*,<sup>50</sup> the *Rules of Procedure and Evidence*,<sup>51</sup> etc.) in accordance with internationally recognized human rights.<sup>52</sup> Her treatment of Article 21 (3) *Rome Statute* is unprecedented. The exact scope and effect of this norm has been under discussion and some scholars have already warned of

<sup>45</sup> *Ibid.*, 385, para. 882.

<sup>46</sup> See *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Judgment, SCSL-04-15-T, 2 March 2009, 511-512, paras 1720-1721 [*Prosecutor v. Sesay, Kallon & Gbao*, Judgment]; *Prosecutor v. Alex Tamba Brima and Others*, Judgment, SCSL-04-16-T, 20 June 2007, 228, paras 736-737.

<sup>47</sup> Graf, *supra* note 32, 965; T. R. Liefänder, ‘The Lubanga Judgment of the ICC: More Than Just the First Step?’, 1 *Cambridge Journal of International and Comparative Law* (2012) 1, 191, 202-203; G. Waschefort, ‘Justice for Child Soldiers?: The RUF Trial of the Special Court for Sierra Leone’, 1 *Journal of International Humanitarian Legal Studies* (2010) 1, 189, 199-201; von Schorlemer, *supra* note 6, 315-316.

<sup>48</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 388-390, paras 890-895.

<sup>49</sup> Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 2-3, para. 6.

<sup>50</sup> ICC, *Elements of Crime*, ICC-PIDS-LT-03-002/11\_Eng (2011).

<sup>51</sup> ICC, *Rules of Procedure and Evidence*, ICC-PIDS-LT-02-002/13\_Eng (2013).

<sup>52</sup> Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 2-3, para. 6.

its possible misuse.<sup>53</sup> What Article 21 (3) *Rome Statute* eventually aims to make sure is that the application or interpretation of the mentioned sources of law by the Court produces results, which are compatible with international human rights.<sup>54</sup> Thus, the result of the Court's ruling has to stand the test. Article 21 (3) *Rome Statute* can in no way oblige the Court to rule on a specific matter or define a legal concept because it might be desirable and could serve the future protection of somebody's human rights. Nonetheless, a more comprehensive definition of the *actus reus* of Article 8 (2) (e) (vii) *Rome Statute* would have been welcomed, especially given the problem of delimiting active participation as used in the *Rome Statute* and direct participation as used in the *Additional Protocols*<sup>55</sup> of the *Geneva Conventions*.<sup>56</sup> But the Chamber was definitely under no obligation to do so in the abstract. Odio Benito's subsequent attempt to define the scope of 'active use' in a broader way needs to be criticized as well. In her opinion, the protection of children from the horrors of warfare cannot limit itself to activities, which directly expose the child soldiers to the dangers of combat but also to any harm the child might suffer from the group that recruited the child illegally. Judge Odio Benito stated:

“Sexual violence committed against children in the armed groups causes irreparable harm and is a direct and inherent consequence to their involvement with the armed group. Sexual violence is an

<sup>53</sup> D. Sheppard, 'The International Criminal Court and "Internationally Recognized Human Rights": Understanding Article 21(3) of the Rome Statute', 10 *International Criminal Law Review* (2010) 1, 43, 46-48; G. Sluiter, 'Human Rights Protection in the ICC Pre-Trial Phase', in G. Sluiter & C. Stahn (eds), *The Emerging Practice of the International Criminal Court* (2009) [Sluiter & Stahn, *Emerging Practice of the ICC*], 459, 466-467.

<sup>54</sup> Schabas, *supra* note 12, 398-400; G. Bitti, 'Article 21 of the Statute of the ICC and the Treatment of Sources of Law in the Jurisprudence of the ICC', in Sluiter & Stahn, *Emerging Practice of the ICC*, *supra* note 53, 285, 303; A. Pellet, 'Applicable Law', in A. Cassese, P. Gaeta & J. R. W. D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (2002), 1051, 1079-1082.

<sup>55</sup> *Protocol Additional I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Art. 77 (2), 1125 UNTS 3, 39; *Protocol Additional II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 4 (3) (c), 1125 UNTS 609, 612.

<sup>56</sup> For a discussion of this aspect, see Cottier, *supra* note 8, 470-471, para. 229; M. Happold, 'Prosecutor v. Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007', 56 *International and Comparative Law Quarterly* (2007) 3, 713, 719-721.

intrinsic element of the criminal conduct of “use to participate actively in the hostilities”. Girls who are used as sex slaves or “wives” of commanders or other members of the armed group provide essential support to the armed groups.”<sup>57</sup>

Her understanding of the concept of ‘active use’ is surprising, to say the least. How can the rape of a member of the own armed forces be read as the use to participate actively in hostilities? This analysis goes clearly beyond the ordinary meaning of the wording. Such a ‘generous’ interpretation of the material elements of a specific crime is a breach of Article 22 (2) *Rome Statute* (*nullum crimen sine lege*) because it overextends the meaning of ‘active use’. Article 22 (2) *Rome Statute* explicitly states that in case of ambiguity, the definition of a crime shall be interpreted in favor of the person being prosecuted (*in dubio pro reo*). Above all, the ICC is a criminal court and it has to respect basic principles of criminal law, which were unmistakably laid down in Articles 22 to 33 of its statute. The ICC would not be a court of law if it would convict the accused for certain crimes only because it might seem indispensable to protect a specific group of victims as best as possible. Odio Benito’s style of reasoning is not a mere interpretation of the law but rather leads to the making of new law. She could have tried to argue that sexual violence committed against child soldiers is an excessive form of active use under customary international law. But would she be able to find supporting material or cases for such a claim? She would not as her findings simply lack proper judicial reasoning.<sup>58</sup> Fortunately, the majority of the Trial Chamber did not follow Odio Benito’s line of argument.

## V. Proving the Age of a Child Soldier

A very practical and decisive issue when it comes to the prosecution of recruiting/using child soldiers is the question of age. The trial of *Lubanga* showed how difficult it is to confirm that the soldiers under consideration are below the 15-year threshold.<sup>59</sup>

<sup>57</sup> Separate and Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Judgment, *supra* notes 2 & 34, 7-8, para. 20.

<sup>58</sup> Also rejecting her findings: Ambos, *supra* note 11, 137; Graf, *supra* note 32, 966.

<sup>59</sup> In the RUF case before the SCSL the Trial Chamber identified the problem and held: “While the Chamber heard testimony from child fighters who were able to identify their ages at the times of relevant events, we note that several such witnesses estimated the age of other child fighters based on comparisons between their own size and that of the other children. The Chamber also heard evidence from many other witnesses who observed

The civil administration in the DRC functioned only to a very limited extent at the relevant time. Therefore, civil status documents confirming the age of child soldiers, which were recruited by the FPLC, were extremely hard to obtain by the prosecution. The investigators eventually refrained from contacting village chiefs or former schoolteachers to verify the age of specific victims because it was deemed to be too dangerous for the children and their families.<sup>60</sup> Instead, the OTP decided to turn to medical examinations to prove the age of children under consideration. The medical specialists<sup>61</sup> later testified in Court that based on X-ray images, some recruits may have been as young as ten or eleven years old at the time they were allegedly FPLC fighters. Others, however, probably were not as young, said the experts, pointing out that the poor quality of the X-ray images created a margin of error. The age determination techniques involved studying the bones of the left wrist and hand because the development of these body parts indicates the person's age. The method is effective for age determination in males less than 20 years old and females less than 17 years old. Beyond those ages these bones are normally fully developed. The two main clinical methods for forensic age estimation are the *Greulich and Pyle* (G&P) method<sup>62</sup> and the *Tanner and Whitehouse* (T&W) method<sup>63</sup> and have been standard practice in national criminal proceedings. There are a few differences between the two methods. In the case of *Lubanga* the two medical experts relied

children who appeared to be under the age of 15 engaged in various war-related activities. The Chamber is cognisant that these estimations of age were generally made on the basis of a child's appearance or height, rather than on objective proof of age. Given the inherent uncertainties in such estimations, the Chamber has exercised caution in determining the ages of children associated with the rebel factions in its findings. We nonetheless note that during the DDR process it was established through the use of verification of age methods such as the physical inspection of teeth that many of the children who had fought with the RUF and AFRC forces were under 15 at that time, which was towards the end of the Indictment period." See *Prosecutor v. Sesay, Kallon & Gbao*, Judgment, *supra* note 46, 487, paras 1627-1628.

<sup>60</sup> See *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 83-87, paras 170-175.

<sup>61</sup> The medical experts were Dr. Caroline Rey-Salmon, a pediatrician and Dr. Catherine Adamsbaum, a radiologist, both from Paris, France.

<sup>62</sup> See S. Mora *et al.*, 'Skeletal Age Determinations in Children of European and African Descent: Applicability of the Greulich and Pyle Standards', 50 *Pediatric Research* (2001) 5, 624.

<sup>63</sup> See S. Schmidt *et al.*, 'Applicability of the Skeletal Age Determination Method of Tanner and Whitehouse for Forensic Age Diagnostics', 122 *International Journal of Legal Medicine* (2008) 4, 309.

on the G&P method plus teeth examinations of the third molar.<sup>64</sup> According to them, the two combined would give a reliable conclusion concerning the age of the patient.<sup>65</sup> The experts admitted that poor nutrition and disease factors could distort results. The Trial Chamber handled this evidence with care when it ruled:

“These examinations were not meant to determine a person’s age with precision; furthermore, the model is based on European and American populations rather than those from Sub-Saharan Africa, and the methodology has not been updated for 50 years. Therefore, it is suggested this approach will only provide an approximate answer, particularly given it is not an exact science. The Chamber accepts that this material needs to be treated with care, not least because analysis of this kind, based on X-rays, was principally developed to measure biological rather than chronological age.”<sup>66</sup>

Accordingly the Judges considered an abundance of additional factors when trying to pinpoint the age of a child soldier. During the trial it became clear that the term ‘kadogos’ was used within the FPLC to refer to child soldiers of a very young age but not necessarily below the age of 15 years.<sup>67</sup> Often witnesses stated the children under consideration were visibly under fifteen years of age by comparing them to other juveniles, describing their general behaviour or their state of physical development. In one case, some children were said to have weighed less than their weapons and could barely carry the AK-47s they were given.<sup>68</sup> One former member of the FPLC testified that some of the young boys would cry for their mothers when they were hungry and would play children’s games during the day while they had their weapons next to them.<sup>69</sup>

<sup>64</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 12 May 2009, ICC-01/04-01/06-T-172-ENG, 13-16.

<sup>65</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 13 May 2009, ICC-01/04-01/06-T-173-ENG, 27-28.

<sup>66</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 399, para. 176.

<sup>67</sup> *Ibid.*, 381-384, paras 870-877.

<sup>68</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 3 February 2009, ICC-01/04-01/T-114-Red2-ENG, 37.

<sup>69</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 25 March 2009, ICC-01/04-01/T-154-Red2-ENG, 41.

Others would make toys for themselves after training or play marbles.<sup>70</sup> Another witness, a political advisor for the UPC at the time, told the Court that he used to be a teacher and had been in daily contact with children of this age group. Thus, his estimates were found to be particularly reliable and he testified about child soldiers being clearly younger than 10 years.<sup>71</sup> Of course, due to the subjective nature of these assessments their value is limited and the defence tried to rebut the reliability of every single witness. Here the defence could have gained substantial ground especially after some former child soldiers, who took the stand in the courtroom, where caught lying about their age and their deployment in the ranks of the FPLC.<sup>72</sup>

But the Judges were eventually able to make up their own minds about the actual appearance of young soldiers when video-footage from the time the charged crimes allegedly took place was introduced as evidence. The Chamber held:

“Mr Lubanga is also filmed returning to his residence after an event at the Hellenique Hotel on the same day (23 January 2003), travelling in a vehicle accompanied by members of the presidential guard. Two young individuals in camouflage clothing, who are clearly under the age of 15, are to be seen sitting with armed men wearing military clothing. *The size and general appearance of these two young individuals, when compared with other children and the men who are with them in the vehicle, leads to the conclusion that they are under the age of 15.*”<sup>73</sup>

In this case, the quasi-standard of proof could be reduced to the famous slogan: “I know it when I see it!”<sup>74</sup> Such a rule is obviously not foreseen in any *Rules of Procedure and Evidence* and might not be an appropriate basis for

<sup>70</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 10 June 2009, ICC-01/04-01/06-T-189-Red2-ENG, 17.

<sup>71</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Transcript of 27 May 2009, ICC-01/04-01/06-T-179-Red-ENG, 87.

<sup>72</sup> For example, witness D-0004 never served in the military and was probably coerced into testifying against Lubanga. See *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 178-179, paras 391-392.

<sup>73</sup> *Ibid.*, para. 862 (emphasis added).

<sup>74</sup> This phrase was used by U.S. Supreme Court Justice Potter Stewart in his Concurring Opinion to describe his threshold test for pornography in the case *Nico Jacobellis v. Ohio*, 22 June 1964 (1964), U.S. Supreme Court, 378 U.S. 184, 197.

a judicial decision *per se* but anybody who has presented such evidence in a courtroom knows about the power of pictures. This and similar video-footage was the ‘smoking gun’ because it more or less brought the crime scene to the courtroom. It was probably the best piece of evidence the OTP was able to produce.

After the introduction of this video, the issue was settled and the Trial Chamber was convinced that numerous children below the age of 15 years were recruited and used by the UPC/FPLC.<sup>75</sup> Hence, in the end – even if probably expected otherwise – the medical examinations did not deliver the decisive answer to the age question. While in national criminal proceedings the aforementioned methods have established somewhat of a reliable standard the context of international trials has shown once again that one cannot simply adopt national methods. It remains to be seen if in future trials the OTP will turn to medical examinations again.

## VI. Lubanga’s Intent and Knowledge

Did the defendant also mean to conscript, enlist, or use children under the age of 15 to participate actively in hostilities and was he aware that by implementing the common plan these consequences would occur ‘in the ordinary course of events’? The mental element of Article 8 (2) (e) (vii) *Rome Statute* requires the defendant to have known or should have known that the person recruited into the armed forces or used was under the age of fifteen years.<sup>76</sup> The defence argued that a policy requiring age verification was implemented by the UPC/FPLC, thereby considerably reducing the risk that children under the age of 15 would be enlisted. Lubanga’s lawyers also tried to prove, that he was opposed to the recruitment of children by pointing at documents from the relevant time signed by their client in which he had ordered his subordinates to demobilize children under the age of 18 years. The Judges were not persuaded. Even if orders of demobilization of soldiers below the age of 18 years might have been given on behalf of the accused, the Chamber was not only convinced that they were eventually not fully implemented but these orders clearly showed that Lubanga knew that the recruitment of children was prohibited and that children remained amongst the ranks of the UPC/FPLC in spite of the prohibition.<sup>77</sup> The Chamber concluded:

<sup>75</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 378, para. 916.

<sup>76</sup> The perpetrator does not have to know that his individual crime was part of a plan or policy or large-scale commission in the sense of Art. 8 (1) *Rome Statute*.

<sup>77</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 584-585, para. 1346.

“The defence has been imprecise as to whether the demobilisation order of 21 October 2002 and the decree of 1 June 2003 lead to the conclusion that the resulting crimes did not occur in the ordinary course of events, or whether it is only suggesting that the accused did not have the “intention” to commit the crimes. However, the lack of cooperation on the part of the UPC/FPLC with the NGOs working within the field of demobilisation and the threats directed at human rights workers who were involved with children’s rights tend to undermine the suggestion that demobilisation, as ordered by the President, was meant to be implemented. Instead, Thomas Lubanga used child soldiers below the age of 15 as his bodyguards within the PPU and he gave speeches and attended rallies where conscripted and enlisted children below the age of 15 were present. Mr Lubanga was aware that children under the age of 15 were within the personal escorts of other commanders. Moreover, the accused visited UPC/FPLC camps, and particularly at the Rwampara camp he gave a morale-boosting speech to recruits who included young children who were clearly below the age of 15. As already set out, the Chamber concludes that this video, filmed on 12 February 2003, contains compelling evidence as to Thomas Lubanga’s awareness of, and his attitude towards, the enduring presence of children under the age of 15 in the UPC.”<sup>78</sup>

Under these circumstances there was no room left to raise the defence of mistake of law.<sup>79</sup> The defendant was obviously fully aware of the fact that the recruitment of minors was unlawful at the time. Otherwise he would not have given the aforementioned orders. Lubanga’s defence had argued in the pre-trial phase that the crime of recruiting child soldiers was so new, the defendant did not know about it and thus could not be held responsible for doing something he thought was legal. The PTC considered this argument to be irrelevant here, because there was enough evidence, which showed that the defendant was fully aware of the prohibition.<sup>80</sup>

<sup>78</sup> *Ibid.*, 585-586, para. 1348.

<sup>79</sup> *Rome Statute*, Art. 32 (2), *supra* note 5, 108.

<sup>80</sup> See *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 107-108, paras 313-316.

More promising might have been the issue of mistake of fact.<sup>81</sup> Lubanga could have argued the children in his forces appeared to be older than 15 years to him. But the deviation of the general standard of intent and knowledge of Article 30 *Rome Statute* in relation to child soldiering as set out in the *Elements of Crimes* ('should have known') almost makes it impossible to successfully raise this defence. While several scholars have discussed if such a digression of the general standard set out in the Statute through the *Elements of Crimes* is possible at all,<sup>82</sup> the PTC has found such a deviation to be permissible.<sup>83</sup> The 'should have known'-standard can be qualified as a form of negligence and defined as a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>84</sup> Anytime the defendant's false assessment of the age of his soldiers was the result of negligence his defence will be without merit. Thus, the defendant will have to make specific enquiries into the age of the potential soldier whenever his or her physical appearance gives rise to reasonable doubt about his or her eligibility to join armed forces.<sup>85</sup> This would have afforded some very credible and convincing evidence. The large number of children, which were clearly and visibly below the 15-year threshold and in close contact with the defendant while acting as his bodyguards in the presidential guard for a considerable amount of time, did simply not enable the defence to rebut Lubanga's negligent conduct. Here the aforementioned video-evidence was crucial again. He obviously knew he was using minors for activities, which would entail his criminal responsibility. Accordingly, the Trial Chamber did not further elaborate on the problem of negligence but found *dolus directus*. It did not have to rule on the applicability of the 'should have known'-standard here and sidestepped an important and controversial issue of this war crime.

#### D. The Gravity Test of Article 78 (1) *Rome Statute*

The Trial Chamber held separate hearings on the matter of sentencing and reparations. When trying to find an appropriate sentence for recruiting and using child soldiers the Judges, first of all, had to consider the factor of gravity,

<sup>81</sup> *Rome Statute*, Art. 32 (1), *supra* note 5, 108.

<sup>82</sup> Schabas, *supra* note 12, 474-475; K. J. Heller, 'Mistake of Legal Element, the Common Law, and Article 32 of the Rome Statute: A Critical Analysis', 6 *Journal of International Criminal Justice* (2008) 3, 419, 435-436.

<sup>83</sup> *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, *supra* note 16, 122, para. 359.

<sup>84</sup> A. Cassese *et al.*, *Cassese's International Criminal Law*, 3rd ed. (2013), 53-54.

<sup>85</sup> Waschefort, *supra* note 47, 202; Cottier, *supra* note 8, 475, para. 234.

as mentioned in Article 78 (1) *Rome Statute*. Now obviously, all crimes under the jurisdiction of the ICC are ‘most serious crimes’. And the Chamber reiterated that this is undoubtedly also the case for Article 8 (2) (e) (vii) *Rome Statute*.<sup>86</sup> Now such an abstract finding does not say anything about the personal culpability of the convicted person. The essence of the gravity test is rather a thorough examination of the specific circumstances of the conduct which Lubanga was found guilty of. The general guidelines for this test are laid down in Rule 145 of the *Rules of Procedure and Evidence* of the ICC which does not entail an exhaustive list.<sup>87</sup> When it comes to child soldiers the following specific indicators should be taken into account: (1) the overall number of children under 15 years of age in the armed groups, (2) the time frame in which their recruitment/use took place, (3) the amount of especially young soldiers, and (4) the specific treatment of the children while being deployed as soldiers (harsh punishment, brain-washing, drug abuse, misuse for extremely hazardous actions, etc.).

## I. Mitigating and Aggravating Factors

A report by the Trust Fund for Victims suggested that a total number of 2,900 children under the age of 15 were enlisted by the UPC/FPLC.<sup>88</sup> The Chamber did not confirm that number and instead ruled that the recruitment was widespread and a significant number of children were used.<sup>89</sup> By contrast to the situation in Sierra Leone, where whole units of the opposing parties were

<sup>86</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 15, para. 37.

<sup>87</sup> *Rules of Procedure and Evidence*, Rule 145, *supra* note 51, 55: “[...] (c) In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person. 2. In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as: (i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) The convicted person’s conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court; (b) As aggravating circumstances: (i) Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) Abuse of power or official capacity.”

<sup>88</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 19, para. 46.

<sup>89</sup> *Ibid.*, 20, paras 49-50.

exclusively formed by minors,<sup>90</sup> the soldiers of the FPLC were mostly adults. It was not an army of children. Also there was no evidence that a considerable number of those minors were extremely young, though the Judges stated repeatedly that some of the recruits shown on video were “clearly under the age of 15 years”. It was never questioned that the recruitment and use took place during the whole timeframe of the charges (September 2002 until August 2003). Only the future case law of the ICC will show if 12 months is an average or a short period for such crime of a continuing nature. The true reasons for the termination of the criminal conduct will be the decisive factor in this regard. In the normal course of events this will only take place after the underlying hostilities have ended and the perpetrators have reached their military goals. While the conflict in Ituri was still going on, Lubanga issued orders to demobilize child soldiers, but eventually these were never fully implemented and only after he failed in his military campaign and was arrested by the state authorities of the DRC did his criminal conduct end. His overall motive to bring peace to the region and the necessity to form an army including minors in order to do so, can hardly be seriously considered to be of mitigating value.<sup>91</sup> Child soldiers were also subject to punishment. But such disciplinary actions were not found to be abusive and foremost not part of a general policy which was implemented by the defendant.<sup>92</sup> The Chamber, unlike the OTP, rejected crimes of sexual violence, which certainly had taken place in the FPLC, to be an aggravating factor for Lubanga because the link between the defendant and sexual violence in the context of the charges was not proven.<sup>93</sup> The defendant was not found to have ordered or encouraged sexual violence against ‘his’ child soldiers at any time. In sum, the Judges did not find any aggravating factors of the aforementioned kind. Outside the analysis of the specific criminal conduct the Judges discussed possible factors concerning the individual circumstances of the convicted person. The fact that

<sup>90</sup> The RUF command, for example, referred to some of their units as ‘Small Boys Units’ or ‘Small Girls Units’. See *Prosecutor v. Sesay, Kallon and Gbao*, *supra* note 46, 518, para. 1745. The child soldier phenomenon in Sierra Leone and its surrounding States was much graver than in the eastern part of the DRC. But a comparison is hard to make because the conflicts between the RUF, the AFRC and the CDR were much more widespread and lasted many years.

<sup>91</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 32-33, para. 87. The SCSL had also rightly rejected a possible fighting for a just cause to be a mitigating factor. See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgment, SCSL-04-14-A, 28 May 2008, 169-170 & 173, paras 523 & 534.

<sup>92</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 23-24, para. 59.

<sup>93</sup> *Ibid.*, 28, paras 74-75.

Lubanga had no prior conviction could hardly be a mitigating factor. When it comes to core crimes, nobody can seriously expect to receive a lesser penalty because this was his first war crime. Instead, it found the full cooperation of the defendant with the Court during the entire proceedings to be a mitigating circumstance.<sup>94</sup> It did not, consider his senior position within the UPC/FPLC do be aggravating, though such factors had been taken into consideration by the ICTY in cases where defendants held extremely influential posts.<sup>95</sup> In sum, one can conclude that the Court characterized the conduct under consideration to be somewhat of an average gravity, though it did not expressly say so.

## II. Some General Sentencing Rules

The OTP argued that the starting point for any crime under the *Rome Statute* had to be 80 percent of the statutory maximum of 30 years of imprisonment and requested a 30-year joint sentence for Lubanga.<sup>96</sup> Such a sentencing rule is nowhere to be found in the *Rome Statute* or its *Rules of Procedure and Evidence*. It would drastically restrict the Chamber in its search for the appropriate penalty with the result of very little breathing space (6 years) for very varying degrees of culpability. In addition, the prosecutor's result is the maximum possible sentence in accordance with Article 77 (1) (a) of the *Rome Statute*. So when the crime of child soldiering deserves the maximum sentence, where do we go from here? Is life imprisonment for every future conviction for crimes against humanity, which by some authors is being regarded as being more severe than war crimes,<sup>97</sup> the only left avenue then?<sup>98</sup> And what is appropriate in case of genocide? The answers are obvious and the Judges discarded the OTP's approach.<sup>99</sup> Instead, they treated each charged conduct separately and found 13 years for conscripting child soldiers, 12 years for enlisting child soldiers and 15 years of imprisonment for using child soldiers actively in hostilities to be

<sup>94</sup> *Ibid.*, 34, para. 91.

<sup>95</sup> *Prosecutor v. Biljana Plavšić*, Judgment, IT-00-39 & 40/1, 27 February 2003, 19, para. 57; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment, IT-02-60-A, 9 May 2007, 128, para. 324.

<sup>96</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 34-35, paras 92 & 95.

<sup>97</sup> See Schabas, *supra* note 12, 41.

<sup>98</sup> Not even Judge Odio Benito called for such drastic measures. She requested a joint sentence of 15 years in her Dissenting Opinion. See Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 52, para. 27.

<sup>99</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 35, para. 93.

the appropriate sentences.<sup>100</sup> The joint sentence was 14 years.<sup>101</sup> These separate findings establish some sort of hierarchy within the war crime of Article 8 (2) (e) (vii) of the *Rome Statute* in terms of gravity. The result being that active use is definitely the harshest form of this crime. This is only logical because 'active use' directly exposes the children to the dangers of armed conflict while the conduct of conscription and enlistment is more of a preparatory stage leading to their use.<sup>102</sup> Giving enlistment less weight than conscription eventually corresponds with the Trial Chamber's earlier statement in the judgment, that enlistment has a voluntary element while conscription supposedly implies some form of compulsion.<sup>103</sup> In the end, the Chamber deducted the time Lubanga spent in detention in The Hague but refused to do so when considering his time spent in detention in the DRC before being transferred to the Court.<sup>104</sup> Such prior detention only qualifies for a deduction if it was served because of conduct underlying the crimes for which the defendant was tried for at the ICC, Article 78 (2) of the *Rome Statute*. The Chamber did not find sufficient evidence to ascertain that Lubanga was detained in Kinshasa because of crimes of child recruitment. Given the dire financial situation of the defendant the Chamber did not impose an additional fine to benefit the Trust Fund for Victims.<sup>105</sup>

## E. Conclusion

Despite much criticism, the ICC showed that it is a functioning institution. Even if not all contentious issues were sufficiently resolved by the Trial Chamber, the precedential value of its rulings on the material elements of the war crime of child soldiering is evident. Judge Odio Benito's reasoning was rightly rejected by the majority of the Chamber. Also the sentencing decision establishes some important first guidelines for interpreting Article 78 of the *Rome Statute*. The defence and the OTP appealed the judgment. The prosecutor argued in its brief that a 14-year sentence fails to give sufficient weight to the gravity of the

<sup>100</sup> *Ibid.*, 36, para. 98.

<sup>101</sup> *Ibid.*, 37 & 38-39, paras 99 & 107.

<sup>102</sup> Odio Benito finds all three modes of conduct to be of equal gravity. See Dissenting Opinion of Judge Odio Benito, *Prosecutor v. Lubanga*, Decision on Sentence, *supra* notes 1 & 98, 51-52, paras 24-26. The Chief Prosecutor had argued in his opening statement on 26 January 2009 that no distinction as to gravity arises between these three modes of conduct.

<sup>103</sup> *Prosecutor v. Lubanga*, Judgment, *supra* note 2, 278-279, para. 608.

<sup>104</sup> *Prosecutor v. Lubanga*, Decision on Sentence, *supra* note 1, 37, paras 100-102.

<sup>105</sup> *Ibid.*, 38, paras 105-106.

crimes against children and the extent of the damage caused to victims and their families.<sup>106</sup> Lubanga's counsel based their appeal on several grounds. One of their arguments being that the Trial Chamber erroneously concluded the recruitment of children into the FPLC was widespread.<sup>107</sup> Now the Appeals Chamber will have the chance to rule on these controversial issues.

<sup>106</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Document in Support of Appeal against the "Decision on sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-2950, 3 December 2012, 46, paras 94-95.

<sup>107</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Mr Thomas Lubanga's Appellate Brief against Trial Chamber I's 10 July 2012 Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, 3 December 2012, 5-9, paras 12-25.



## **Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law**

Wolfgang Alschner\*

### Table of Contents

A. Introduction.....	456
B. FCN Treaties as Investment Protection Agreements .....	461
C. The 1980s U.S. Debate and the Shift From FCN to BITs.....	463
D. The Impact of FCN Treaties on the U.S. BIT Program .....	468
I. Pre-Establishment Provisions.....	469
II. Non-Conforming Measures .....	470
III. International Law Minimum Standard.....	471
IV. Protection of Personal Investor Rights .....	472
V. Transparency and Other Positive Integration-Type Obligations .....	473
E. There and Back Again: The Return of the FCN Approach to Investment Treaties .....	474
I. The Rise and Decline of First Generation BITs.....	475
II. The Changing Economics of Investment .....	477
III. The Rise of a New Generation of Investment Treaties .....	480
F. The Americanization of the IIA Universe .....	484
G. Conclusion: What to Make of the Return of the FCN Approach? .....	485

\* Graduate Institute of International and Development Studies, Geneva, Switzerland. An earlier version of this paper was presented at the 2nd Conference of the Postgraduate and Early Professionals/Academics Network of the Society of International Economic Law (PEPA/SIEL) at Goettingen University, 25th & 26th January 2013. I want to thank the organizers for their great work and the participants and commentators for their valuable feedback.

## Abstract

Friendship, Commerce and Navigation (FCN) treaties are more than a historical precursor to international investment agreements (IIA) and continue to influence and inspire modern investment treaty design. Until the 1960s, FCN treaties were the American conceptual alternative to the European BIT Model. FCN treaties were comprehensive and complex agreements covering trade, intellectual property, and even human rights in addition to investment disciplines. BITs, in contrast, were short, simple, and focused on investment protection only. Furthermore, while FCN treaties were designed to govern symmetrical investment relations between like-minded developed countries, BITs targeted an asymmetrical relationship between developed capital exporting States and developing capital importers. Even after the U.S. shifted from FCN to BITs in the early 1980s, FCN treaties continued to impact investment policy-making. First, key FCN features such as pre-establishment commitments, non-conforming measures, and investor rights survived the U.S. policy-shift and have since found their way into IIAs around the world. Second, as a conceptual alternative to simple and specialized European BITs, FCN treaties have inspired a new generation of IIAs that are complex and comprehensive in nature, containing a fine-tuned mix of rights and obligations, and treating investment alongside other policy concerns. Third, the spread of FCN-inspired treaties coincides with the demise of European-style BITs. As policy-makers turn to the United States instead of Europe for investment policy innovation, we observe an Americanization of the IIA universe.

## A. Introduction

The year 1959 is often referred to as the date of birth of the modern international investment agreement (IIA) with the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan.<sup>1</sup> This reference, and the underlying emphasis on BITs, tends to neglect another rich body of investment treaties – the so-called Friendship, Commerce and Navigation (FCN) treaties.<sup>2</sup>

<sup>1</sup> *1959 Germany–Pakistan BIT*, 25 November 1959, 457 UNTS 23. R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), 6. United Nations Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties 1959-1999* (2000), 1 [UNCTAD, *Bilateral Investment Treaties 1959-1999*].

<sup>2</sup> For recent work on FCN treaties and its relevance for investment law, see J. F. Coyle, ‘The Treaty of Friendship, Commerce and Navigation in the Modern Era’, 51 *Columbia*

Predating BIT practice and primarily concluded by the United States of America (United States, U.S.), FCN treaties were originally concerned mainly with commercial matters, but developed a significant investment protection component after the Second World War.

FCN treaties can tell us much about the past, present, and arguably even the future of international investment treaty law. On the historical front, FCN treaties inspired the terms of the *Abs-Shawcross Draft Convention*, upon which the first BITs were modeled. Thereby, FCN treaties coined some of the core standards like ‘fair and equitable treatment’ (FET) that are omnipresent in today’s investment law.<sup>3</sup> But FCN treaties also remain relevant on their own. Over forty FCN treaties are still in force today and exist in parallel to the BIT universe.<sup>4</sup> The *ELSI* case, one of the few investment disputes brought before the International Court of Justice, concerned the breach of an FCN treaty.<sup>5</sup> Moreover, creative lawyers have contemplated the use of FCN treaties to advance arguments impossible to justify under BITs.<sup>6</sup> In the most comprehensive recent study on the modern relevance of FCN treaties, Coyle even argues that these treaties can inform future policy-making.<sup>7</sup> While he concedes that FCN treaties are less important today when it comes to protecting rights of foreigners in domestic litigation, since host State’ statutes and more specialized international treaties have largely supplanted FCN provisions, he points out that the FCN model can

*Journal of Transnational Law* (2013) 2, 302; J. W. Yackee, ‘Sacrificing Sovereignty: Bilateral Investment Treaties, International Arbitration, and the Quest for Capital’, *USC Center in Law, Economics and Organization Research Paper No. C06-15* (2006); O. T. Johnson Jr. & J. Gimblett, ‘From Gunboats to BITs: The Evolution of Modern International Investment Law’, 3 *Yearbook on International Investment Law & Policy* (2010-2011) (2012), 649; K. J. Vandavelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (2010), 19-24 (in particular) [Vandavelde, BITs: History, Policy, and Interpretation].

<sup>3</sup> H. Abs & H. Shawcross, ‘The Proposed Convention to Protect Private Foreign Investment: Introduction’, 9 *Journal of Public Law* (1960) 1, 115, 119-120; F. A. Mann, ‘British Treaties for the Promotion and Protection of Investments’, 52 *British Yearbook of International Law* (1981), 241, 241. For the influence of the *Draft Convention* on BITs, see S. W. Schill, *The Multilateralization of International Investment Law* (2009), 35-36.

<sup>4</sup> For an overview of U.S. FCN treaties in force, see the website of the U.S. Trade Compliance Center, available at [http://tcc.export.gov/Trade\\_Agreements/index.asp](http://tcc.export.gov/Trade_Agreements/index.asp) (last visited 31 January 2014).

<sup>5</sup> It concerned an alleged breach of the *U.S.–Italy FCN Treaty*. See *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Judgment, ICJ Reports 1989, 15.

<sup>6</sup> See Schill, *supra* note 3, 147-150. He points out that the *Germany–U.S. FCN Treaty*, unlike most BITs, does not exclude benefits from the ambit of its MFN clause that arise by virtue of a contracting party’s membership in a regional integration organization.

<sup>7</sup> Coyle, *supra* note 2.

address two pressing contemporary challenges in international law. First, FCN treaties show how diverse areas of law can be managed under a single treaty umbrella, providing a practical solution to international law's fragmentation. Second, in the debate over re-balancing investment treaties, FCN treaties offer a unique but overlooked example on how non-investment considerations such as human rights can be inserted into investment protection treaties.<sup>8</sup>

The most important contributions of FCN treaties to our understanding of the modern investment treaty universe, however, lie elsewhere. A fact that is seldom acknowledged is that until the 1960s, FCN treaties remained the American *alternative* to the BIT program of European States. Whereas BITs were short, simple, and focused on investment protection, FCN treaties were comprehensive and complex agreements covering trade, navigation, intellectual property, and even human rights in addition to investment disciplines. Furthermore, FCN treaties were primarily signed between developed countries and reflected the spirit of *symmetrical* political and economic relations. In the context of reciprocity, each contracting party would only demand what it was willing to give in return, resulting in carefully balanced treaties. BITs, in contrast, emerged in the context of *asymmetrical* political and economic relations. The balance underlying BITs was not a reciprocal trade-off between rights and obligations, but a 'grand bargain' of Northern capital in exchange for Southern countries tying their hands to investment protection standards.<sup>9</sup> So, FCN treaties and BITs were alternative approaches to investment policy-making, pursuing the same end through very different treaty design means.

The co-existence of the two models of investment protection agreements did not last long. In the midst of the Cold War and decolonization, it became increasingly difficult for the United States to sign FCN treaties. American business groups grew increasingly weary of negotiations with potential markets for foreign direct investment being stalled over human rights issues, while their European competitors benefited from the competitive advantage of an increasingly wide web of investment protection agreements. After a number of failed negotiations, the United States finally decided to abandon its century-old

<sup>8</sup> *Ibid.*

<sup>9</sup> J. W. Salacuse & N. P. Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain', 46 *Harvard International Law Journal* (2005) 1, 67 [Salacuse & Sullivan, Do BITs Really Work].

policy of concluding FCN treaties in the late 1970s and, instead, endorsed the European BIT approach.

The U.S. debate surrounding the shift from FCN to BITs is not only of historical interest. In fact, as this article will show, it exposes fault lines that still run through the investment treaty universe today and can tell us much about investment law's evolution. Firstly, even after they were formally abandoned, the FCN treaty heritage had a marked influence on the U.S. investment treaty program. Even though the U.S. largely followed the European BIT Model, American BITs retained a number of key FCN treaty design features absent in European BITs. These treaty features included 1) an important liberalization dimension, 2) reservations to safeguard policy space, 3) references to the international law minimum standard, 4) a greater focus on the investing individual (rather than just her investment) and, finally, 5) positive integration-type obligations. After being first incorporated into the U.S. BIT program, these FCN features inspired NAFTA and ultimately spread into the entire investment treaty universe. Today, these FCN elements continue to evolve and are systematically used in IIAs concluded by Australia, Canada, Chile, Japan, South Korea, Peru, Singapore, and Taiwan amongst others.

Secondly, as a conceptual alternative to the BIT approach, FCN treaties had a lasting *ideational* impact beyond the American BIT program, inspiring the recent emergence of a second generation of investment treaties markedly different from first generation European treaties. At its core, the 1980s U.S. debate concerned the question of what treaty design is best suited to govern investment relations. Should inter-state investment relations be regulated by short, simple, and specialized agreements focusing on investment protection only, or, should they be governed by more complex and comprehensive instruments that treat investment in its wider context? In the U.S. policy debate of the 1980s, the contest was won by the BIT approach. With the advent of more symmetrical investment flows, a more intertwined global economy, and developed countries entering in investment treaties among themselves, however, we observe a full reversal of the U.S. debate. More and more countries revert from simple BITs to more complex and comprehensive BITs and preferential trade and investment agreements (PTIAs) that are better suited to govern 21st century investment relations. While this emerging second generation of IIAs has little in common with FCN treaties in terms of subject matters covered, it reflects the FCN approach to investment policy-making: protecting investment abroad while safeguarding policy space at home and treating investment in its wider policy context. Hence, the FCN treaty approach to investment

treaties, its demise in the 1980s and its recent return are a prism through which we can better understand the evolution of investment treaty law.<sup>10</sup>

Finally, the return of the FCN treaty approach and its design elements also point to an Americanization of the global investment treaty universe which had long been dominated by European-style BITs. As more and more countries dissatisfied with the performance of existing BITs look to Washington instead of Europe for policy innovation, the new gold-standard for investment treaties is made in the U.S. This global policy shift is currently at a critical juncture as the European Union, which recently acquired competency over investment policy-making through the *Lisbon Treaty*, is negotiating IIAs with Canada and the U.S. If the EU rejects the long-standing traditional BIT approach of its most influential Member States and turns to more complex and comprehensive agreements, these negotiations will mark the late victory of the FCN approach over the short, simple, and specialized BIT model.

As an alternative approach to investment protection, the FCN model has thus informed investment treaty-making, has inspired concrete treaty design features absent in traditional BITs, and is likely to become the globally dominating approach to investment policy-making. This article traces this impact of FCN treaties on modern investment treaty law, offering new insights into the evolution of investment treaty-making. First, it presents FCN as an alternative approach to investment policy-making. Second, it recapitulates the U.S. debate in the early 1980s that surrounded the transition from FCN to BITs. Third, by identifying FCN design features that survived the transition, the article shows how FCN treaties inspired the provisions of the U.S. BIT program. Fourth, moving from concrete treaty features to underlying ideas, the contribution describes and explains the re-emergence of the FCN approach in recent IIAs and highlights the increasing Americanization of the global IIA

<sup>10</sup> This contribution is a study of comparative treaty design. Aside from conducting a traditional comparative legal analysis of BITs and FCN at a micro-level (specific legal provisions) and a macro-level (surrounding legal context), this study introduces a meso-level treaty design analysis. Occupying a middle ground, a treaty design analysis looks beyond content and context and instead focuses on the functional architecture and underlying structures of a treaty. For traditional comparative law, see K. Zweigert & H. Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed. (1996), 4-5.

universe. The paper concludes by evaluating the impact of the return of FCN treaty design on international investment treaty law.

## B. FCN Treaties as Investment Protection Agreements

As their name suggests, friendship, commerce and navigation treaties were not initially conceived as investment protection agreements. Originally, these treaties sought to establish friendly political and commercial relations between the newly independent American colonies and the Old Continent.<sup>11</sup> The first FCN treaty was concluded in 1778, in the midst of the American War of Independence, between the United States and France and was signed together with a treaty of alliance between the two countries.<sup>12</sup> After independence, similar agreements between the U.S. and other European and South American countries followed suit.<sup>13</sup> These early FCN treaties primarily dealt with commercial matters, guaranteeing most-favoured nation (MFN) treatment in trade,<sup>14</sup> but also addressed the status of American citizens abroad covering consular relations, immigration, as well as religious and personal rights.<sup>15</sup> The protection of alien property rights was present, but initially constituted a mere incidental feature of early FCN treaties.<sup>16</sup> This began to change after the First World War, as the U.S. turned from a capital importer to a capital exporter.<sup>17</sup> From the 1923 *U.S.–Germany FCN Treaty* onwards, the United States began to systematically expand the treaties' scope, from

<sup>11</sup> Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21-23.

<sup>12</sup> *Ibid.*, 19; H. Walker Jr., 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice', 5 *American Journal of Comparative Law* (1956) 2, 229, 231 [Walker, Protection of Foreign Investment].

<sup>13</sup> Walker, 'Protection of Foreign Investment', *supra* note 12, 231; H. Walker Jr., 'Modern Treaties of Friendship, Commerce and Navigation', 42 *Minnesota Law Review* (1958) 5, 805, 805 (in particular) [Walker, Modern Treaties of Friendship, Commerce and Navigation]; Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21-26.

<sup>14</sup> Schill, *supra* note 3, 29-30.

<sup>15</sup> K. S. Gudgeon, 'United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards', 4 *International Tax & Business Lawyer* (1986) 1, 105, 108. On the common origins of trade, investment, and human rights law, see also N. DiMascio & J. Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?', 102 *American Journal of International Law* (2008) 1, 48.

<sup>16</sup> Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 21.

<sup>17</sup> R. R. Wilson, 'A Decade of New Commercial Treaties', 50 *American Journal of International Law* (1956) 4, 927, 928 [Wilson, Commercial Treaties].

covering primarily natural persons to also protecting the rights of companies abroad,<sup>18</sup> and also set out to strengthen the protection of private property.<sup>19</sup>

The major change in the focus of FCN treaties occurred in the years following the Second World War. With international trade becoming subject to multilateral rules through the inception of the GATT in 1947, the content of FCN treaties gradually shifted towards the protection of investment abroad. In post-war FCN treaties, investment-related provisions then made up almost half of the treaty body.<sup>20</sup> In the words of one commentator, these instruments had effectively been turned into “Treaties for the Encouragement and Protection of Foreign Investment”.<sup>21</sup> Hence, contrary to what is sometimes asserted,<sup>22</sup> FCN treaties, at least in the post-war era, were not primarily about trade, but already contained extensive investment protection standards.<sup>23</sup> Sachs thus concludes that “the [U.S.] transition from FCN to BIT occurred not in the early 1980s but some thirty years earlier”.<sup>24</sup> Between 1946 and 1966, the U.S. concluded 21 such agreements.<sup>25</sup> Other countries such as Japan and, to a more limited extent, Germany and the UK concluded similar FCN type treaties in the same period.<sup>26</sup>

These FCN treaties contained investment protection standards very similar to those offered by early BITs albeit with minor differences in language, with the FCN treaty referring to ‘nationals’, ‘companies’ or, ‘property’ whereas BITs talked about ‘investors’, ‘investment’ and ‘assets’.<sup>27</sup> This is best illustrated by the *U.S.–Pakistan FCN Treaty* concluded in the same year (1959) as the first BIT between Germany and Pakistan. The two agreements contained the same core investment protection standards, such as non-discrimination, full

<sup>18</sup> H. Walker Jr., ‘Provisions on Companies in United States Commercial Treaties’, 50 *American Journal of International Law* (1956) 2, 373; W. Sachs, ‘The New U.S. Bilateral Investment Treaties’, 2 *International Tax & Business Lawyer* (1984) 1, 192, 196.

<sup>19</sup> R. R. Wilson, ‘Property-Protection Provisions in United States Commercial Treaties’, 45 *American Journal of International Law* (1951) 1, 83.

<sup>20</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 12, 234.

<sup>21</sup> *Ibid.*, 229.

<sup>22</sup> Schill, *supra* note 3, 29.

<sup>23</sup> K. J. Vandeveld, ‘A Brief History of International Investment Agreements’, 12 *UC Davis Journal of International Law & Policy* (2005) 1, 157, 162-166 [Vandeveld, A Brief History of IIAs].

<sup>24</sup> Sachs, *supra* note 18, 197.

<sup>25</sup> K. J. Vandeveld, ‘The Bilateral Investment Treaty Program of the United States’, 21 *Cornell International Law Journal* (1988) 2, 201, 209 [Vandeveld, The BIT Program of the United States].

<sup>26</sup> Johnson Jr. & Gimblett, *supra* note 2, 677; Yackee, *supra* note 2, 19.

<sup>27</sup> See Coyle, *supra* note 2, 350-351.

protection and security, expropriation and transfer of funds.<sup>28</sup> Neither of the two agreements provided for investor-State arbitration (ISA), since BITs began to include ISA provisions, “what has turned out to be their primary—indeed, their only truly important—difference from modern FCN treaties”,<sup>29</sup> only in the 1960s.<sup>30</sup> So, in summary, in the early 1960s, FCN treaties and BITs coexisted as investment protection treaties.

### C. The 1980s U.S. Debate and the Shift From FCN to BITs

In spite of their similarities, FCN treaties and BIT differed notably in their underlying approach to investment policy-making. These differences crystallized most clearly in the U.S. debate in the late 1970s and early 1980s on whether the U.S. should adopt the European-style BITs or continue to conclude FCN treaties. At that time, the American business community had become increasingly dissatisfied with FCN treaties as a policy tool for investment protection, and had begun to pressurise the government to endorse a treaty model more akin to European BITs.<sup>31</sup> The principal criticism was targeted at the design of FCN treaties. Even in its post-war form, FCN treaties remained comprehensive and complex agreements covering a wide array of potentially controversial subject matters such as human rights, immigration policy, or religious practices.<sup>32</sup> As Bergmann notes: “the attempt to address very complex issues in the context of such a broad spectrum of relations detracted from the utility of the FCN as an investment protection device”<sup>33</sup> and made the negotiation of these treaties highly cumbersome and politicized, often resulting in failure. The United States

<sup>28</sup> Johnson Jr. & Gimblett, *supra* note 2, 678; Yackee, *supra* note 2, 89 (note 43).

<sup>29</sup> Johnson Jr. & Gimblett, *supra* note 2, 679.

<sup>30</sup> On the similarities and differences between BITs and FCN, see Vandavelde, ‘A Brief History of IIAs’, *supra* note 23, 168-175.

<sup>31</sup> V. H. Ruttenberg, ‘The United States Bilateral Investment Treaty Program: Variations on the Model’, 9 *Journal of International Business Law* (1987) 1, 121, 122; Sachs, *supra* note 18, 21; C. A. Hamilton & P. I. Rochwerger, ‘Trade and Investment: Foreign Direct Investment Through Bilateral and Multilateral Treaties’, 18 *New York International Law Review* (2005) 1, 1, 4-5; Vandavelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 25.

<sup>32</sup> Hamilton & Rochwerger, *supra* note 31, 44; Gudgeon, *supra* note 15, 108.

<sup>33</sup> M. S. Bergman, ‘Bilateral Investment Protection Treaties: An Examination of the Evolution and Significance of the U.S. Prototype Treaty’, 16 *New York University Journal of International Law & Politics* (1983) 1, 1, 7.

concluded its last FCN treaty with Thailand in 1966.<sup>34</sup> A subsequent negotiation with the Philippines was abandoned in the early 1970s.<sup>35</sup>

At the same time, European countries were highly successful in negotiating BITs. Until the late 1970s over 170 of such agreements had been concluded.<sup>36</sup> The comparative advantage of European BITs lay in their “brevity and simplicity”.<sup>37</sup> In contrast to FCN treaties, BITs were short, intuitive, and focused on investment protection only. As the primary advocate of BITs in the U.S., the American business community hoped that a more concise treaty model tailored to the specific needs of American investors especially in developing countries could close the gap of treaty protection separating them from their European competitors.<sup>38</sup> This appeared particularly acute in light of frequent investment restrictions and expropriations in developing countries at the time.<sup>39</sup> In response, the Reagan Administration decided to shift from the traditional FCN treaty to the European BIT Model.<sup>40</sup> The first U.S BIT was concluded with Egypt in 1982, and nine more agreements followed in the same decade.<sup>41</sup>

The shift from FCN to BITs marked a significant conceptual departure in the U.S. investment treaty policy in two ways. First, U.S. FCN treaties had not been limited or even primarily targeted at developing countries.<sup>42</sup> Rather the opposite was true. As ‘treaties of general relations’ they were originally designed to form political and economic ties with other developed countries.<sup>43</sup> Also in the post-war period, negotiations by the U.S. included major developed States such as France, Italy, Belgium, or Germany. FCN treaties were thus firmly grounded in the principle of symmetry, reciprocity, and mutuality – premises which did not vary significantly even when applied to a developing country treaty partner, since FCN, like later BITs, were negotiated using model agreements.<sup>44</sup> This

<sup>34</sup> Ruttenberg, *supra* note 31, 124.

<sup>35</sup> Gudgeon, *supra* note 15, 108.

<sup>36</sup> United Nations Centre on Transnational Corporations (UNCTC), *Bilateral Investment Treaties 1959-1991* (1992), 3.

<sup>37</sup> Gudgeon, *supra* note 15, 110.

<sup>38</sup> Ruttenberg, *supra* note 31, 122.

<sup>39</sup> Vandavelde, ‘A Brief History of IIAs’, *supra* note 23, 166-171.

<sup>40</sup> Ruttenberg, *supra* note 31, 121.

<sup>41</sup> Sachs, *supra* note 18, 193 (note 10).

<sup>42</sup> Vandavelde, ‘The BIT Program of the United States’, *supra* note 25, 209: “Unlike the modern FCNs, which were directed primarily at developed countries, the BITs, were targeted at developing countries.”

<sup>43</sup> Coyle, *supra* note 2, 306-307.

<sup>44</sup> Vandavelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 19; Sachs, *supra* note 18, 197; Wilson, ‘Commercial Treaties’, *supra* note 17, 928.

symmetry coupled with the fact that FCN treaties were considered directly enforceable before U.S. courts<sup>45</sup> and could spark actual litigation on issues highly intrusive to national sovereignty such as employment regulations<sup>46</sup> had important repercussions on treaty design. As Walker observed, “the limits of [a] [FCN type] investment treaty are set by the degree to which the United States is willing to bind its own domestic policy”.<sup>47</sup> In other words, reciprocity in law and in fact imposed a natural restraint on investment protection in FCN treaties. As a result, these treaties reflected a finely tuned balance of investment protection obligations and flexibility clauses preserving the right to regulate in sensitive policy areas<sup>48</sup> which rendered FCN treaties “essentially moderate in their content and purport”.<sup>49</sup> The same is not true for BITs. BITs were designed to cover an asymmetrical relationship between developed, capital exporting countries and developing, capital importing countries.<sup>50</sup> Although BITs formally apply equally to both parties, with investment flows being unidirectional, “reciprocity is to a large extent a matter of prestige rather than reality”.<sup>51</sup> The former U.S. negotiator Alvarez concurs: “[t]he regulatory burdens of [early U.S. BITs] fell almost entirely on our (LDC) BIT partners.”<sup>52</sup> Even

<sup>45</sup> Coyle, *supra* note 2, 335 (note 142).

<sup>46</sup> J. A. Miller, ‘Title VII and the FCN Treaty: The Exemption of Japanese Branch Operations from Employment Discrimination Laws’, 7 *Boston College International and Comparative Law Review* (1984) 1, 67.

<sup>47</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 12, 246. Similarly, Walker, ‘Modern Treaties of Friendship, Commerce and Navigation’, *supra* note 13, 810.

<sup>48</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 12, 247. For examples of such investment-related flexibility clauses, see, for instance, the 1959 *U.S.–Pakistan FCN Treaty*, Arts II (3), VII (2), IX (3), XII (2) & XX (12 U.S.T. 110, 112, 114-117 & 121-122).

<sup>49</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 12, 247. Walker goes on to confirm that “moderation is not synonymous with ineffectiveness. These treaties focus, in fundamental terms of enduring value over the long range, upon the line between policy favorable and policy unfavorable to foreign investment.” *Ibid.*

<sup>50</sup> J. W. Salacuse, ‘BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries’, 24 *The International Lawyer* (1990) 3, 655, 663: “A BIT purports to create a symmetrical legal relationship between the two States, for it provides that either party may invest under the same conditions in the territory of the other. In reality, an asymmetry exists between the parties to most BITs since one State will be the source and the other the recipient of virtually any investment flows between the two countries. This asymmetry conditions the dynamics of the BIT negotiation.”

<sup>51</sup> Mann, *supra* note 3, 241.

<sup>52</sup> J. E. Alvarez, ‘The Evolving BIT’, 7 *Transnational Dispute Management* (2010) 1, 1, 3.

if reciprocal investment flows had existed, the possibility of litigation against developed countries was dismissed by commentators. As Gann put it in 1985,

“[f]rom the United States’ standpoint, the rights and duties under the BITs are redundant because investments in the United States already receive substantial and non-discriminatory protection. The practical effect of the BIT, then, is to secure from the signatory developing country some assurance of encouragement and protection of outbound U.S. investment.”<sup>53</sup>

Since reciprocity coupled with the threat of litigation at home, which had imposed a natural restraint on FCN treaties, was thus absent in BITs, the treaty design of the latter became skewed in favor of investment protection obligations, giving little consideration to the host State’s regulatory autonomy. The *quid pro quo* of BITs was thus fundamentally different from the trade-off of rights and obligations in FCN treaties.<sup>54</sup> Developing countries signed BITs ‘that hurt them’ to benefit from a different bargain: they hoped to reap development benefits arising from increased foreign investment, in exchange for limiting their right to regulate and expropriate.<sup>55</sup> In sum, FCN treaties and BITs were signed in very different spirits, and reflected a very different mix of investment protection obligations and regulatory flexibility.

Second, the U.S.’ endorsement of the BIT model meant an investment policy shift away from a holistic treatment of investment, trade, and foreign relations together to a compartmentalization of legal regimes. Proponents of BITs considered this investment-only approach to be beneficial as it allowed for stronger and more tailored investment protection and avoided politically contentious

<sup>53</sup> P. B. Gann, ‘The U.S. Bilateral Investment Treaty Program’, 21 *Stanford Journal International Law* (1985) 2, 373, 374.

<sup>54</sup> See Salacuse & Sullivan, ‘Do BITs Really Work’, *supra* note 9, 77: “An investment treaty between two developed States, both of whose nationals expect to invest in the territory of the other, would be based on the notion of reciprocity and mutual protection. However, this bargain would not seem applicable in the context of a treaty between a developed, capital-exporting State and a poor, developing country whose nationals are unlikely to invest abroad.”

<sup>55</sup> A. T. Guzman, ‘Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’, 38 *Virginia Journal of International Law* (1998) 4, 639, 658-665; Salacuse & Sullivan, ‘Do BITs Really Work’, *supra* note 9, 77.

issue areas, speeding up negotiation.<sup>56</sup> Divorcing investment protection from its wider policy context, however, also has important drawbacks. As Walker noted:

“The building and operation of a motor factory by a big corporation clearly is ‘investment’ in its major ‘economic development’ connotation; but how can, and why should, treaty protection be written that does not cover also, at the other end of the business scale, the individual entrepreneur engaged in a sales activity?”<sup>57</sup>

In practice, investment transactions are often intrinsically linked to trade and intellectual property rights but also touch upon environmental, cultural, and human rights issues. That is why, as Walker put it:

“[The FCN treaty] regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total ‘climate’ in which it is to exist. A specialized ‘investment agreement’ [i.e. a BIT] based on a narrower premise would be to that extent unrealistic and inadequate.”<sup>58</sup>

So whereas the BIT as a special-purpose vehicle may have been more apt to advance some of the protective interests of investors, it lacked the benefits associated with a comprehensive treatment of investment ‘in context’ which FCN treaties displayed.

In sum, FCN treaties and BITs were both agreements to protect foreign investment, but they reflected two opposing philosophies on how this was best to be achieved. BITs were short, simple, and highly specialized agreements tailored to govern an asymmetrical economic relationship, whereas FCN treaties were complex and comprehensive agreements placing investment protection in its wider context and designed to cover symmetrical economic exchanges. In spite of these differences, it is not entirely true that the “FCN treaty has few bases for comparison with the more focused investment treaties of modern times”.<sup>59</sup> As

<sup>56</sup> Gudgeon, *supra* note 15, 108-109; Ruttenberg, *supra* note 31, 124.

<sup>57</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 12, 244.

<sup>58</sup> *Ibid.*

<sup>59</sup> M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (2010), 182. For Sornarajah, FCN treaties may, however, offer an insight into how instruments initially designed to spread the influence of powerful countries can be turned against their initial masters. Not unlike NAFTA, which was unexpectedly used to challenge not only Mexican,

will be further explored in the following sections, as an alternative approach to investment treaty design FCN treaties continue to inspire actual policy-making.

#### D. The Impact of FCN Treaties on the U.S. BIT Program

While the U.S. policy shift reflected a change in the underlying approach to investment policy-making, the U.S. did not fully abandon its FCN heritage. In fact, several FCN treaty design elements survived the policy shift and were integrated and reformulated in the U.S. BIT program and, from there, inspired NAFTA and, indeed, global investment treaty-making.

Although commentators differ in their assessment of the FCN impact on U.S. BITs,<sup>60</sup> it can be safely said that FCN treaties provided a crucial reference point for early U.S. BIT negotiators. On the one hand, the FCN experience provided motivation to remedy perceived deficiencies of earlier treaties in the new BITs. For instance, improvements were perceived necessary with respect to expropriation and arbitration provisions of FCN treaties.<sup>61</sup> On the other hand, the U.S. program clearly built on the FCN experience. Rather than blindly copying from European-style treaties, U.S. drafters strove to combine the best of both worlds.<sup>62</sup> Sometimes this meant improving on both FCN treaties and European BITs. For instance, both FCN treaties and BITs were criticized for the vagueness of their treaty provisions.<sup>63</sup> According to Gudgeon “there was concern that the European model lacked sufficient

but also Canadian and the American measures, FCN treaties had been used by Japanese nationals or the governments of Nicaragua and Iran to bring a case against U.S.

<sup>60</sup> Some authors consider the U.S. BIT program as the clear successor of the FCN program, albeit stripped of its non-investment components. See Gudgeon, *supra* note 15, 108-110; Sachs, *supra* note 18, 193-198; Vandeveld, *BITs: History, Policy, and Interpretation*, *supra* note 2, 1. Other authors clearly see a break between them. See Ruttenberg, *supra* note 31, 125-126; Bergman, *supra* note 33, 6 & 10; P. McKinstry Robin, ‘The Bit Won’t Bite: The American Bilateral Investment Treaty Program’, 33 *American University Law Review* (1984) 4, 931, 941-942.

<sup>61</sup> Bergman, *supra* note 33, 8.

<sup>62</sup> For detailed comparison see Gann, *supra* note 53.

<sup>63</sup> Bergman, *supra* note 33, 8; Ruttenberg, *supra* note 31, 125; McKinstry Robin, *supra* note 60, 941.

specific guidance in the enforcement context”.<sup>64</sup> As a result, the language of the 1982 *U.S. Model BIT* became particularly (or even overly) complex.<sup>65</sup>

Also, performance requirements absent in earlier FCN treaties or European BITs were considered necessary innovations and thus made their way into the IIA universe through the first U.S. BIT.<sup>66</sup> Most interesting for our purposes, however, are the instances where the U.S. program constituted the continuation of the FCN legacy. Largely absent in European-style BITs, five FCN design elements in particular survived the U.S. policy shift in the 1980s and have started to thrive in the modern investment treaties across the globe. They include 1) pre-establishment clauses, 2) non-conforming measures, 3) international law minimum standard references, 4) personal investor protection, and 5) positive integration-type clauses.<sup>67</sup> Aside from the United States, Australia, Canada, Chile, Japan, South Korea, Mexico, Singapore, and Taiwan, also, amongst others, today systematically include some or all of these FCN design features into their treaties.

## I. Pre-Establishment Provisions

Whereas European BITs were typically limited to investment protection post-establishment, American BITs from the very start also contained pre-establishment commitments that had traditionally been found in FCN treaties.<sup>68</sup> The common purpose of American FCN treaties and BITs was not only the protection of investment stock but also the liberalization of investment

<sup>64</sup> Gudgeon, *supra* note 15, 110. Conflicting interpretations by arbitral tribunals of similar treaty provisions (e.g. the necessity defense) are cases in point.

<sup>65</sup> The language was simplified in subsequent U.S. BITs. See Gann, *supra* note 53, 374. For criticism of the rigidity of the early U.S. BIT Model, see Ruttenberg, *supra* note 31, 134-137.

<sup>66</sup> A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), 422; McKinstry Robin, *supra* note 60, 949-950; Bergman, *supra* note 33, 18; Ruttenberg, *supra* note 31, 126.

<sup>67</sup> This list is not meant to exhaust the number of FCN features that were retained in U.S. BITs. As stated in the introduction, the impact of FCN language on BITs (both U.S. and non-U.S.) is much more pervasive. The purpose of this section is to identify conceptually significant treaty designed features that survived the shift from BITs to FCN.

<sup>68</sup> UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (2009), 20: “[...] looking from the perspective of developing countries, there are two BIT models: (a) ‘protection only’ BITs mostly with European countries and other developing countries; and (b) liberalizing BITs concluded mainly with the United States and Canada, and more recently, with Japan.”

flows.<sup>69</sup> The typical American IIA thus offers national treatment and most-favored nation treatment to foreign investors for the phases of acquisition and establishment also. The inclusion of a pre-establishment component has since become increasingly common in IIAs around the world.<sup>70</sup>

## II. Non-Conforming Measures

Historically linked, but not limited to the pre-establishment component of FCN treaties are reservations, also called non-conforming measures, which carve out certain policy areas from the national treatment and MFN obligations. The U.S. typically maintained restrictions regarding, for instance, the foreign acquisition of businesses in the field of communications, air or water transport, the exploitation of land, or other natural resources in their FCN treaties.<sup>71</sup> The early U.S. BITs continued this practice, but moved the listing of non-conforming measures to the annexes.<sup>72</sup> Modern investment treaties have followed NAFTA in refining this practice by setting up a complex multiple annex structure of non-conforming measures that include 1) existing non-conforming laws sometimes distinguishing between national and sub-national levels and 2) future non-conforming measures that may be taken in identified sectors or sub-sectors. Aside from grandfathering existing restrictions, the purpose of these annexes is to establish a ceiling of reservations, while allowing sufficient flexibility to regulate sensitive policy areas. These reservations are no longer limited to national treatment and MFN, but typically also cover performance

<sup>69</sup> Vandeveld, *BITs: History, Policy, and Interpretation*, *supra* note 2, 413-418. See also UNCTAD, *Admission and Establishment* (2002), 17 & 26.

<sup>70</sup> See, for instance, *ASEAN-Australia-New Zealand Free Trade Agreement* (2009), Art. 4 of Ch. 11, available at <http://www.asean.fta.govt.nz/assets/Agreement-Establishing-the-ASEAN-Australia-New-Zealand-Free-Trade-Area.pdf> (last visited 31 January 2014), 148; 2002 *Japan-South Korea BIT*, Art. 2; 2004 *Singapore-Jordan BIT*, Art. 5; 2005 *Belgium-Luxembourg-Dem. Rep. of the Congo BIT*, Art. 4 (2). China, in contrast, which has endorsed many of the other FCN features discussed below, has limited its pre-establishment commitments to MFN only. See 2012 *Canada-China FIPA*, Art. 5. All named BITs and the FIPA can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>71</sup> See, for instance, 1954 *Germany-U.S. FCN Treaty*, Art. VII (2) (7 U.S.T. 1839, 1847).

<sup>72</sup> See, for instance, 1994 *U.S. Model BIT*, Art. II (2) (a) (*Treaty Between the Government of the United States of America and the Government of [...] Concerning the Encouragement and Reciprocal Protection of Investment*, reprinted in UNCTAD, *International Investment Instruments: A Compendium*, Vol. III (1996), 195, 197).

requirements and sojourn of personnel provisions.<sup>73</sup> Additional policy space is accounted for in recent IIAs that provide the contracting States with the right to issue interpretations of annexes in the course of investor-State arbitration that are binding on the tribunal.<sup>74</sup> Importantly, the inclusion of non-conforming measures does not necessarily translate into a lower level of investment protection, as compared to European BITs where such reservations are generally absent. As highlighted by several commentators, American treaties reach even higher levels of protection, since non-conforming measures are accompanied by more extensive or new protective obligations (e.g. performance requirements) generally not found in European BITs.<sup>75</sup>

### III. International Law Minimum Standard

One of the goals of the American FCN and then the BIT program consisted of the reinforcement and recognition of an international customary law minimum standard of treatment (MST) in light of its contestation by countries of the South.<sup>76</sup> While the ‘fair and equitable treatment’ (FET) clause was typically self-standing in FCN treaties, the obligation to afford ‘constant protection and security’ to nationals was tied to the international law minimum standard.<sup>77</sup> When the new *U.S. Model BIT* joined the two clauses, the reference to international law was retained in Article II (4) of the 1982 *U.S. Model BIT*.<sup>78</sup> Such a direct textual reference was absent both in the *Abs-Shawcroft Draft* and the 1967 *OECD Draft Convention on the Protection of Foreign Property* which inspired European BITs, leading to a debate on whether these standards are free standing, or linked to customary international law.<sup>79</sup> While the inclusion of the

<sup>73</sup> See, for instance, 2011 *Colombia–Japan BIT*, Art. 1 of Annex I or 2008 *Rwanda–U.S. BIT*, Explanatory Notes of Annex I. Both BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>74</sup> See, e.g., 2008 *Rwanda–U.S. BIT*, Art. 31. The BIT can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>75</sup> Bergman, *supra* note 33, 24; Gann, *supra* note 53, 439.

<sup>76</sup> Bergman, *supra* note 33, 34–35. See generally S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009).

<sup>77</sup> See, for instance, 1959 *U.S.–Pakistan FCN Treaty*, Arts I & III (1) (*supra* note 48, 110 & 112); 1961 *U.S.–Belgium FCN Treaty*, Arts 1 & 3 (1) (14 U.S.T. 1284, 1286 & 1288); 1966 *U.S.–Thailand FCN Treaty*, Arts I (2) & III (2) (19 U.S.T. 5843, 5845 5847).

<sup>78</sup> See also Vandevelde, *BITs: History, Policy, and Interpretation*, *supra* note 2, 76.

<sup>79</sup> The 1967 Commentary to the *OECD Draft Convention*, however, links “fair and equitable treatment” and “constant protection and security” to the international law minimum standard. OECD (ed.), *Draft Convention on the Protection of Foreign Property: Texts with Notes and Comments* (1962), 9 (paras 4 & 5).

international law reference is an important element of continuity from FCN to BITs, one must admit that its underlying function has changed dramatically since the U.S. policy shift. From being a floor (i.e. encouraging protection beyond the MST) it has been turned into a ceiling in investment protection (i.e. confining FET to MST) in post-NAFTA treaties, as States seek to strengthen the defensive elements of their treaties in light of growing investment claims.<sup>80</sup>

#### IV. Protection of Personal Investor Rights

Whereas European BITs focused on the protection of investment, FCN treaties placed the investing national or company center-stage.<sup>81</sup> The additional protection afforded to the person of the investor has remained a pillar of the U.S. BIT program although in a more confined manner. The U.S. has consistently included provisions governing the entry and sojourn of personnel and senior management in its treaties, continuing its long-standing FCN practice in this regard.<sup>82</sup> Moreover, modern U.S. treaties are not only concerned with host State measures relating to investment, but extend their coverage to measures affecting investors of the other party.<sup>83</sup> In particular, national and MFN standards of

<sup>80</sup> Consider, in particular, the intervention by the NAFTA parties through an authoritative interpretation. See NAFTA Free Trade Commission, 'Notes of Interpretation of Certain Chapter 11 Provisions' (31 July 2001), available at [http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding\\_e.asp](http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp) (last visited 31 January 2014). See also UNCTAD, 'Interpretation of IIAs: What States Can Do', *IIA Issues Note No. 3* (11 January 2012), available at [http://www.unctad.org/en/Docs/webdiaeia2011d10\\_en.pdf](http://www.unctad.org/en/Docs/webdiaeia2011d10_en.pdf) (last visited 31 January 2014) [UNCTAD, Interpretation of IIAs].

<sup>81</sup> Coyle, *supra* note 2, 350, stating that "[t]he transition from the FCN treaty to the BIT, moreover, represents a transition from a treaty regime concerned with protecting *individuals* to one concerned with protecting *investment*".

<sup>82</sup> 1982 *U.S. Model BIT*, Art. 5 (b) (*Treaty Between the United States of America and [Country] Concerning the Reciprocal Encouragement and Protection of Investment*, reprinted in 15 *Law and Policy in International Business* (1983) 1, 273, A-1, A-7); *North American Free Trade Agreement*, 8-17 December 1992, Art. 1107, 32 ILM 289 & 32 ILM 605, 640 [NAFTA]; 2012 *U.S. Model BIT*, Art. 9 (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.state.gov/documents/organization/188371.pdf> (last visited 31 January 2014), 13).

<sup>83</sup> See NAFTA, Art. 1101 (1), *supra* note 82, 640; 2004 *U.S. Model BIT*, Art. 2 (1) (*Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.state.gov/documents/organization/117601.pdf> (last visited 31 January 2014), 6) and 2012 *U.S. Model BIT*, Art. 2 (1), *supra* note 82, 6.

treatment are typically given not only to investments but also to investors.<sup>84</sup> As a result, treaties containing such language cannot, and should not, be reduced to *property* protection treaties. Rather, like FCN treaties, they also contain a significant *personal* protection component.<sup>85</sup> The granting of independent investor rights has potentially important repercussions. In *RosInvest v. Russia*, involving a similarly worded treaty between the Soviet Union and the United Kingdom (1989), the tribunal stressed the fact that the treaty extended MFN coverage not only to investment, but also to investors, which meant that the latter could invoke it to rely on the more favorable dispute settlement provision of a third treaty.<sup>86</sup> The existence of personal investor rights may prove significant also on other fronts, e.g., on the question whether tribunals can award moral damages. In sum, the personal protection granted to the investor is an important continuation of the FCN experience.

## V. Transparency and Other Positive Integration-Type Obligations

A final treaty design heritage of the FCN treaty is the reliance on positive integration-type obligations. European BITs were negative integration-type treaties that prohibit or constrain certain governmental conduct.<sup>87</sup> Positive integration-type obligations, in contrast, require a specific positive administrative or legislative action on part of the contracting States. FCN treaties contained extensive positive integration obligations relating, for instance, to the protection of human or consular rights, or the recognition procedure of arbitral awards. These concerns have since been addressed on the multilateral level through the *Human Rights Covenants*, the *Vienna Convention on Consular Relations* and the *New York Convention*. What survived the transfer to the American BIT program,

<sup>84</sup> See 2004 *U.S. Model BIT*, Art. 3 (1), *supra* note 83, 6 and 2012 *U.S. Model BIT*, Art. 3 (1), *supra* note 82, 7.

<sup>85</sup> Z. Douglas, *The International Law of Investment Claims* (2009), 136-141, paras 276-290. Contrary to Douglas' assertion that treaties granting investor rights are an exception, they have been proliferating rapidly and are today systematically included in the BIT program of Australia, Canada, Japan, U.S., Singapore, and Taiwan amongst others.

<sup>86</sup> *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award on Jurisdiction of 1 October 2007, 77-80, paras 126-133.

<sup>87</sup> Negative integration type clauses may still require positive action, for instance, if benefits withheld to foreign investment but accorded to domestic investment have to be extended to all investment by virtue of the National Treatment obligation. J. Robbins, 'The Emergence of Positive Obligations in Bilateral Investment Treaties', 13 *University of Miami International & Comparative Law Review* (2006) 2, 403. This, however, is just an incidental effect of negative integration type clauses and does not reflect the distinction drawn here.

however, were the obligations to publish laws in advance and to guarantee access to institutions and proceedings of domestic justice.<sup>88</sup> While the importance of the latter is today somewhat reduced due to the widespread recourse to arbitration, transparency clauses remain meaningful and have since evolved to include means for participation in law-making for the other contracting party or affected stakeholders.<sup>89</sup> The 2012 *U.S. Model BIT* goes particularly far by extending the reach of this obligation to domestic standard setting.<sup>90</sup>

In sum, important FCN treaty design elements survived the U.S. shift from FCN to BITs and gave the American BIT program a unique design, distinguishing it from European BITs. These FCN design features have since found their way into NAFTA and were subsequently included in the investment treaty programs of other major economies, where they continue to evolve.

## E. There and Back Again: The Return of the FCN Approach to Investment Treaties

In addition to shaping the American BIT program, FCN treaties have influenced modern investment treaty law in a more subtle way, by providing the ideational roots for the emergence of a second generation of investment treaties. Although BITs and FCN treaties are no longer competing in actual investment treaty making as in the 1960s, they remain conceptual alternatives that continue to inspire different approaches to investment policy-making.

The American policy shift suggests that the economic and political context to a large extent determines whether a FCN or a BIT approach is chosen. In the immediate post-war era, FCN treaties were the instruments of choice to put the economic and political relations between like-minded developed countries on a new foundation. Then, the intensifying Cold War confrontation and

<sup>88</sup> See 1959 *U.S.–Pakistan FCN Treaty*, Art. XV (*supra* note 48, 119) (the article's scope, however, was limited to trade matters); 1984 *U.S. Model BIT*, Art. II (8) & Art. IX (*U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, reprinted in 4 *International Tax & Business Lawyer* (1986) 1, 136, 138 & 142). See also R. R. Wilson, 'Access-to-Courts Provisions in United States Commercial Treaties', 47 *American Journal of International Law* (1953) 1, 20.

<sup>89</sup> See, for instance, 2011 *Japan–Papua New Guinea BIT*, Art. 7 & 8; 2007 *Peru–Colombia BIT*, Art. 15; 2005 *U.S.–Uruguay BIT*, Art. 11. All named BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>90</sup> 2012 *U.S. Model BIT*, Art. 11 (8) (a), *supra* note 82, 16, stipulates that “[e]ach Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies”.

decolonization changed the political climate, making it less conducive to treaties of general relations. At the same time, the need for investment protection became most acute in developing countries which had no outward investment of their own, making asymmetrical rather than symmetrical treaties a more natural choice. In that setting, the more specialized and seemingly more technical BITs presented an attractive alternative to the FCN treaty. Just as the political and economic climate favored the rise of the BITs approach, changes in the world economy have since led to its decline and to a re-emergence of the FCN approach to investment policy making.

## I. The Rise and Decline of First Generation BITs

After the fall of the Berlin Wall, BITs proliferated quickly across the globe. In the 1990s alone, almost 1600 such treaties were concluded.<sup>91</sup> The brevity and simplicity of BITs made them easy to negotiate.<sup>92</sup> At its peak in 1996, UNCTAD reported the conclusion of 211 BITs – meaning that on average, a new BIT was signed every one and a half days.<sup>93</sup>

The enthusiasm towards European-style BITs, however, started to wane in the early 21st century. Until the late 1990s, investor-State arbitration, provided for in most BITs, had largely lain dormant. Since then, however, a total of over 500 cases have been filed.<sup>94</sup> In light of the flood of investment claims, States began to discover that the early BIT approach of brevity and simplicity coupled with a focus on investment protection not only had certain benefits but also entailed significant risks.<sup>95</sup> BITs' simplicity made them prone to unpredictable

<sup>91</sup> UNCTAD, *Bilateral Investment Treaties 1959-1999*, *supra* note 1, 1.

<sup>92</sup> In addition, until recently, the majority of these treaties were closely modeled on the *OECD Draft Convention on the Protection of Foreign Property* of 1967 producing largely homogenous treaties. Hence many countries shared a common reference point which also facilitated negotiations. See Schill, *supra* note 3, 35-36.

<sup>93</sup> UNCTAD, 'Quantitative Data on Bilateral Investment Treaties and Double Taxation Treaties', available at [http://www.unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx](http://www.unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Quantitative-data-on-bilateral-investment-treaties-and-double-taxation-treaties.aspx) (last visited 31 January 2014).

<sup>94</sup> UNCTAD, 'Recent Developments in Investor-State Dispute Settlement (ISDS)', *IIA Issues Note No. 1* (10 April 2013), available at [http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d3\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf) (last visited 31 January 2014), 3.

<sup>95</sup> L. N. Skovgaard Poulsen & E. Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning', 65 *World Politics* (2013) 2, 273; L. N. Skovgaard Poulsen, *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries, and Bounded Rationality* (2011) [Skovgaard Poulsen, *Sacrificing Sovereignty by Chance*].

and, at times even, inconsistent interpretation.<sup>96</sup> Their brevity created an apparent justification for judicial activism in order to clarify vague treaty language and to close gaps left open by the drafters.<sup>97</sup> Finally, their focus on investment protection sparked debates on their compatibility with other public policy objectives such as human rights or environmental protection especially as investors began challenging general legislation in the public interest.<sup>98</sup>

As a result of these concerns, States began to re-consider their approach to investment treaties. Some countries started to denounce their BITs.<sup>99</sup> Bolivia, Ecuador, and Venezuela even exited the *ICSID Convention*.<sup>100</sup> In general, States became more hesitant to negotiate BITs. With only 20 new BITs signed in 2012, the number of agreements concluded yearly has reached pre-1990 levels.<sup>101</sup> This

<sup>96</sup> Consider for example the conflicting awards involving Argentina's necessity defense: *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award of 12 May 2005, 44 ILM 1205; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award of 22 May 2007; *LG&E Energy Corp. and Others v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability of 3 October 2006, 46 ILM 40; *Sempra Energy International v. Argentina*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for Annulment of the Award of 29 June 2010, 49 ILM 1445; *Enron Creditors Recovery Corp. Ponderosa Assets, L.P. v. The Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic of 30 July 2010.

<sup>97</sup> W. Alschner, 'Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory' (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2241652](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241652) (last visited 31 January 2014).

<sup>98</sup> See generally M. Waibel *et al.* (eds), *The Backlash Against Investment Arbitration: Perceptions and Reality* (2010); S. D. Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions', 73 *Fordham Law Review* (2005) 4, 1521.

<sup>99</sup> South Africa, for instance, denounced or declined to renew several BITs with EU countries. See Webber Wentzel, 'SA Declines to Renew Bilateral Investment Treaties With European Union Member States' (1 October 2012), available at <http://www.polity.org.za/article/sa-declines-to-renew-bilateral-investment-treaties-with-eu-member-states-2012-10-01> (last visited 31 January 2014). See also M. Allix, 'EU Steps up Fight to Have Treaties With SA Retained', *Business Day* (12 November 2013), available at <http://www.bdlive.co.za/business/trade/2013/11/12/eu-steps-up-fight-to-have-treaties-with-sa-retained> (last visited 31 January 2014).

<sup>100</sup> UNCTAD, 'Denunciation of the ICSID Convention and BITS: Impact on Investor-State Claims', *IIA Issues Note No. 2* (10 December 2010), available at [http://www.unctad.org/en/docs/webdiaeia20106\\_en.pdf](http://www.unctad.org/en/docs/webdiaeia20106_en.pdf) (last visited 31 January 2014), 1.

<sup>101</sup> UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), 101.

decline in numbers cannot be explained by a saturation of the field alone.<sup>102</sup> Rather, more and more countries have put their BIT program on hold in order to re-evaluate their approach to investment policy-making.<sup>103</sup>

## II. The Changing Economics of Investment

International arbitration, which exposed the risks and liabilities of BITs, was not the only factor triggering a reconsideration of the underlying approach towards investment treaty-making. Importantly, the economic patterns of investment have also undergone a significant change, making a policy adjustment necessary.

First, with the dawn of the 21st century, the traditional investment treaty paradigm of Northern countries being capital exporters, and Southern States being capital importers, began to wane. Instead, emerging economies have turned into sources of outward investment and developed countries have become the recipients of investment from the South. Investment flows are increasingly becoming bi-directional.<sup>104</sup> The change of global investment patterns coupled with the availability of investor-State arbitration has reshuffled benefits and costs in investment treaties. The regulatory burden of BITs does not fall any longer on the developing country BIT partners alone, but is also borne by developed countries. Hence, today reciprocity is not a matter of formal prestige any more, but of reality. As a result of bi-directional investment flows, no country can feel safe from investment claims. With the return of reciprocity, many developed

<sup>102</sup> Skovgaard Poulsen, *Sacrificing Sovereignty by Chance*, *supra* note 95, 210. See also UNCTAD, *World Investment Report 2011: Non-Equity Modes of International Production and Development* (2011), 102-103 [UNCTAD, World Investment Report].

<sup>103</sup> For India, see N.N., 'India Places All BIT Talks on Hold, Pending Review of Own Model Deal', *Inside U.S. Trade* (1 February 2013), available at <http://www.wtonewsstand.com/Inside-US-Trade/Inside-U.S.-Trade-02/01/2013/menu-id-445.html> (last visited 31 January 2014). For Pakistan, see M. Haider, 'Bilateral Investment Treaties Need Reexamination', *The International News* (3 July 2013), available at <http://www.thenews.com.pk/Todays-News-3-187324-Bilateral-investment-treaties-need-reexamination> (last visited 31 January 2014). For South Africa, see South African Department of Trade and Industry, 'Bilateral Investment Treaty Policy Framework Review: Executive Summary of Government Position Paper', *Government Gazette/Staatskoerant No. 32386* (7 July 2009), available at <http://www.northernlaw.co.za/images/stories/files/actsbills/BILATERAL%20INVESTMENTS%20TREATY%20POLIVY.pdf> (last visited 31 January 2014). For Australia, see Australian Government Productivity Commission, 'Bilateral and Regional Trade Agreements' (November 2010), available at <http://www.pc.gov.au/projects/study/trade-agreements> (last visited 31 January 2014).

<sup>104</sup> See UNCTAD, *World Investment Report 2011*, *supra* note 102, 2-4, which shows that developing countries are becoming important sources of outward investment.

country negotiators thus have again seen the need to scale down their investment protection demands to levels that they are willing to grant foreign investors in return. Just as Walker had observed in the context of FCN treaties, reciprocity and symmetry tend to balance and moderate the content of investment treaties.

Second, aside from differences between developed and emerging economies being evened out, investment agreements themselves have moved into new territories. These agreements are not concluded anymore only by developed-developing country pairs, but also increasingly govern investment relations between developing-developing and, more recently, developed-developed States at bilateral and regional levels.<sup>105</sup> In South-East Asia especially, a tight net of investment agreements has emerged that connects highly linked economies of a similar level of development. On-going negotiations over a transpacific partnership and a transatlantic trade and investment partnership between the EU and the U.S. have given negotiations among high-income countries a global dimension. The changed context of investment treaties involving countries that share a similar level of development creates further pressure for more symmetrical and reciprocal rule-making.

Finally, the notions of ‘investment’ and ‘investors’ have changed considerably in economic terms since the advent of the first BITs. Over the last twenty years, we have observed the emergence of global value chains in what Baldwin called the “unbundling of productions stages previously clustered in factories and offices”.<sup>106</sup> Products like iPods are invented and developed in the U.S., their parts manufactured in South East Asia, and the final product assembled in China. Hence, different forms of investment transactions increasingly interact both among themselves and with other types of economic activities resulting in what Baldwin termed 21st century commerce or the “trade-investment-service nexus”.<sup>107</sup> Furthermore, disputes have begun to span across legal regimes, such as the plain cigarette packages litigation against Australia before the WTO and an investment tribunal,<sup>108</sup> giving rise to a risk of inconsistent awards. The realization

<sup>105</sup> See UNCTAD, ‘The Rise of Regionalism in International Investment Policymaking: Consolidation or Complexity?’, *IIA Issues Note No. 3* (13 June 2013), available at [http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d8\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/webdiaepcb2013d8_en.pdf) (last visited 31 January 2014).

<sup>106</sup> R. E. Baldwin, ‘21st Century Regionalism: Filling the Gap Between 21st Century Trade and 20th Century Trade Rules’ (April 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1869845](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1869845) (last visited 31 January 2014), 5.

<sup>107</sup> *Ibid.*

<sup>108</sup> A. D. Mitchell, ‘Australia’s Move to the Plain Packaging of Cigarettes and its WTO Compatibility’, 5 *Asian Journal of WTO and International Health Law and Policy* (2010)

that different economic transactions as well as legal regimes become increasingly intertwined puts into question the compartmentalization underlying traditional BITs, in which investment protection is treated in isolation.

The need to take the wider context of investment protection into account is also highlighted by the changing forms of investors. Formerly, the interests of home States were largely aligned with that of their investors who formed part of a national business community. The BIT was an “institutional means of protecting the private foreign investments of Western capital-exporting nations”.<sup>109</sup> Today, with the rise of multinational companies (MNCs) the bondage of nationality is beginning to break down. Due to the highly fungible nature of international capital,<sup>110</sup> the protection of shareholders and the myriad of means for corporate restructuring and treaty shopping,<sup>111</sup> every BIT may potentially benefit capital originating from a variety of States. As a result, the means of control by home States are diminishing and treaty protection may be accorded to types of investors which the home State does not actually want to protect.<sup>112</sup> This is all the more disconcerting as MNCs are often engaged in activities that involve the provision of essential services such as water, sewage-disposal, or electricity and directly impact human rights, public health, or environmental issues. Where the developing host State does not have the capacity to effectively regulate MNCs and no home State exists, international norms such as corporate social responsibility standards need to step in to regulate investment in context.<sup>113</sup> Hence, with investment trans-nationalizing and investors multi-nationalizing,

2, 405; T. Voon & A. Mitchell, ‘Time to Quit? Assessing International Investment Claims Against Plain Tobacco Packaging in Australia’, 14 *Journal of International Economic Law* (2011) 3, 515 [Voon & Mitchell, Plain Tobacco Packaging in Australia]. See generally T. Voon & A. Mitchell, ‘Implications of International Investment Law for Tobacco Flavouring Regulation’, 12 *Journal of World Investment & Trade* (2011) 1, 65.

<sup>109</sup> Abs & Shawcross, *supra* note 3, 115.

<sup>110</sup> B. Legum, ‘Defining Investment and Investor: Who is Entitled to Claim?’, 22 *Arbitration International* (2006) 4, 521.

<sup>111</sup> Schill, *supra* note 3, 197-240.

<sup>112</sup> For instance, while Philip Morris Hong Kong launched an investment claim against Australia’s Plain Cigarette Packaging legislation, its home State Hong Kong received a WHO award on the ‘World No Tobacco Day 2011’ for being at the forefront of tobacco control policies. So, in some instances, the policy goals of a home State and its investor may be very much opposed. See Voon & Mitchell, ‘Tobacco Packaging in Australia’, *supra* note 108, 523.

<sup>113</sup> W. Alschner & E. Tuerk, ‘The Role of International Investment Agreements in Fostering Sustainable Development’, in F. Baetens (ed.), *Investment Law Within International Law: Integrationist Perspectives* (2013), 217.

the FCN logic of treating “investment as a process inextricably woven into the fabric of human affairs generally”<sup>114</sup> regulating and coordinating a wider range of policy issues has become more pertinent than ever.

### III. The Rise of a New Generation of Investment Treaties

The emergence of bi-directional investment flows coupled with the proliferation of investor-State arbitration and the changing economic realities of investment transactions have led States to re-consider the early BIT approach to investment treaty design. Realizing that Walker might have been right that “[a] specialized ‘investment agreement’ [...] would be [...] unrealistic and inadequate”<sup>115</sup>, States began to turn their backs on the traditional brevity and simplicity of first generation BITs and embraced more complex and comprehensive agreements more akin in design to FCN treaties, giving rise to what we will call a second generation of investment agreements.

The first step towards this second generation was the emergence of preferential trade and investment agreements beginning with the conclusion of NAFTA in 1992.<sup>116</sup> It is no coincidence that NAFTA marked the re-entry of the FCN approach to investment policy-making. Since the United States shifted relatively late from FCN to BITs and even then retained many FCN components in its treaties, it was well situated to revive the FCN approach to investment policy-making, as the European BIT Model became ill-equipped to deal with a new economic context. This moment came when, for the first time in post-FCN treaty-making, the United States was negotiating not only with a developing but also with a developed country partner. The symmetry of levels of development coupled with the prospect of bi-directional investment flows made a new approach to investment policy-making necessary. Like FCN treaties, but unlike the BITs of its time, NAFTA is a complex, delicately balanced agreement that regulates investment ‘in context’. In addition to its non-investment chapters and environmental and labour side agreements, Chapter 11 itself contains references to a number of non-investment concerns most notably in a special clause on environmental measures in Article 1114. Moreover, Articles 1106 on performance requirements and 1108 on reservations are remarkably fine-tuned clauses reflecting an intricate balance of investment protection and policy space preservation. NAFTA thus became the first specimen of a second generation

<sup>114</sup> Walker, ‘Protection of Foreign Investment’, *supra* note 13, 244.

<sup>115</sup> *Ibid.*

<sup>116</sup> The earlier 1988 *Free Trade Agreement* between Canada and the United States (CUFTA) only contained a limited investment chapter without investor-State arbitration.

of IIAs. Since then, PTIAs modelled on NAFTA have proliferated and are today concluded by Australia, ASEAN, Canada, Chile, Japan, Mexico, Peru, Singapore, and Taiwan to name but a few. Structured in detailed chapters, these PTIAs re-unite trade and investment governance alongside other economic policy concerns such as intellectual property rights, competition policy, or business facilitation.

Crucially, the return of the FCN approach is not limited to PTIAs but also extends to a new generation of BITs. Hence, following NAFTA, an increasing number of countries have also fundamentally changed the design of their BITs. Whereas the 1959 *Germany–Pakistan BIT* contained only 14 articles, the 2008 *U.S.–Rwanda BIT* has 37, the 2011 *Colombia–Japan BIT* 44 and the 2006 *Canada–Peru BIT* even 52 articles.<sup>117</sup> Part of the increase in length is devoted to more detailed arbitration procedures, but other elements point to an FCN-like approach also in BITs. This is not to say that this emerging second generation of IIAs is substantively similar to FCN treaties. Subject matters such as consular relations, navigation, or human rights are today regulated by a multitude of other specialized bilateral and multilateral treaties. Rather, the similarities lie in their common underlying approach to treaty design based on symmetrical and complex rules and investment protection ‘in context’.

First, in light of reciprocal investment relations, second generation IIAs, like their FCN predecessors, are highly complex with carefully worded provisions and an intricate interplay of obligations and exceptions reflecting the need to balance investment protection abroad with policy space at home.<sup>118</sup> On the one hand, this is done through exception clauses. A number of countries have inserted general exceptions in their BITs.<sup>119</sup> The 2011 *Colombia–Japan BIT*, for instance, has no less than 14 exception clauses.<sup>120</sup> As already mentioned above, exclusions in the form of non-conforming measure clauses increasingly find their way also into treaties across the globe. On the other hand, States have added

<sup>117</sup> These BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>118</sup> For fine-tuning of rights and obligations in recent BITs, see A. van Aaken, ‘International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis’, 12 *Journal of International Economic Law* (2009) 2, 507; S. A. Spears, ‘The Quest for Policy Space in a New Generation of International Investment Agreements’, 13 *Journal of International Economic Law* (2010) 4, 1037.

<sup>119</sup> See, for instance, the model BITs of Botswana, Canada, Colombia, Egypt, Latvia, Mauritius, Norway, and Turkey.

<sup>120</sup> Counted are clauses that begin with “nothing in this agreement [or article] shall prevent” or “notwithstanding [...] a Contracting Party may”.

precision confining the reach of the primary investment protection obligations. One frequently found example is an explanatory clause clarifying that “non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation”.<sup>121</sup> Hence, second generation IIAs contain a fine-tuned balance of rights and obligations.

Second, the new generation of IIAs considers investment in its wider policy context. While they do not go as far as FCN treaties to comprehensively cover civil or religious rights, they have expanded their coverage to a wider range of investment-related concerns. Many of the recently concluded IIAs refer to trade law, intellectual property rights, or even non-economic concerns such as environmental protection or labour rights. A 2011 OECD Working Paper showed, for example, that over 100 treaties out of a sample of 1,593 BITs contain references to environmental concerns.<sup>122</sup> These references, virtually absent before the mid-1990s, have sky rocketed to being part of 89 percent of newly concluded treaties in 2008.<sup>123</sup> In addition, all PTIAs in the sample contained environmental language. Other novel concerns are also tackled in IIAs. Japan, for instance, has consistently included anti-corruption standards in its modern BITs.<sup>124</sup> Canada and the U.S. have begun to address corporate social responsibility in some of their PTIA investment chapters.<sup>125</sup> A number of Belgian

<sup>121</sup> 2004 *Canada Model BIT*, Annex B.13(1) (*Agreement Between Canada and ... for the Promotion and Protection of Investments*, available at <http://www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited 31 January 2014), 21). See also, e.g., 2005 *U.S.–Uruguay BIT*, Annex B; 2008 *Japan–Peru BIT*, Annex IV. The BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>122</sup> K. Gordon & J. Pohl, ‘Environmental Concerns in International Investment Agreements: A Survey’, *OECD Working Papers on International Investment No. 2011/1* (2011), available at <http://www.oecd-ilibrary.org/content/workingpaper/5kg9mq7scrjh-en> (last visited 31 January 2014), 5.

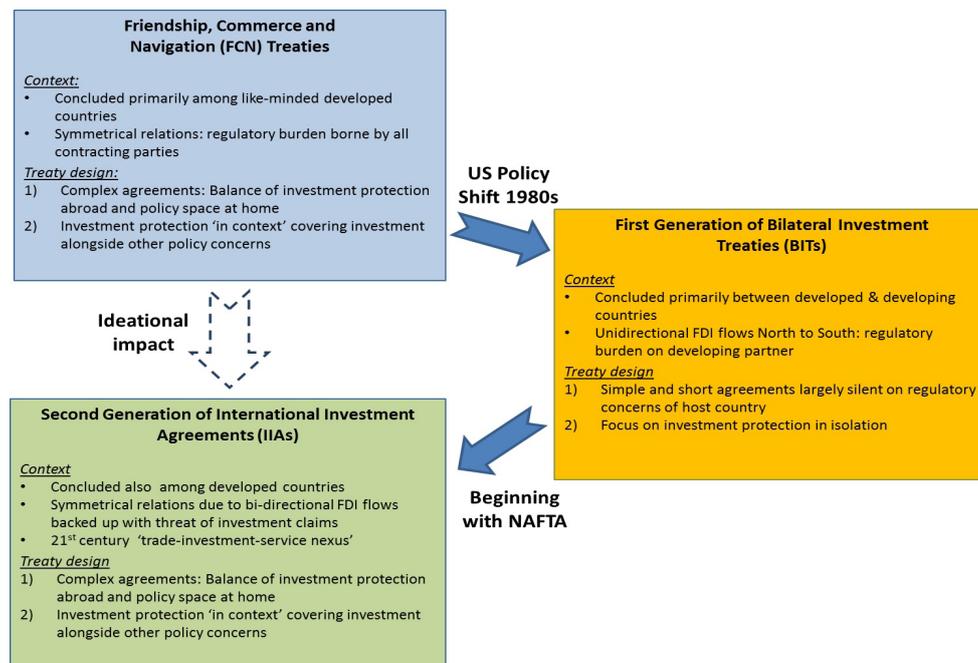
<sup>123</sup> They are particularly frequent in recent agreements by Canada, New Zealand, the U.S., Japan, Mexico, Finland, and Peru. Other countries like Germany and the UK still refrain from including such concerns into their treaties on a systematic basis.

<sup>124</sup> 2011 *Japan–Papua New Guinea BIT*, Art. 9; 2008 *Japan–Laos BIT*, Art. 10, 2008 *Japan–Uzbekistan BIT*, Art. 9, 2008 *Japan–Peru BIT*, Art. 10, 2011 *Japan–Colombia BIT*, Art. 8. All named BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014). See also J. Pauwelyn, ‘Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy’, in S. Rose-Ackerman & P. D. Carrington (eds), *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* (2013), 247, 257-261.

<sup>125</sup> UNCTAD, *World Investment Report 2011*, *supra* note 102, 120.

BITs require that the contracting parties’ “legislation provides for high levels of environmental protection”.<sup>126</sup> By considering issues such as environmental protection, a regulatory race to the bottom or corporate social responsibility, the new generation of IIAs has extended its scope beyond having bilateral investment protection as its sole policy concern and tackled wider regulatory objectives.

In conclusion, FCN treaties may have covered different issue areas than recently concluded IIAs, but their underlying approach still inspires modern investment treaty-making. In a time of reciprocal investment flows and an increasing need to consider investment in its wider policy context, the FCN philosophy of investment protection agreements has proven more apt to address 21st century policy challenges than the short, simple, and specialized BIT model.<sup>127</sup>



<sup>126</sup> 2009 *Belgium–Barbados BIT*, Art. 11 (1); 2009 *Belgium–Panama BIT*, Art. 5 (1); 2009 *Belgium–Tadjikistan BIT*, Art. 5 (1); 2009 *Belgium–Togo BIT*, Art. 5 (1). All named BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>127</sup> The following figure ‘The Gobar Policy Shift From FCN to BIT and the Rise of a Second Generation of IIAs’ summarizes the findings of this section.

## F. The Americanization of the IIA Universe

Since the conclusion of NAFTA, we are witnessing a global policy shift towards a second generation of investment treaties that has its ideational roots in the American FCN program. Today, countries look to Washington and not to Europe to seek inspiration for their investment policy-making. Put differently, like in the 1960s, again two competing approaches to investment policy-making are available to policy-makers, but this time the FCN-inspired treaties are gaining the upper hand. Hence, tracing the impact of FCN treaties on modern investment treaty law reveals one final insight: the Americanization of the investment treaty universe which for a long time had been dominated by the European BIT approach. As specific FCN treaty design features and its general approach to investment policy-making spread into the IIA universe, they have given it a distinctly American touch.

The Americanization of the formerly European-style BIT universe is equivalent to a change in the dominant approach to investment treaty-making. As more and more countries experience frustration with European style BITs, the comprehensive and complex FCN approach ‘made in the U.S.’ presents a natural alternative to reform investment policy without engaging in costly institutional innovation from scratch. Especially in America and Asia, the *U.S. Model BIT* is visibly used as a template for treaty negotiations.<sup>128</sup> Part of the appeal of the *U.S. Model BIT* is undoubtedly due to the status of the U.S. as major political and economic power. In addition, the U.S. was among the first developed countries to be challenged before investment treaty arbitration. It is thus not surprising that other countries want to learn from the U.S. experience as a litigator as well as treaty-maker to improve the arbitration procedure and to enhance defensive elements in their treaties. Importantly, however, these more recent adjustments to better accommodate the increase in investment litigation constitute a mere *tactical* change in investment treaty design compared to the more fundamental *strategic* transition in global investment policy-making from

<sup>128</sup> See, for instance, M. Kinnear & R. Hansen, ‘The Influence of NAFTA Chapter 11 in the BIT Landscape’, 12 *UC Davis Journal of International Law & Policy* (2005) 1, 101; A. Berger, ‘Investment Rules in Chinese PTIAs – A Partial “NAFTA-ization”’, in R. Hofmann, S. W. Schill & C. J. Tams (eds), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (2013), 297.

first generation BITs to FCN-inspired second generation treaties which began with NAFTA.

The rise of a FCN-inspired second generation of investment treaties has today become a global phenomenon. FCN elements are not limited to IIAs of the United States, Canada, or Mexico, but have spread to South America (e.g. Colombia, Chile, Peru), Asia (e.g. Japan, South Korea, Singapore, Taiwan), and even Europe (e.g. Belgium Luxembourg, Finland, Latvia) with more countries following suit. Although some countries such as Germany, the Netherlands, or the United Kingdom, as intellectual fathers of the original BIT approach, are still firmly committed to brevity and simplicity in their BITs, the pendulum is swinging towards more complex and comprehensive treaties that consider investment protection in context. With the investment competency shift towards the EU through the *Lisbon Treaty* and the on-going PTIA negotiations with the NAFTA countries, Canada and the U.S.—both firmly rooted in the FCN approach—, Europe is also likely to shift towards an FCN-inspired investment treaty approach.<sup>129</sup>

## G. Conclusion: What to Make of the Return of the FCN Approach?

The IIA universe is changing. From short, simple, and specialized agreements we observe a shift towards complex and comprehensive IIAs that treat investment ‘in context’ having more in common with the approach underlying FCN treaties than with first generation European BITs. On a general level, typical FCN-inspired second generation treaties are characterized by a more elaborate mix of rights and obligations and provisions covering investment-related issues such as intellectual property rights, trade, labour, or environmental issues. On a more concrete level, these treaties often contain liberalization provisions, non-conforming measure clauses, references to the customary international law minimum standard, personal protection provisions of the investor, and a range of positive integration-type clauses.

The return of the FCN approach to investment policy-making has three important repercussions on investment law. First, with respect to dispute settlement, more exceptions and a stronger alignment of interests between host and home State are likely to make it more difficult for investors to succeed in traditional investment claims. Already today, a State is almost twice as likely to

<sup>129</sup> N. Lavranos, ‘The New EU Investment Treaties: Convergence Towards the NAFTA Model as the New Plurilateral Model BIT Text?’ (29 March 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2241455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455) (last visited 31 January 2014).

win a NAFTA dispute as compared to a non-NAFTA dispute.<sup>130</sup> At the same time, second generation treaties also offer protection clauses absent in European BITs making it more difficult to determine, on balance, whether we see a reduction, augmentation, or simply restructuring of investment protection levels. In any case, more precise language is likely to generate more predictable outcomes – a development which is going to benefit both States and investors and which may also lead to more amicable settlements. Second, within but also beyond dispute settlement, the new symmetry and equality between the contracting parties is likely to strengthen cooperative elements in investment treaties. Many treaties modelled on NAFTA delegate certain questions of interpretation to the contracting States or set up treaty-based committees in which party representatives jointly monitor the agreement's application.<sup>131</sup> We are likely to see more concerted and unilateral State interventions into the arbitral process in the future.<sup>132</sup> Finally, second generation IIAs, like FCN treaties, are likely to fulfil broader governance functions that go beyond investment protection. They regulate investment in its wider context, e.g., by imposing negative integration-type clauses in IIAs on new subject matters such as environmental protection, but also venture into positive integration-type clauses on diverse issue areas. In sum, the global policy shift from first generation BITs to second generation IIAs marks a fundamental transformation of the IIA universe, the impact of which we are just beginning to understand.

<sup>130</sup> The calculation is based on UNCTAD's ISDS database which lists treaty-based arbitrations decided until 2010. The database is available at <http://www.unctad.org/iia-dbcases/> (last visited 31 January 2014).

<sup>131</sup> UNCTAD, 'Interpretation of IIAs', *supra* note 80.

<sup>132</sup> For an elaboration of this point, see W. Alschner, 'The Return of the Home State and the Rise of 'Embedded' Investor-State Arbitration', in S. Lalani & R. Polanco (eds), *The Role of the State in Investor-State Arbitration* (2014) (forthcoming).

# The Possible Future of Promoting and Protecting European Investments in Sub-Saharan Africa

Lars Schönwald\*

## Table of Contents

A. Introduction.....	489
B. Possible Parties of New Investment Treaties.....	494
I. The Possible Parties as Subjects of Public International Law .....	494
II. Competence to Negotiate and Conclude Treaties Aiming at Protecting Foreign Investors .....	497
1. The EU's Competence to Negotiate and Conclude IIAs .....	498
2. The Competence of the Various SSA Regional Organizations to Negotiate and Conclude IIAs.....	509
C. Introducing the Current Standard Clauses Into the New Investment Treaty Regime .....	511
I. Determining the Investor to Be Protected by the New Treaty .....	513
II. Determining the Decisive Laws and Regulations of the Host Entity Pursuant to the 'Accordance With the Law Clause' .....	514
III. Alterations to the Standard 'NT Clause'.....	516
IV. Alterations to the Standard 'MFN Clause' .....	517
V. Alterations to the Standard 'FET Clause' .....	518
VI. Alterations to the Standard 'Expropriation/ Compensation Clause' .....	519
VII. Attributing Violations of the 'Expropriation/Compensation Clause and the 'FET Clause' to the Host Entity.....	520

\* The author is Doctoral Candidate and Research Assistant at the Chair of Constitutional and Administrative Law, Public International Law, European and International Economic Law of Professor Dr. Hans-Georg Dederer at the University of Passau (Germany). He may be contacted at Lars Schönwald, Lehrstuhl Prof. Dr. Dederer, Universität Passau, 94030 Passau (Germany), or at [lars.schoenwald@uni-passau.de](mailto:lars.schoenwald@uni-passau.de).

VIII. Settling Disputes Between Host State and Foreign Investor Through International Arbitration .....	521
D. Introducing New and Adapting Existing Concepts .....	525
E. Conclusion .....	530

## Abstract<sup>1</sup>

Sub-Saharan Africa (SSA) represents an interesting target market for European investors. However, the level of investment protection in SSA is rather outdated. Considering that Article 207 (1) of the *Treaty on the Functioning of the European Union* confers upon the European Union (EU) the exclusive competence to negotiate and conclude new investment treaties, the scope of this article is to determine what a possible future treaty aiming at protecting foreign investments concluded between the EU and SSA could look like. Following a brief introduction (A.) and after determining the potential parties of a new investment treaty between the EU and SSA (B.), it will be examined whether the current standard clauses can be introduced into the new treaty as well (C.), and to what extent new concepts can, should or even have to be included in a respective new agreement (D.).

## A. Introduction

Despite various negative news reported in ‘Western’ media, Africa is on the move.<sup>2</sup> This is clearly reflected by numerous indicators which document the constant improvement of Africa’s economic development.<sup>3</sup> With an increase in the demand for services by the population of Sub-Saharan Africa (SSA),<sup>4</sup> this

<sup>1</sup> This article is the revised version of a paper presented by the author at the 2nd Conference of the Postgraduate and Early Professionals/Academics of the Society of International Economic Law (PEPA/SIEL), held in Goettingen (Germany) on 25 and 26 January 2013. The author is very grateful for the comments on the paper given by Steffen Hindelang and Yannick Radi, as well as by other participants of the conference. This article is also influenced by various comments the author received with respect to two similar papers presented, respectively, at the Second African International Economic Law Network Regional Conference, held in Johannesburg (South Africa) on 7 and 8 March 2013, and at the Workshop of the European Society of International Law Interest Group on International Economic Law (ESIL IG IEL), held in Amsterdam (Netherlands) on 23 May 2013. The author is very thankful for all the comments on these papers. Special thanks are due to Stephan W. Schill who commented on the author’s paper at the ESIL IG IEL workshop in Amsterdam.

<sup>2</sup> Cf. C. Roxburgh *et al.*, ‘Lions on the Move: The Progress and Potential of African Economies’ (June 2010), available at [http://www.mckinsey.com/insights/africa/lions\\_on\\_the\\_move](http://www.mckinsey.com/insights/africa/lions_on_the_move) (last visited 31 January 2014), 2.

<sup>3</sup> *Ibid.*, vi. Cf. also the World Bank’s 2011 Africa Development Indicators, available at [http://data.worldbank.org/sites/default/files/adi\\_2011-web.pdf](http://data.worldbank.org/sites/default/files/adi_2011-web.pdf) (last visited 31 January 2014).

<sup>4</sup> This is, for instance, indicated by the rise of supermarkets, see T. Reardon *et al.*, ‘The Rise

large region has become a very interesting target market for European investors.<sup>5</sup> In addition, the abundant untapped resource deposits vested in SSA are of significant interest for European mining corporations.<sup>6</sup>

As a result of the continent's positive development, the influx of foreign direct investments (FDIs) has constantly increased during the last decade.<sup>7</sup> However, with a share of mere 14.8 percent of all FDIs flowing into Africa in 2011, Europe ranks only third, trailing Asia (56.7 percent) and the Middle East (16.3 percent).<sup>8</sup> Recently, several African governments specifically asked for more FDIs from European corporations.<sup>9</sup> This gives rise to the question of why European corporations appear rather reluctant to invest in SSA.

Besides the (asserted) high risks foreign investors are facing,<sup>10</sup> one reason for the reluctance might be the outdated investment protection provided. For instance, various bilateral investment treaties (BITs) and other types of international investment agreements (IIAs) concluded between the SSA States and European countries date back to the 1960s and 1970s.<sup>11</sup> Consequently, the

of Supermarkets in Africa, Asia, and Latin America', 85 *American Journal of Agricultural Economics* (2003) 5, 1140, 1140. Also, there is an increasing demand for telecommunication services. Cf. C. Garbacz & H. G. Thompson Jr, 'Demand for Telecommunication Services in Developing Countries', 31 *Telecommunications Policy* (2007) 5, 276, 276.

<sup>5</sup> Cf. J. Cantwell, 'Globalization and Development in Africa', in J. H. Dunning & K. A. Hamdani (eds), *The New Globalism and Developing Countries* (1997), 155, 155-156.

<sup>6</sup> Cf. *ibid.*, 160.

<sup>7</sup> See, e.g., UNCTAD, *World Investment Report 2012: Towards a New Generation of Investment Policies* (2012), 40-41.

<sup>8</sup> For further information, see *ibid.*, 3-4.

<sup>9</sup> Cf. M. Carbone, 'The European Union and China's Rise in Africa: Competing Visions, External Coherence and Trilateral Cooperation', 29 *Journal of Contemporary African Studies* (2011) 2, 203, 211-213.

<sup>10</sup> Typical non-economic risks faced by foreign investors in Africa are political and macro-economic instability, low growth, weak infrastructure, poor governance, inhospitable regulatory environments, and ill-conceived investment promotion strategies. See C. Dupasquier & P. N. Osakwe, 'Foreign Direct Investment in Africa: Performance, Challenges, and Responsibilities', 17 *Journal of Asian Economics* (2006) 2, 241, 241. See for a more general analysis of the interconnection between risks and effects of foreign direct investments on the domestic and foreign company E. Petrović & J. Stanković, 'County Risk and Effects of Foreign Direct Investment', 6 *Facta Universitatis: Economics and Organization* (2009) 1, 9.

<sup>11</sup> For example, Benin concluded BITs with Germany in 1978, Switzerland in 1966, and the United Kingdom in 1987, also concluding BITs with Belgium and Luxembourg as well as with the Netherlands in 2001. Similarly, Cameroon (which concluded BITs with Belgium and Luxembourg in 1980, Germany in 1962, the Netherlands in 1965, Switzerland in 1963, and the United Kingdom in 1982, but with Italy in 1999), the

Central African Republic (which concluded BITs with Germany in 1965 and Switzerland in 1973), Chad (which concluded BITs with France in 1960, Germany in 1967, Italy in 1969, and Switzerland in 1967), the Democratic Republic of Congo (which concluded BITs with France in 1972, Germany in 1969, and Switzerland in 1972, but which has also concluded BITs with Belgium and Luxembourg in 2005, Greece in 1991, and Portugal in 2011), Côte d'Ivoire (which concluded BITs with Germany in 1966, Italy in 1969, the Netherlands in 1965, Sweden in 1965, and Switzerland in 1962, but which has also concluded BITs with Belgium and Luxembourg in 1999 and the United Kingdom in 1995), Gabon (which concluded BITs with Italy in 1968, Romania in 1979, and Switzerland in 1972, but with Belgium and Luxembourg in 1998, Germany in 1998, Portugal in 2001, and Spain in 1995), Guinea (which concluded BITs with Italy in 1964 and Switzerland in 1962, but with Germany in 2006 and Serbia in 1996), Liberia (which concluded BITs with France in 1979, Germany in 1961, and Switzerland in 1963, but with Belgium and Luxembourg in 1985), Mali (which concluded BITs with Germany in 1977 and Switzerland in 1978, but with the Netherlands in 2003), Niger (which concluded BITs with Germany in 1964 and Switzerland in 1962), Rwanda (which concluded BITs with Germany in 1967 and Switzerland in 1963, but with Belgium and Luxembourg in 2007), Senegal (which concluded BITs with Germany in 1964, the Netherlands in 1979, Romania in 1980, Sweden in 1967, Switzerland in 1962, and the United Kingdom in 1980, but with Italy in 2000, Portugal in 2011, Spain in 2007, and Turkey in 2010), Sierra Leone (which concluded a BIT with Germany in 1965, but with the United Kingdom in 2000), Sudan (which concluded BITs with France in 1978, Germany in 1963, the Netherlands in 1970, and Romania in 1978, but with Belgium and Luxembourg in 2005, Bulgaria in 2002, Italy in 2005, and Switzerland in 2002), and Togo (which concluded BITs with Germany in 1961 and Switzerland in 1964, but with Belgium and Luxembourg in 2009) also have rather old BITs with European countries. Rather outdated as well are the BITs concluded by Burundi (with Belgium and Luxembourg in 1989, Germany in 1984, and the United Kingdom in 1990, but with the Netherlands in 2007), Cape Verde (with Austria in 1991, Germany in 1990, Italy in 1997, the Netherlands in 1991, Portugal in 1990, and Switzerland in 1991), Eritrea (which concluded BITs with Italy in 1996, but with the Netherlands in 2003), Ghana (which concluded BITs with Bulgaria in 1989, Denmark in 1992, France in 1999, Germany in 1995, Italy in 1998, the Netherlands in 1989, Romania in 1989, Switzerland in 1991, and the United Kingdom in 1989, but with Spain in 2006), Guinea-Bissau (which concluded a BIT with Portugal in 1991), Lesotho (which concluded BITs with Germany in 1982 and the United Kingdom in 1981, but with Switzerland in 2004), Mauritania (which concluded BITs with Belgium and Luxembourg in 1983, Germany in 1982, Romania in 1988, and Switzerland in 1976, but with Italy in 2003 and Spain in 2008), Namibia (which concluded BITs with France in 1998, Germany in 1994, and Switzerland in 1994, but with Austria in 2003, Finland in 2002, Italy in 2004, the Netherlands in 2002, and Spain in 2003), Nigeria (which concluded BITs with Bulgaria in 1998, France in 1990, Germany in 2000, Italy in 1990, the Netherlands in 1992, Romania in 1998, and the United Kingdom in 1990, but with Finland in 2005, Serbia in 2002, Spain in 2002, Sweden in 2002, Switzerland in 2001, and Turkey in 2011), São Tomé and Príncipe (which concluded a BIT with Portugal in 1997), Somalia (which concluded a BIT with Germany in 1981), South Africa (which

concluded BITs with Austria in 1996, Belgium and Luxembourg in 1998, Czech Republic in 1998, Denmark in 1996, Finland in 1998, France in 1995, Germany in 1995, Greece in 1998, Italy in 1997, the Netherlands in 1995, Spain in 1998, Sweden in 1998, Switzerland in 1995, Turkey in 2000, and the United Kingdom in 1994), Swaziland (which concluded BITs with Germany in 1990 and the United Kingdom in 1995), Tanzania (which concluded BITs with Denmark in 1999, Finland in 2001, Italy in 2001, the Netherlands in 2001, Sweden in 1999, Switzerland in 2004, and the United Kingdom in 1994, but with Germany in 1965), and Zimbabwe (which concluded BITs with Austria in 2000, Czech Republic in 1999, Denmark in 1996, France in 2001, Germany in 1995, Italy in 1999, the Netherlands in 1996, Portugal in 1994, Serbia in 1996, Sweden 1997, Switzerland in 1996, and the United Kingdom in 1995). On the contrary, Angola, for instance, quite recently concluded BITs with Germany in 2003, Italy in 2002, Portugal in 2008, Spain in 2007, and the United Kingdom in 2000. The same applies to Botswana (which concluded BITs with Belgium and Luxembourg in 2006 and Germany in 2000), Burkina Faso (which concluded BITs with Belgium and Luxembourg in 2001, Germany in 1996, and the Netherlands in 2000, but also has concluded a BIT with Switzerland in 1969), the Comoros (which concluded a BIT with Belgium and Luxembourg in 2001), the Republic of Congo (which concluded BITs with Germany in 2010, Italy in 1994, Portugal in 2010, and Spain in 2008, but also with Switzerland in 1962 and the United Kingdom in 1989), Djibouti (which concluded BITs with France in 2007, Italy in 2006, and Switzerland in 2001), Equatorial Guinea (which concluded BITs with Portugal in 2009 and Spain in 2003, but with France in 1982), Ethiopia (which concluded BITs with Austria in 2004, Belgium and Luxembourg in 2006, Denmark in 2001, Finland in 2006, France in 2003, Germany in 2004, Italy in 1994, the Netherlands in 2003, Spain in 2009, Sweden in 2004, Switzerland in 1998, Turkey in 2000, and the United Kingdom in 2009), Gambia (which concluded BITs with the Netherlands in 2002, Spain in 2008, Switzerland in 1993, and the United Kingdom in 2002), Kenya (which concluded BITs with Finland in 2008, France in 2007, Germany in 1996, Italy in 1996, Slovakia in 2011, Switzerland in 2006, and the United Kingdom in 1999, but with the Netherlands in 1970), Madagascar (which concluded BITs with Belgium and Luxembourg in 2005, France in 2003, Germany in 2006, and Switzerland in 2008, but with Norway in 1966 and Sweden in 1966), Malawi (which concluded BITs with Italy in 2003 and the Netherlands in 2003), Mauritius (which concluded BITs with Belgium and Luxembourg in 2005, Czech Republic in 1999, Finland in 2007, France in 2010, Portugal in 1997, Romania in 2000, Sweden in 2004, and Switzerland in 1998, but with Germany in 1971), Mozambique (which concluded BITs with Belgium and Luxembourg in 2006, Denmark in 2002, Finland in 2004, France in 2002, Germany in 2002, Italy in 1998, the Netherlands in 2001, Portugal in 1996, Spain in 2010, Sweden in 2001, Switzerland in 2002, and the United Kingdom in 2004), Uganda (which concluded BITs with Belgium and Luxembourg in 2005, Denmark in 2001, France in 2003, Italy in 1997, the Netherlands in 2000, and the United Kingdom in 1998, but with Germany in 1966 and Switzerland in 1971), and Zambia (which concluded BITs with Belgium and Luxembourg in 2001, Finland in 2005, France in 2002, Italy in 2003, and the Netherlands in 2003, but with Germany in 1966 and Switzerland in 1994). The Seychelles have not concluded a single BIT with a European country. States not mentioned in this list have either not

level of investment protection occurs rather antiquated. Even if the BITs were concluded more recently, they mostly contain the level of protection provided in the 1960s and 1970s and do not contain, for instance, provisions on labor standards, environmental protection, or human rights.<sup>12</sup> Therefore, negotiations aiming at concluding new BITs should be initiated.

The scope of this paper is to analyze what shape the future of investment protection for European investors in SSA could take. The first part will elaborate the possible parties to a new international treaty aiming at protecting foreign investors. It will be argued that, besides investment treaties between the European Union (EU) and single SSA States, treaties between the EU and at least two regional organizations in SSA can indeed be concluded. The simple availability of a treaty aiming at protecting foreign investors does not of course automatically create sufficient investment protection. Instead, actual concrete provisions of the BIT are of great importance. It will be argued in the second part of this paper that the current standard clauses cannot be included in a possible investment treaty between the EU and one or more SSA regional organizations. As a result, a possible treaty aiming at protecting foreign investors between the

concluded any BIT, or have not reported their BITs to the United Nations Conference on Trade and Development (UNCTAD). All named BITs can be retrieved at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_____779.aspx) (last visited 31 January 2014). However, it has to be noted that South Africa terminated its BIT with Belgium and Luxemburg in 2012 and announced its intention to terminate its other BITs with other European countries. See letter from Maite Nkoana-Mashabane, Minister of International Relations and Co-Operation, to Johan Maricou, Ambassador of the Kingdom of Belgium to South Africa, on 7 September 2012 entitled 'Termination of the Bilateral Investment Treaty with the Belgo-Luxembourg Economic Union' (unpublished). See also 'South Africa Begins Withdrawing From EU-Member BITs', *Investment Treaty News* (30 October 2012), available at <http://www.iisd.org/itn/2012/10/30/news-in-brief-9/> (last visited 31 January 2014). In 2013, South Africa equally terminated its BITs with Spain, the Netherlands (cf. L. Kolver, 'SA Proceeds With Termination of Bilateral Investment Treaties', *Engineering News* (21 October 2013), available at <http://www.engineeringnews.co.za/article/sa-proceeds-with-termination-of-bilateral-investment-treaties-2013-10-21> (last visited 31 January 2014), Germany, Switzerland (cf. R. Hunter, 'South Africa Terminates Bilateral Investment Treaties with Germany, Netherlands and Switzerland', available at <http://www.rh-arbitration.com/south-africa-terminates-bilateral-investment-treaties-with-germany-netherlands-and-switzerland/> (last visited 31 January 2014), and Canada (A. Green, 'Canada 'Very Disappointed' at South Africa's Investment Treaty Termination', *This is Africa* (30 May 2013), available at <http://www.thisisafricaonline.com/Business/Legal-Bulletin/Canada-very-disappointed-at-South-Africa-s-investment-treaty-termination?ct=true> (last visited 31 January 2014).

<sup>12</sup> See the BITs listed *supra* note 11.

EU and a SSA regional organization has to introduce new and adapt existing concepts in order to provide sufficient protection for FDIs. The third part will provide a short outlook on these concepts and how they might affect the future development of investment protection – not only on the bilateral, but also on a multilateral level. As an alternative to a BIT, other well-established treaty regimes, such as the so-called *Cotonou-Agreement* for example, could be adapted in order to include investment protection as well.

## B. Possible Parties of New Investment Treaties

In order to ensure a very efficient and high level of investment protection, it seems desirable that the new investment treaties should be negotiated and concluded between the EU on the one side, and one or more SSA regional organizations on the other side. Considering that these new investment treaties would be treaties within the meaning of Article 2 (1) (a) of the 1986 *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations* (VCLT-IO),<sup>13</sup> the respective parties to these treaties have to be (at least limited) subjects of public international law (I.), and must have the competence to negotiate and conclude such agreements (II.).

### I. The Possible Parties as Subjects of Public International Law

Historically, only States and a few rather exotic entities<sup>14</sup> were considered to be subjects of public international law.<sup>15</sup> Whereas States remain the most important subjects of public international law, other subjects have emerged. Among them are International Organizations (IOs).<sup>16</sup> IOs gain their status as subjects of public international law from the founding parties – in most cases

<sup>13</sup> *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, Art. 2 (1) (a), UN Doc A/CONF.129/15, 25 ILM 543, 545-546 [VCLT-IO]. The VCLT-IO is not yet in force (as of 12 April 2014). However, its substantive provisions are generally accepted as the applicable international law, thus reflecting customary international law. See A. Aust, *Modern Treaty Law and Practice*, 3rd ed. (2013), 347.

<sup>14</sup> Namely the Holy See, the Sovereign Order of Malta, and the International Committee of the Red Cross. For more information, see C. Walter, 'Subjects of International Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. IX (2012), 634, 636, para. 7.

<sup>15</sup> *Ibid.*, 635, para. 2.

<sup>16</sup> *Ibid.*, 636, para. 5. See also *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, ICJ Reports 1996, 66.

States – which transfer some of their sovereign rights to the IO.<sup>17</sup> As a result, IOs are only limited subjects of public international law.<sup>18</sup>

As a result, in order to be able to conclude a new treaty aiming at protecting foreign investors between the EU on the one side and one or more SSA regional organizations on the other, the parties have to be subjects of public international law. Article 47 of the *Treaty on European Union* (TEU) explicitly states that the EU is a (limited) subject of public international law.<sup>19</sup> Similar clauses can be found in the founding treaties establishing the Economic and Monetary Community of Central Africa (CEMAC),<sup>20</sup> the Common Market for Eastern and Southern Africa (COMESA),<sup>21</sup> the East African Community (EAC),<sup>22</sup> the Economic Community of Central African States (ECCAS),<sup>23</sup> the Economic Community of West African States (ECOWAS),<sup>24</sup> the Inter-Governmental Authority on Development (IGAD),<sup>25</sup> the Southern African Customs Union

<sup>17</sup> See K. Schmalenbach, 'International Organizations or Institutions, General Aspects', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. V (2012), 1126, 1131-1132, para. 22.

<sup>18</sup> *Ibid.*, 1131, para. 19.

<sup>19</sup> The consolidated version of the TEU can be found in OJ C 83/15 (30 March 2010).

<sup>20</sup> *Treaty on the Economic and Monetary Community of Central Africa*, 16 March 1994, Art. 3 (as amended on 25 June 2008), available at [http://www.cemac.int/sites/default/files/documents/files/traite\\_revise\\_cemac.pdf](http://www.cemac.int/sites/default/files/documents/files/traite_revise_cemac.pdf) (last visited 31 January 2014), 3 [CEMAC Treaty]. Member States of CEMAC are Cameroon, Central African Republic, Chad, Equatorial Guinea, Gabon, and Republic of the Congo.

<sup>21</sup> *Common Market for Eastern and Southern Africa Treaty*, 5 November 1993, Art. 186 (1), 33 ILM 1067, 1112 [COMESA Treaty]. Current Member States of COMESA are Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe.

<sup>22</sup> *Treaty for the Establishment of the East African Community*, 30 November 1999, Art. 138 (1), 2144 UNTS 255, 322 [EAC Treaty]. Member States of EAC are Burundi, Kenya, Rwanda, Tanzania, and Uganda.

<sup>23</sup> *Treaty Establishing the Economic Community of Central African States*, Art. 87 (1), 23 ILM 945, 964 [ECCAS Treaty]. Member States of ECCAS are Angola, Burundi, Cameroon, Central African Republic, Chad, Democratic Republic of Congo, Equatorial Guinea, Gabon, Republic of the Congo, as well as São Tomé and Príncipe.

<sup>24</sup> *Revised Treaty of the Economic Community of West African States*, 24 July 1993, Art. 88 (1), 2373 UNTS 233, 271 [ECOWAS Treaty]. Member States of ECOWAS are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

<sup>25</sup> *Agreement Establishing the Inter-Governmental Authority on Development*, 21 March 1996, Art. 3, Doc IGAD/SUM-96/AGRE-Doc, 6 [IGAD Agreement]. Member States of IGAD are Djibouti, Eritrea (currently suspended), Ethiopia, Kenya, Somalia, South

(SACU),<sup>26</sup> the Southern African Development Community (SADC),<sup>27</sup> and the West African Economic and Monetary Union (*Union Economique et Monétaire Ouest Africaine*, UEMOA).<sup>28</sup>

However, some treaties do not contain such an explicit provision.<sup>29</sup> Therefore, these treaties have to be interpreted in order to determine whether they implicitly provide for the subjectivity of the IO. As these treaties are treaties within the meaning of Article 2 (1) (a) of the 1969 *Vienna Convention on the Law of Treaties* (VCLT),<sup>30</sup> the relevant provisions on treaty interpretation are

Sudan, Sudan, and Uganda.

<sup>26</sup> *Southern African Customs Union Agreement*, 21 October 2002, Art. 4 (1), available at <http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html> (last visited 31 January 2014) [SACU Agreement]. Member States of SACU are Botswana, Lesotho, Namibia, South Africa, and Swaziland.

<sup>27</sup> *Treaty of the Southern African Development Community*, 17 August 1992, Art. 3 (1), 32 ILM 116, 123 (as amended on 14 August 2001) [SADC Treaty]. Member States of SADC are Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar (currently suspended), Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>28</sup> *Treaty Establishing the West African Economic and Monetary Zone [Traite Modifie de l' Union Economique et Monétaire Ouest Africaine]*, 10 January 1994, Art. 9, available at <http://www.uemoa.int/Documents/TraitReviserUEMOA.pdf> (last visited 31 January 2014), 7 [UEMOA Treaty]. Member States of the UEMOA are Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

<sup>29</sup> For instance, the *Constitutive Act of the African Union*, 11 July 2000, 2158 UNTS 3 [AU Act], the *Treaty Establishing the African Economic Community*, 3 June 1991, 30 ILM 1241 [AEC Treaty], the *Treaty Instituting the Arab Maghreb Union*, 17 February 1989, 1546 UNTS 151 [AMU Treaty], the *Treaty Establishing the Community of Sahel-Saharan States* (4 February 1998) [CEN-SAD Treaty], and the *Greater Arab Free Trade Agreement*, 25 February 2004, available at <http://www.mit.gov.jo/portals/0/Facilitate%20and%20Develop%20Trade%20Among%20Arab%20States.pdf> (last visited 31 January 2014) [GAFTA Agreement] do not contain any explicit references to the legal personality of the organizations established by these treaties. For more information about the *CEN-SAD Treaty*, see African Union, 'Status of Integration in Africa (SIA)' (April 2009), available at <http://europafrika.files.wordpress.com/2009/05/status-of-integration-in-africa-27-04-09.pdf> (last visited 31 January 2014), 84-95, paras 298-342).

<sup>30</sup> *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 [VCLT]. Art. 5 VCLT explicitly states that that the VCLT is applicable to any constituent instrument of an international organization without prejudice to any relevant rules of the organization. Thus, in cases of conflict, the provisions of the constituent instrument supersede as *leges speciales* the provisions of the VCLT as *leges generales*. K. Schmalenbach, 'Article 5', in O. Dörr & K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2012), 89, 96, para. 15. As the *AU Act*, the *AEC Treaty*, the *AMU Treaty*, the *CEN-SAD-Treaty*, and the *GAFTA Agreement* do not contain provisions on how these

Articles 31 to 33 VCLT.<sup>31</sup> By interpreting the *AU Act*, the *AEC Treaty*, the *AMU Treaty*, the *CEN-SAD Treaty*, and the *GAFTA Agreement* in accordance with the ‘general rule of interpretation’<sup>32</sup> contained in Article 31 VCLT, it must be taken into account that the objectives of the African Union (AU) enumerated in Article 3 *AU Act* render it necessary that the AU possesses legal personality. Similarly, the *AEC Treaty* refers in its Article 98 (2) to the competence of the Secretary General of the African Economic Community (AEC) to enter into contracts on behalf of the AEC. The same applies to the CEN-SAD. The objectives of the Arab Maghreb Union (AMU) enumerated in Article 2 *AMU Treaty*, however, indicate that the AMU is designed to be more of an internal forum of the Member States, than an actor on the international plain, and therefore it does not have legal personality under public international law in general. The same applies to the Greater Arab Free Trade Area (GAFTA).<sup>33</sup>

## II. Competence to Negotiate and Conclude Treaties Aiming at Protecting Foreign Investors

The mere fact that an IO possesses subjectivity under public international law does not suffice to assume that the IO is also competent to negotiate and conclude IIAs. Being only limited subjects of public international law, the competences of IOs depend on the rights that the Member States have transferred to the respective IO.<sup>34</sup> Similarly, Article 6 VCLT-IO states that “[t]he capacity of an international organization to conclude treaties is governed by the rules of that organization”.<sup>35</sup> This provision is considered to reflect customary international

treaties shall be interpreted, Arts 31-33 VCLT are applicable and govern the interpretation of the aforementioned treaties. Art. 26 *AU Act* (*supra* note 29, 42) and Art. 87 *AEC Treaty* (*supra* note 29, 1279), stipulating that the African Court of Justice and Human Rights has the competence to interpret the *AU Act*, respectively the *AEC Treaty* does not contradict this finding.

<sup>31</sup> For general information about the interpretation of treaties, see Aust, *supra* note 13, 205-226.

<sup>32</sup> *Ibid.*, 207 *et seq.*

<sup>33</sup> For more information about the GAFTA, see T. Broude, ‘Regional Economic Integration in the Middle East and North Africa: A Primer’, 1 *European Yearbook of International Economic Law* (2010), 269, 292-294.

<sup>34</sup> Cf. P. Sands Q. C. & P. Klein, *Bowett’s Law of International Institutions*, 6th ed. (2009), 476-477, paras 15-007-15-008. See also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, 174, 182.

<sup>35</sup> VCLT-IO, Art. 6, *supra* note 13, 549.

law.<sup>36</sup> Therefore, the treaties establishing the various IOs have to be analyzed in order to determine whether the EU and the various SSA regional organizations have at least the competence to negotiate and conclude IIAs.

## 1. The EU's Competence to Negotiate and Conclude IIAs

According to Article 207 (1) in conjunction with Articles 3 (1) (e) and 206 of the *Treaty on the Functioning of the European Union* (TFEU),<sup>37</sup> the EU holds exclusive competence in the field of FDIIs.<sup>38</sup> Despite the *prima facie* clear wording of Article 207 (1) TFEU, the scope of the EU's competence remains unclear, mostly because the notion of 'foreign direct investments' is neither defined in the TEU, nor in the TFEU.<sup>39</sup> Therefore, the term 'foreign direct investment' in Article 207 (1) TFEU has to be interpreted.

As neither the TEU nor the TFEU contain any provisions on how to interpret the constituent treaties of the EU,<sup>40</sup> it would seem logical and in accordance with Article 5 VCLT that – in the absence of a *lex specialis* – Articles 31 to 33 VCLT would govern the interpretation of Article 207 (1) TFEU as *leges generales*. However, the (European) Court of Justice (ECJ)<sup>41</sup> has labeled the *Treaty Establishing the European Economic Community*<sup>42</sup> as an "independent source of law" of a "special and original nature",<sup>43</sup> and not as an international treaty within the meaning of Article 2 (1) (a) VCLT.<sup>44</sup> In its subsequent

<sup>36</sup> A. Peters, 'Treaty-Making Power', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. X (2012), 56, 63, para. 35.

<sup>37</sup> The consolidated version of the TFEU can be found in OJ C 115/47 (9 May 2008).

<sup>38</sup> See for the continued validity of BITs concluded by EU Member States M. Burgstaller, 'The Future of Bilateral Investment Treaties of EU Member States', in M. Bungenberg, J. Griebel & S. Hindelang (eds), *European Yearbook of International Economic Law – Special Issue: International Investment Law and EU Law* (2011), 55, 67.

<sup>39</sup> M. Bungenberg, 'The Division of Competences Between the EU and its Member States', in Bungenberg, Griebel & Hindelang, *supra* note 38, 29, 35.

<sup>40</sup> H. Rösler, 'Interpretation of EU Law', in J. Basedow, K. J. Hopt & R. Zimmermann (eds), *The Max Planck Encyclopedia of European Private Law*, Vol. II (2012), 979, 979. Art. 344 TFEU prescribes only that a dispute about the interpretation of the TEU and TFEU has to be settled by the mechanisms provided within the TEU and TFEU (thus pursuant to Article 19 (1) (2) TEU by the ECJ), but does not prescribe how the ECJ has to interpret the constituent instruments of the EU.

<sup>41</sup> In this article, 'ECJ' is used as the well-known abbreviation even though its new name, after the *Treaty of Lisbon*, is simply the 'Court of Justice'.

<sup>42</sup> *Treaty Establishing the European Economic Community*, 25 March 1957, 298 UNTS 3.

<sup>43</sup> *Flaminio Costa v. ENEL*, Case C-6/64, [1964] ECR 585, 594.

<sup>44</sup> Advocate General Poiares Maduro, referring to the *Flaminio Costa v. ENEL* Judgment,

decisions, the ECJ did not apply the VCLT even once when interpreting any of the constituent treaties of the EU and its predecessors.<sup>45</sup> Instead, it even explicitly denied the applicability of the VCLT when it ruled out the legal possibility of Member States to invoke their right to suspend the operation of an international treaty in case of a material breach pursuant to Article 60 VCLT in order to defend their non-performance of the *Treaty Establishing the European Community*.<sup>46</sup> When the ECJ had to interpret any constituent instrument of the EU and its predecessors, it mainly used the grammatical, systematic, and purposive methods of interpretation.<sup>47</sup> With regard to the first and foremost method, the ECJ uses coordinate versions of texts in the different official languages.<sup>48</sup> By doing so, the ECJ applied the principle codified in Article 33 (1) VCLT without of course explicitly referring to this principle. Similarly, the other two methods of interpretation, which the ECJ often employed,<sup>49</sup> are very similar to the principles codified in Article 31 VCLT. The historical method of interpretation, as codified in Article 32 VCLT, was only rarely employed by the ECJ, mostly because of the complex and incompletely published legislative history.<sup>50</sup> However, even the principle codified in Article 32 is only a subsidiary method of treaty interpretation. Summing up, there is no difference in practice between the methods of interpretation of an international treaty prescribed by the VCLT and the methods of interpretation of the constituent instruments of the EU and its predecessors developed by the ECJ. As a result, Article 207 (1) TFEU has to be interpreted in accordance with the grammatical, systematical, and purposive method of interpretation.

The only promising method of interpreting Article 207 (1) TFEU in order to determine its scope is the grammatical method. In order to employ this method, the various authentic texts have to be compared. According to Article

even stated that “[t]he [ECJ] held that the Treaty is not merely an agreement between States, but an agreement between the peoples of Europe. [...] In other words, the Treaty has created a municipal legal order of trans-national dimensions, of which it forms the ‘basic constitutional charter.’” Opinion of Mr. Advocate General Póitres Maduro, *Yassin Abdullah Kadi and Al Barakat International Foundation v. Council of the European Union and Commission of the European Communities*, Joined Cases C-402/05 & C-415/02 P, [2008] ECR I-6351, I-6370, para. 21.

<sup>45</sup> Schmalenbach, *supra* note 30, 93, para. 9.

<sup>46</sup> *Commission of the European Economic Community v. Grand Duchy of Luxembourg and Kingdom of Belgium*, Joined Cases C-90/63 & C-91/63, [1964] ECR 625, 631.

<sup>47</sup> Rösler, *supra* note 40, 979.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

358 TFEU in conjunction with Article 55 (1) TEU, the original versions of the TFEU in Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish are the authentic versions of the TFEU. However, in each of these versions, Article 207 (1) TFEU refers only to the term ‘foreign direct investment’.<sup>51</sup> Hence, a comparative analysis of the various authentic versions of the TFEU is not beneficial to the interpretation of the term ‘foreign direct investment’ in Article 207 (1) TFEU. However, besides a simple comparative analysis of the various authentic versions of the TFEU, the ECJ also interprets provisions of the TFEU in accordance with the grammatical method by interpretation in good faith and by determining the ordinary meaning of the term in question, taking the object and purpose of the treaty into consideration.<sup>52</sup> Considering that the main purpose of Article 207 (1) TFEU is to ensure a coherent European investment policy, to enlarge the EU’s bargaining power, and to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy,<sup>53</sup> the object and purpose of Article 207 (1) TFEU is not useful for the interpretation of the term ‘foreign direct investment’. Instead, emphasis should be placed on the ordinary meaning of the term ‘foreign direct investment’. The ordinary meaning of this term can be determined by referring to definitions contained in the so-called secondary law of the EU, judgments of the ECJ, legally non-binding texts of the organs of the EU, IIAs between EU Member States, IIAs between EU Member States and third States, free trade agreements (FTAs) of the EU and its Member States with third States or other IOs and which contain an investment

<sup>51</sup> Bulgarian: *преките чуждестранни инвестиции*; Czech: *přímé zahraniční investice*; Danish: *direkte udenlandske investeringer*; Dutch: *directe buitenlandse investeringen*; English: *foreign direct investment*; Estonian: *välismaistesse otseinvesteeringutesse*; Finnish: *ulkomaisten suorien sijoitusten*; French: *investissements étrangers directs*; German: *ausländische Direktinvestitionen*; Greek: *άμεσες ξένες επενδύσεις*; Hungarian: *továbbá a külföldi közvetlen befektetésekre*; Irish: *hinfheistíocht dhíreach choigríche*; Italian: *investimenti esteri diretti*; Latvian: *ārvalstu tiešajiem ieguldījumiem*; Lithuanian: *tiesioginėmis užsienio investicijomis*; Maltese: *investment barrani dirett*; Polish: *bezpośrednich inwestycji zagranicznych*; Portuguese: *investimento estrangeiro directo*; Romanian: *investițiile străine directe*; Slovak: *priamym zahraničným investiciám*; Slovenian: *tujih neposrednih naložbah*; Spanish: *inversiones extranjerias directas*; Swedish: *utländska direktinvesteringar*.

<sup>52</sup> Cf. G. van Calster, ‘The EU’s Tower of Babel: The Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in More Than one Official Language’, 17 *Yearbook of European Law* (1997), 363, 374-375.

<sup>53</sup> Cf. Secretariat of the European Convention, *Draft Articles Concerning External Action in the Constitutional Treaty*, Doc CONV 685/03, 23 April 2003, 3-4, 53.

chapter, IIAs of non-EU Member States, the jurisprudence of international courts and tribunals, and academic writings.

The now-expired capital market *Directive 88/361/EEC* of 24 June 1988 defines direct investments as

“[i]nvestments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense”.<sup>54</sup>

The ECJ, though not providing an all-embracing definition of foreign investments, has indicated that physical transfer of financial assets could be a movement of capital as long as it was “essentially concerned with the investment of funds”.<sup>55</sup> Even after the expiration of *Directive 88/361/EEC*, the ECJ still used the nomenclature annexed to this directive as an indication of which operations constitute capital movement.<sup>56</sup> The first and most important category of capital movements indicated in this nomenclature includes movements linked to direct investments. This notion is associated with the establishment of, extension of, or participation in new or existing undertakings via equity or securities holdings which establish or maintain direct links between the person providing the capital and the undertaking to which the capital is made available in order to carry out an economic activity.<sup>57</sup> The ECJ reaffirmed these criteria in its 2006

<sup>54</sup> *Council Directive of 24 June 1988 for the Implementation of Article 67 of the Treaty (88/361/EEC)*, OJ (EU) 1988/L 178/5 (8 July 1988), 11 (explanatory notes).

<sup>55</sup> *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*, Joined Cases C-286/82 & C-26/83, [1984] ECR 377, 404, para. 21. See also *Criminal Proceedings Against Guerrino Casati*, Case C-203/80, [1981] ECR 2595, 2614, para. 10.

<sup>56</sup> *Manfred Trummer and Peter Mayer*, Case C-222/97, [1999] ECR, I-1661, I-1678, paras 21-22; *Commission of the European Communities v. Portuguese Republic*, Case C-367/98, [2002] ECR I-4731, I-4772, para. 37; *Commission of the European Communities v. Kingdom of Spain*, Case C-463/00, [2003] ECR I-4581, I-4629, para. 52; *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case C-98/01, [2003] ECR I-4641, I-4661, para. 39 [Commission v. United Kingdom and Others]; *Commission of the European Communities v. Italian Republic*, Case C-174/04, [2005] ECR I-4933, I-4961, para. 27 [Commission v. Italy].

<sup>57</sup> A. Dimopoulos, *EU Foreign Investment Law* (2011), 38. Cf. also *Commission of the European Communities v. Federal Republic of Germany (VW Case)*, Case C-112/05, [2007]

*Test Claimants* judgment.<sup>58</sup> However, these findings apply only to investments within the internal market, and thus are not applicable to foreign investments due to the fact that such an investment either flows into the EU from a third State or flows out to such a State.

The European Commission considers FDIs to generally “include any foreign investment which serves to establish lasting and direct links with the undertaking to which capital is made available in order to carry out an economic activity”,<sup>59</sup> thus aligning with the criteria established by the capital market *Directive 88/361/EEC* and the aforementioned judgments of the ECJ. The European Parliament, reacting to this communication, states in its *Resolution on the Future European International Investment Policy* that it is especially aware of the pertinent ECJ judgments, but finds that there is no clear definition of the term ‘foreign direct investment’ and therefore asks the Commission to provide a clear definition of the investments to be protected under the future European international investment policy.<sup>60</sup>

Even among EU Member States there is no uniform definition of the term ‘foreign direct investment’.<sup>61</sup> For example, the nearly 200 BITs concluded between two EU Member States (so-called intra-EU BITs)<sup>62</sup> do not specifically define ‘foreign direct investments’, but more broadly the term ‘investments’,

ECR I-8995, I-9027, paras 18-19; *Commission v. United Kingdom and Others*, *supra* note 56, 4648, para. 5; *Commission v. Italy*, *supra* note 56, I-4661, para. 40; S. Hindelang, ‘The EC Treaty’s Freedom of Capital Movement as an Instrument of International Investment Law?’, in A. Reinisch & C. Knahr (eds), *International Investment Law and Context* (2007), 43, 47; S. L. E. Johannsen, ‘Die Kompetenz der Europäischen Union für ausländische Direktinvestitionen nach dem Vertrag von Lissabon’, *Beiträge zum Transnationalen Wirtschaftsrecht No. 90* (2009), 11-12.

<sup>58</sup> *Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue*, Case C-446/04, [2006] ECR I-11753, I-11869-I-11870, paras 180-182.

<sup>59</sup> European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: Towards a Comprehensive European International Investment Policy*, Doc COM(2010)343 final (7 July 2010), 2.

<sup>60</sup> European Parliament, *European Parliament Resolution of 6 April 2011 on the Future European International Investment Policy (2010/2203(INI))*, OJ (EU) 2012/C 296 E/05 (2 October 2012), para. 11.

<sup>61</sup> Cf. J. Karl, ‘The Competence for Foreign Direct Investment: New Powers for the European Union?’, 5 *Journal of World Investment & Trade* (2004) 3, 413, 420.

<sup>62</sup> The conformity of intra-EU BITs with EU law in general is largely doubted. See W. Shan & S. Zhang, ‘The Treaty of Lisbon: Half Way Toward a Common Investment Policy’, 21 *European Journal of International Law* (2010) 4, 1049, 1054-1056 with further references.

which spreads from “any financial asset”,<sup>63</sup> thus a very broad definition, to “financial assets arising out of self-employment”,<sup>64</sup> to “financial assets assessed

<sup>63</sup> See 1997 *Austria–Bulgaria BIT*, Art. 1 (1); 1990 *Austria–Czech Republic BIT*, Art. 1 (1); *Austria–Estonia BIT*, Art. 1 (1); 1994 *Austria–Latvia BIT*, Art. 1 (1); 2002 *Austria–Malta BIT*, Art. 1 (2); 1988 *Austria–Poland BIT*, Art. 1 (1); 2002 *Austria–Slovenia BIT*, Art. 1 (2); 1988 *Belgium–Bulgaria BIT*, Art. 1 (1); 1997 *Belgium–Cyprus BIT*, Art. 1 (2); 1989 *Belgium–Czech Republic BIT*, Art. 1 (2); 1996 *Belgium–Estonia BIT*, Art. 1 (2); 1986 *Belgium–Hungary BIT*, Art. 1 (1); 1996 *Belgium–Latvia BIT*, Art. 1 (2); 1987 *Belgium–Malta BIT*, Art. 1 (1); 1987 *Belgium–Poland BIT*, Art. 1 (1); 1996 *Belgium–Romania BIT*, Art. 2 (1); 1999 *Belgium–Slovenia BIT*, Art. 1 (1); 1987 *Bulgaria–Cyprus BIT*, Art. 1 (1); 1989 *Bulgaria–France BIT*, Art. 1 (1); 1986 *Bulgaria–Germany BIT*, Art. 1 (1); 1994 *Bulgaria–Hungary BIT*, Art. 1 (1); 1984 *Bulgaria–Malta BIT*, Art. 1 (1); 1999 *Bulgaria–Netherlands BIT*, Art. 1 (1); 1994 *Bulgaria–Poland BIT*, Art. 1 (1); 1994 *Bulgaria–Romania BIT*, Art. 1 (1); 1989 *Cyprus–Hungary BIT*, Art. 1 (1); 1990 *Czech Republic–Finland BIT*, Art. 1 (1); 1990 *Czech Republic–France BIT*, Art. 1 (1); 1990 *Czech Republic–Germany BIT*, Art. 1 (1); 1991 *Czech Republic–Greece BIT*, Art. 1 (1); 1991 *Czech Republic–Netherlands BIT*, Art. 1 (1); 1990 *Czech Republic–Spain BIT*, Art. 1 (1); 1991 *Danmark–Estonia BIT*, Art. 1 (1); 1988 *Danmark–Hungary BIT*, Art. 1 (1); 1992 *Danmark–Latvia BIT*, Art. 1 (1); 1992 *Danmark–Lithuania BIT*, Art. 1 (1); 1994 *Danmark–Romania BIT*, Art. 2 (1); 1992 *Estonia–Finland BIT*, Art. 1 (1) (a); 1992 *Estonia–France BIT*, Art. 1 (1); 1992 *Estonia–Germany BIT*, Art. 1 (1); 1992 *Estonia–Netherlands BIT*, Art. 1 (1); 1994 *Estonia–United Kingdom BIT*, Art. 1 (a); 1988 *Finland–Hungary BIT*, Art. 1 (1); 1992 *Finland–Latvia BIT*, Art. 1 (1) (a); 1992 *Finland–Lithuania BIT*, Art. 1 (1) (a); 1992 *Finland–Romania BIT*, Art. 1 (1) (a); 1990 *Finland–Slovakia BIT*, Art. 1 (1) (a); 1992 *France–Latvia BIT*, Art. 1 (1); 1992 *France–Lithuania BIT*, Art. 1 (1); 1976 *France–Malta BIT*, Art. 1 (1); 1995 *France–Romania BIT*, Art. 1 (1); 1990 *France–Slovakia BIT*, Art. 1 (1); 1998 *France–Slovenia BIT*, Art. 1 (1); 1986 *Germany–Hungary BIT*, Art. 1 (1); 1993 *Germany–Latvia BIT*, Art. 1 (1); 1992 *Germany–Lithuania BIT*, Art. 1 (1); 1980 *Germany–Portugal BIT*, Art. 1 (1); 1993 *Germany–Slovenia BIT*, Art. 1 (1); 1989 *Greece–Hungary BIT*, Art. 1 (1); 1995 *Greece–Latvia BIT*, Art. 1 (1); 1992 *Greece–Poland BIT*, Art. 1 (1); 1997 *Greece–Romania BIT*, Art. 1 (1); 1987 *Hungary–Netherlands BIT*, Art. 1 (1); 1992 *Hungary–Poland BIT*, Art. 1 (2); 1989 *Hungary–Spain BIT*, Art. 1 (1); 1987 *Hungary–United Kingdom BIT*, Art. 1 (1) (a); 1994 *Latvia–Netherlands BIT*, Art. 1 (a); 1994 *Latvia–United Kingdom BIT*, Art. 1 (a); 1994 *Lithuania–Netherlands BIT*, Art. 1 (a); 1993 *Lithuania–United Kingdom BIT*, Art. 1 (a); 1984 *Malta–Netherlands BIT*, Art. 1 (a); 1986 *Malta–United Kingdom BIT*, Art. 1 (a); 1992 *Netherlands–Poland BIT*, Art. 1 (a); 1991 *Netherlands–Slovakia BIT*, Art. 1 (a); 1996 *Netherlands–Slovenia BIT*, Art. 1 (a); 1987 *Poland–United Kingdom BIT*, Art. 1 (a); 1998 *Slovenia–Spain BIT*, Art. 1 (2); and 1996 *Slovenia–United Kingdom BIT*, Art. 1 (a). All aforementioned BITs are available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_____779.aspx) (last visited 31 January 2014).

<sup>64</sup> See 1988 *Austria–Hungary BIT*, Art. 1 (1), available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_____779.aspx) (last visited 31 January 2014).

in the host State in accordance with the host State's laws and regulations"<sup>65</sup> – if they even contain a definition of 'investments'<sup>66</sup> – and thus encompass not only FDIs, but also, for instance, portfolio investments. The same applies to the definition of 'investment' in BITs between EU Member States and non-EU Member States (so called extra-EU BITs).<sup>67</sup> Recently adopted model BITs

<sup>65</sup> See 1996 *Austria–Lithuania BIT*, Art. 1 (1); 1996 *Austria–Romania BIT*, Art. 1 (1); 1996 *Belgium–Lithuania BIT*, Art. 1 (2); 1999 *Bulgaria–Czech Republic BIT*, Art. 1 (1); 1993 *Bulgaria–Denmark BIT*, Art. 1 (1); 1997 *Bulgaria–Finland BIT*, Art. 1 (1); 1993 *Bulgaria–Greece BIT*, Art. 1 (1); 1993 *Bulgaria–Portugal BIT*, Art. 1 (1); 2005 *Bulgaria–Slovakia BIT*, Art. 1 (1); 1995 *Bulgaria–Spain BIT*, Art. 1 (2); 1994 *Bulgaria–Sweden BIT*, Art. 1 (1) (a); 1995 *Bulgaria–United Kingdom BIT*, Art. 1 (1); 2001 *Cyprus–Czech Republic BIT*, Art. 1 (1); 1991 *Czech Republic–Denmark BIT*, Art. 1 (1); 1994 *Czech Republic–Estonia BIT*, Art. 1 (1); 1993 *Czech Republic–Hungary BIT*, Art. 1 (1); 1996 *Czech Republic–Ireland BIT*, Art. 1 (1); 1994 *Czech Republic–Latvia BIT*, Art. 1 (1); 1994 *Czech Republic–Lithuania BIT*, Art. 1 (1); 2002 *Czech Republic–Malta BIT*, Art. 1 (1); 1993 *Czech Republic–Portugal BIT*, Art. 1 (1); 2008 *Czech Republic–Romania BIT*, Art. 1 (1); 1990 *Czech Republic–Sweden BIT*, Art. 1 (1); 1990 *Czech Republic–United Kingdom BIT*, Art. 1 (a); 1990 *Denmark–Poland BIT*, Art. 1 (1) (a); 1999 *Denmark–Slovenia BIT*, Art. 1 (1); 1997 *Estonia–Greece BIT*, Art. 1 (1); 1993 *Estonia–Poland BIT*, Art. 1 (2); 1992 *Estonia–Spain BIT*, Art. 1 (2); 1992 *Estonia–Sweden BIT*, Art. 1 (1); 1996 *Finland–Poland BIT*, Art. 1 (1); 1998 *Finland–Slovenia BIT*, Art. 1 (1); 1986 *France–Hungary BIT*, Art. 1 (1); 1989 *France–Poland BIT*, Art. 1 (1); 1961 *Germany–Greece BIT*, Art. 1 (1); 1989 *Germany–Poland BIT*, Art. 1 (1) (a); 1996 *Germany–Romania BIT*, Art. 1 (1); 1996 *Greece–Lithuania BIT*, Art. 1 (1); 1997 *Greece–Slovenia BIT*, Art. 1 (1); 1999 *Hungary–Latvia BIT*, Art. 1 (1); 1999 *Hungary–Lithuania BIT*, Art. 1 (1); 1992 *Hungary–Portugal BIT*, Art. 1 (b); 1993 *Hungary–Romania BIT*, Art. 1 (1); 1993 *Hungary–Slovakia BIT*, Art. 1 (1); 1996 *Hungary–Slovenia BIT*, Art. 1 (1); 1987 *Hungary–Sweden BIT*, Art. 1 (1); 1989 *Italy–Poland BIT*, Art. 1 (1); 1993 *Latvia–Poland BIT*, Art. 1 (2); 1995 *Latvia–Portugal BIT*, Art. 1 (1); 1995 *Latvia–Spain BIT*, Art. 1 (2); 1992 *Latvia–Sweden BIT*, Art. 1 (1); 1992 *Lithuania–Poland BIT*, Art. 1 (2); 1998 *Lithuania–Portugal BIT*, Art. 1 (1); 1998 *Lithuania–Slovenia BIT*, Art. 1 (1); 1994 *Lithuania–Spain BIT*, Art. 1 (2); 1992 *Lithuania–Sweden BIT*, Art. 1 (1); 1994 *Netherlands–Romania BIT*, Art. 1 (a); 1993 *Poland–Portugal BIT*, Art. 1 (1); 1992 *Poland–Spain BIT*, Art. 1 (2); 1989 *Poland–Sweden BIT*, Art. 1 (1); 1993 *Portugal–Romania BIT*, Art. 1 (2); 1995 *Portugal–Slovakia BIT*, Art. 1 (1); 1997 *Portugal–Slovenia BIT*, Art. 1 (1); 1994 *Romania–Slovakia BIT*, Art. 1 (1); 1995 *Romania–Spain BIT*, Art. 1 (1); 2002 *Romania–Sweden BIT*, Art. 1 (1); 1995 *Romania–United Kingdom BIT*, Art. 1 (a); and 1999 *Slovenia–Sweden BIT*, Art. 1 (1). All aforementioned BITs are available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>66</sup> The 1974 *Germany–Malta BIT* and the 2002 *Italy–Malta BIT* do not contain a definition of the term 'investment'. Both BITs are available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch____779.aspx) (last visited 31 January 2014).

<sup>67</sup> Compare 2004 *France–Bahrain BIT*, Art. 1 (1); 2007 *French–Chinese BIT*, Art. 1 (1); 2005 *Germany–Afghanistan BIT*, Art. 1 (1); 2001 *Germany–Bosnia and Herzegovina BIT*,

of EU Member States,<sup>68</sup> non-EU Member States,<sup>69</sup> COMESA,<sup>70</sup> SADC,<sup>71</sup> the Association of Southeast Asian Nations (ASEAN),<sup>72</sup> and the International

Art. 1 (1); and 2000 *United Kingdom–Sierra Leone BIT*, Art. 1 (a), defining an investment to be any asset, with 1996 *Poland–Jordan BIT*, Art. 1 (2); 2003 *Spain–Albania BIT*, Art. 1 (2); 2005 *Spain–China BIT*, Art. 1 (1); and 2006 *United Kingdom–Mexico BIT*, Art. 1, requiring that the investment has been made in accordance with the laws and regulations of the host State. All aforementioned BITs are available at [http://www.unctadxi.org/templates/DocSearch\\_\\_\\_\\_\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_____779.aspx) (last visited 31 January 2014).

<sup>68</sup> Examples for recently adopted model BITs of EU Member States are the 2006 *France Model BIT (Draft Agreement Between the Government of the Republic of France and the Government of the Republic of (...) on the Reciprocal Promotion and Protection of Investments*, available at <http://www.italaw.com/documents/ModelTreatyFrance2006.pdf> (last visited 31 January 2014)), the 2008 *Germany Model BIT (Treaty Between the Federal Republic of Germany and ... Concerning the Encouragement and Reciprocal Protection of Investments*, available at <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (last visited 31 January 2014)), and the 2003 *Italy Model BIT (Agreement Between the Government of the Italian Republic and the Government of (...) on the Promotion and Protection of Investments*, available at <http://www.italaw.com/sites/default/files/archive/ITALY%202003%20Model%20BIT%20.pdf> (last visited 31 January 2014)).

<sup>69</sup> Examples for recently adopted model BITs of non-EU Member States are the 2004 *Canada Model BIT (Agreement Between Canada and ... for the Promotion and Protection of Investments*, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (last visited 31 January 2014)), the 2007 *Colombia Model BIT (Bilateral Agreement for the Promotion and Protection of Investments Between the Republic of Colombia and ...)*, available at [http://italaw.com/documents/inv\\_model\\_bit\\_colombia.pdf](http://italaw.com/documents/inv_model_bit_colombia.pdf) (last visited 31 January 2014)), the 2003 *India Model BIT (Agreement between the Government of the Republic of India and the Government of the Republic of (...) for the Promotion and Protection of Investments*, available at <http://italaw.com/sites/default/files/archive/ita1026.pdf> (last visited 31 January 2014)), the (now outdated) 2004 *U.S. Model BIT (Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.state.gov/documents/organization/117601.pdf> (last visited 31 January 2014)), and its successor, the 2012 *U.S. Model BIT (Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 31 January 2014)).

<sup>70</sup> *Investment Agreement for the COMESA Common Investment Area* (2007), available at [http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment\\_agreement\\_for\\_the\\_CCIA.pdf](http://www.tralac.org/wp-content/blogs.dir/12/files/2011/uploads/Investment_agreement_for_the_CCIA.pdf) (last visited 31 January 2014).

<sup>71</sup> *SADC Model Bilateral Investment Treaty Template* (2012), available at <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf> (last visited 31 January 2014).

<sup>72</sup> *ASEAN Comprehensive Investment Agreement* (2009), available at [http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20\(ACIA\)%202012.pdf](http://www.asean.org/images/2012/Economic/AIA/Agreement/ASEAN%20Comprehensive%20Investment%20Agreement%20(ACIA)%202012.pdf) (last visited 31 January 2014).

Institute for Sustainable Development (IISD)<sup>73</sup> do not provide a uniform definition of the term ‘investment’ either.<sup>74</sup>

Article 1 (6) of the 1992 *Energy Charter Treaty* (ECT)<sup>75</sup> defines investments as “every kind of asset” associated with an economic activity in the energy sector, thus following the rather broad approach. Article 25 (1) of the 1965 *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* (ICSID Convention) refers generally to “an investment”,<sup>76</sup> but does not further specify or define this term. However, with regard to the notion of ‘investments’ in Article 25 (1) of the Convention, an tribunal of the International Centre for the Settlement of Investment Disputes (ICSID), an entity belonging to the World Bank, decided in the case of *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*<sup>77</sup> that an investment in the meaning of Article 25 (1) *ICSID Convention* is characterized by (i) a contribution in money, in kind, or in industry; (ii) long duration; (iii) the presence of risk; and (iv) the promotion of economic development.<sup>78</sup> The International Monetary Fund (IMF) distinguishes in its *Balance of Payments Manual* between FDIs and portfolio investments.<sup>79</sup>

<sup>73</sup> *IISD Model International Agreement on Investment for Sustainable Development* (2005), available at <http://www.italaw.com/sites/default/files/archive/ita1027.pdf> (last visited 31 January 2014) [IISD Agreement].

<sup>74</sup> Whereas 2006 *France Model BIT*, Art. 1 (1) (*supra* note 68), 2008 *Germany Model BIT*, Art. 1 (1) (*supra* note 68), 2004 *U.S. Model BIT* (*supra* note 69), Art. 1, and 2012 *U.S. Model BIT*, Art. 1 (*supra* note 69) define investments as “any assets”, 2003 *Italy Model BIT*, Art. 1 (1) (*supra* note 68), 2007 *Colombia Model BIT*, Art. 1 (2) (*supra* note 69), 2003 *India Model BIT*, Art. 1 (b) (*supra* note 69), 2009 *ASEAN Comprehensive Investment Agreement*, Art. 4 (a), (c) (*supra* note 72) require that the investment has to be made in accordance with the laws and regulations of the host State. 2004 *Canada Model BIT*, Art. 1 (*supra* note 69), and 2007 *Investment Agreement for the COMESA Common Investment Area*, Art. 1 (*supra* note 70) contain a very detailed and narrow definition of the term ‘investment’. *SADC Model Bilateral Investment Treaty Template*, Art. 2 (*supra* note 71) does not provide one definition, but provides three different definitions – an enterprise-based definition, an asset-based definition based 2004 *Canada Model BIT*, Art. 1 (*supra* note 69), and an asset-based definition based on 2012 *U.S. Model BIT*, Art. 1 (*supra* note 69), thus reflecting the prevailing controversy of defining ‘investments’.

<sup>75</sup> *The Energy Charter Treaty*, 17 December 1994, Art. 1 (6), 2080 UNTS 95, 101.

<sup>76</sup> *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 18 March 1965, Art. 25 (1), 575 UNTS 159, 174.

<sup>77</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, 42 ILM 609, 622, para. 52.

<sup>78</sup> Several other arbitral tribunals have applied this definition. See M. Sornarajah, *The International Law on Foreign Investment*, 3rd ed. (2010), 309.

<sup>79</sup> International Monetary Fund (ed.), *Balance of Payments and International Investment Position Manual*, 6th ed. (2009), 100 *et seq.* & 110, paras 6.8 *et seq.* & 6.55-6.57.

According to the IMF, FDI is a “category of cross-border investment associated with a resident in one economy having control or a significant degree of influence on the management of an enterprise that is resident in another economy”.<sup>80</sup> Further, pursuant to the IMF, “[p]ortfolio investment is defined as cross-border transactions and positions involving debt or equity securities, other than those included in direct investment or reserve assets”.<sup>81</sup>

Summing up, even the grammatical method of interpreting Article 207 (1) TFEU does not provide much clarity.<sup>82</sup> The plain wording of Article 207 (1) TFEU expresses a distinction between direct and non-direct investments and confers upon the EU only the competence to negotiate and conclude international agreements regarding the former investments. However, this distinction remains vague and cannot be determined by employing the grammatical method of interpretation.

Some commentators argue that the EU has an implied external competence relating to non-direct investments based on Articles 63 to 66 TFEU, thus on provisions governing the free movement of capital.<sup>83</sup> In addition, an extensive interpretation of Article 207 (1) TFEU resulting in the inclusion of non-direct investments could be considered based on the *effet utile* principle. This principle aims at ensuring that EU law is given full effect.<sup>84</sup> It could be argued that the competence granted by Article 207 (1) TFEU, limiting the scope of future EU IIAs to only direct investments, cannot be used effectively if non-direct investments are excluded, as the boundaries between direct and non-direct investments are blurred.<sup>85</sup> This would also explain why all BITs concluded by EU Member States – either as intra-EU BIT or as extra-EU BIT – do not distinguish

<sup>80</sup> *Ibid.*, 100, para. 6.8.

<sup>81</sup> *Ibid.*, 110, para. 6.54.

<sup>82</sup> The same conclusion is reached by Dimopoulos, *supra* note 57, 42 and Bungenberg, *supra* note 39, 35-36.

<sup>83</sup> European Commission, *supra* note 59, 8. See also *Fabrique de fer de Charleroi SA and Dillinger Hüttenwerke AG v. Commission of the European Communities*, Joined Cases C-351/85 & C-360/85, [1987] ECR 3639 and *Commission of the European Communities v. Council of the European Communities (European Agreement on Road Transport)*, Case C-22/70, [1971] ECR 263.

<sup>84</sup> See, e.g., *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, Case C-106/77, [1978] ECR 629, 643, paras 14-16; *Rhiannon Morgan v. Bezirksregierung Köln and Iris Bucher v. Landrat des Kreises Düren*, Joined Cases C-11/06 & C-12/06, [2007] ECR I-9161, I-9206, para. 26; *Halina Nerkowska v. Zakład Ubezpieczeń Społecznych Oddział w Koszalinie*, Case C-499/06, [2008] ECR I-3993, I-3999, para. 18.

<sup>85</sup> See, e.g., Dimopoulos, *supra* note 57, 42 and Bungenberg, *supra* note 39, 36-37.

between direct and non-direct investments.<sup>86</sup> Such an extensive interpretation of Article 207 (1) TFEU would likewise correlate with the suggestions of the European Commission and the European Parliament, which prefer that future EU IIAs cover direct and non-direct investments.<sup>87</sup>

Yet, both arguments are criticized by other commentators. According to these commentators, the first argument “ignores the express intention of the drafters of the Lisbon Treaty to limit the EU’s competence to foreign direct investment”.<sup>88</sup> Furthermore, it “cannot explain why the inclusion of foreign direct investment in Article 207 TFEU was necessary in the first place”.<sup>89</sup> If the EU automatically has an implied external competence for every explicit internal competence, the EU would similarly have an implied external competence for foreign direct investment, as it has an explicit internal competence for FDIs.<sup>90</sup> The second argument – resulting in fact in an interpretation *contra legem* – is not in line with the principle of conferral, a substantial principle of EU law, codified in Articles 4 (1) and 5 (1), (2) TEU.<sup>91</sup> According to this principle, the EU’s competences have to be explicitly provided for in the TEU or the TFEU.<sup>92</sup> As demonstrated above, this is not the case with regard to non-direct investments.

Although these critical arguments are *prima facie* convincing, they disregard that Article 352 TFEU allows for a flexible adjustment of EU competences in relation to all objectives of the EU.<sup>93</sup> This provision stipulates that, whenever an action by the EU is deemed necessary to attain one of the objectives set out in the treaties, but the treaties do not provide the powers required, the Council

<sup>86</sup> Cf. *supra* notes 63-67.

<sup>87</sup> European Commission, *supra* note 59, 8; European Parliament, *supra* note 60, para. 11.

<sup>88</sup> M. Krajewski, ‘The Reform of the Common Commercial Policy’, in A. Biondi, P. Eeckhout & S. Ripley (eds), *EU Law After the Treaty of Lisbon* (2012), 292, 302.

<sup>89</sup> *Ibid.*

<sup>90</sup> Cf. Shan & Zhang, *supra* note 62, 1054-1056.

<sup>91</sup> Cf. also TFEU, Art. 7, *supra* note 37.

<sup>92</sup> For an in-depth analysis of the principle of conferral, see A. Weber, ‘The Distribution of Competences Between the Union and the Member States’, in H.-J. Blanke & S. Mangiameli (eds), *The European Union After Lisbon* (2012), 311.

<sup>93</sup> See, e.g., C. Lebeck, ‘Implied Powers Beyond Functional Integration?: The Flexibility Clause in the Revised EU Treaties’, 17 *Journal of Transnational Law and Policy* (2008) 2, 303, 329-332. The exact scope of Art. 352 TFEU is disputed and was of great concern for the *Bundesverfassungsgericht* [the German Federal Constitutional Court] in its judgment on the *Lisbon Treaty*. See *Lissabon-Vertrag* [Lisbon Treaty], Case 2 BvE 2/08 *et al.*, 123 BVerfGE 267, 393-395 (paras 325-328). See to this P. Kiiver, ‘The Lisbon Judgment of the German Constitutional Court: A Court-Ordered Strengthening of the National Legislature in the EU’, 16 *European Law Journal* (2010) 5, 578, 583.

can – and should – adopt ‘appropriate measures’, thus any measure which the Council considers as necessary in order to attain the objective in question effectively. Thus, Article 352 TFEU is an exception to the principle of conferral, which must step back in such instances. In respect of the scope of Article 207 (1) TFEU, it has to be noted that – mainly because the blurred boundaries between direct and non-direct investments – the objective of Article 207 (1) TFEU in particular – namely to ensure a coherent European investment policy, to enlarge the EU’s bargaining power, and to strengthen the EU as an actor in bilateral and multilateral negotiations on investment policy<sup>94</sup> – but also of the EU’s common commercial policy (CCP) in general, cannot be attained effectively if the EU does not have competence with regard to non-direct investments. Thus, provided that the Council adopts ‘appropriate measures’ in accordance with Article 352 TFEU, the EU has the competence to negotiate and conclude IIAs covering both, direct and non-direct investments.<sup>95</sup> Moreover, based on this argumentation, the EU’s competence encompasses the current standard clauses in IIAs, such as the definition of investments covered by the respective IIA (regularly ‘any asset’), a clause determining that the investment has to be in accordance with the laws and regulations of the host entity upon establishment of the investment (‘accordance with the law clause’), the ‘most-favorable nation treatment clause’ (also referred to as the ‘MFN clause’), the ‘national treatment clause’ (also referred to as the ‘NT clause’), the ‘fair and equitable treatment clause’ (also referred to as the ‘FET clause’), a provision limiting expropriations of foreign investors and outlawing any expropriation not accompanied by the payment of a compensation (also referred to as the ‘expropriation/compensation clause’), and the ‘investor-State-dispute settlement clause’ (also referred to as the ‘ISDS clause’).<sup>96</sup>

## 2. The Competence of the Various SSA Regional Organizations to Negotiate and Conclude IIAs

Article 207 (3) TFEU provides the EU with the exclusive competence to negotiate and conclude IIAs not only with States, but also with IOs. Considering

<sup>94</sup> Cf. Secretariat of the European Convention, *supra* note 53, 3-4, 53.

<sup>95</sup> The alternative would be a mixed agreement by the EU and its Member States on the one side and third States or regional organizations on the other side, or an amendment of the TFEU, aiming at transferring the competence to negotiate and conclude IIAs also covering non-direct investments to the EU. This alternative is for example suggested by Bungenberg, *supra* note 39, 40-42.

<sup>96</sup> The fact that the EU has the competence to negotiate and conclude IIAs containing these

that there are several IOs in SSA and that an IIA between the EU on the one side and a regional organization in SSA on the other side would be beneficial in order to create a common level of investment protection for European investors in SSA, and also to avoid single States being played against each other,<sup>97</sup> it has to be assessed whether the IOs' competence extends to negotiating and concluding IIAs.

With the exception of the *AU Act*, the *CEMAC Treaty*,<sup>98</sup> the *CEN-SAD Treaty*, the *SACU Agreement*, and the *UEMOA Treaty*, all constituent treaties of the various regional organizations contain provisions relating to foreign investments.<sup>99</sup> However, with the noteworthy exception of Article 24 (1) *SADC Treaty*,<sup>100</sup> no treaty provision explicitly allows the respective IO to negotiate

standard clauses does not imply that there are no problems related to these clauses. These problems will be discussed *infra*, section C.

<sup>97</sup> UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (2013), 103-107, which reports about increasing regionalism in IIA negotiations.

<sup>98</sup> It has to be noted, though, that in 1999 CEMAC passed the *CEMAC Investment Charter*, 17 December 1999, Regulation No. 17/99/CEMAC-020-CM-03, which is basically a framework that aims at harmonizing the investment codes of the CEMAC Member States. Cf. S. A. Khan & L. T. Bamou, 'An Analysis of Foreign Direct Investment Flows to Cameroon', in S. Ibi Ajayi (ed.), *Foreign Direct Investment in Sub-Saharan Africa: Origins, Targets, Impact and Potential* (2006), 75, 85-86. Although the mere presence of the *CEMAC Investment Charter* does not allow the conclusion that the CEMAC has the competence to negotiate and conclude IIAs, it would seem logical and – considering CEMAC's mission to promote the development of its Member States (*CEMAC Treaty*, Art. 2, *supra* note 20) – desirable that CEMAC serves as a forum and coordinator of the interests of its Member States with regard to future IIAs between the EU and CEMAC Member States.

<sup>99</sup> See Arts 4 (2) (c), 42 (1) (b) (iii) & 65 (1) (b) (i) *AEC Treaty* (*supra* note 29, 1253, 1266 & 127); Arts 3 (c), 4 (3) (e), 84 (c), 100 (f), 100 (h), 104 (1) (c), 106 (2) (b), 138 (1) (c), 139 (2) (c), 146 (b), 148 (ii), 153 (a) & 158-160 *COMESA Treaty* (*supra* note 21, 1075, 1090, 1094-1096, 1102-1108); Arts 79 & 80 *EAC Treaty* (*supra* note 22, 290-291), Art. 46 (1) (a) *ECCAS Treaty* (*supra* note 23, 957); Arts 3 (2) (f), 3 (2) (i), 34 (b) (i) & 66 (2) (d) *ECOWAS Treaty* (*supra* note 24, 238-239, 253 & 265); Arts 7 (c) & 13A (l) *IGAD Agreement* (*supra* note 25, 7 & 12); and Arts 5 (2) (i), 21 (3) (c) & 24 (1) *SADC Treaty* (*supra* note 27, 125, 130).

<sup>100</sup> It should be noted that SADC already made use of this competence at least to some extent by adopting the *SADC Model BIT Template* (*supra* note 71). However, this instrument is – as its name already suggests – only a template for BITs concluded by SADC Member States and is not intended to be a model for BITs concluded directly by SADC. For more information, see H. Mann, 'The SADC Model Bit Template: Investment for Sustainable Development' (30 October 2012), available at <http://www.iisd.org/itn/2012/10/30/the-sadc-model-bit-template-investment-for-sustainable-development/> (last visited 31

and conclude international agreements. Instead, the treaty provisions consider it rather as a forum to coordinate the various interests of its Member States. By doing so, the respective IO might serve as negotiating partner for the EU, but the IIA has ultimately to be signed by the Member States of the IO. Solely the *COMESA Treaty*, with its investment chapter in Articles 158 to 160 and its Article 153 (a) could be interpreted to grant COMESA the competence to negotiate and conclude IIAs. Other treaties, such as Articles 79 and 80 *EAC Treaty*, Article 46 (1) (a) *ECCAS Treaty*, and Articles 3 (2) (f) and 3 (2) (i) *ECOWAS Treaty*, refer only to the creation of a common investment code.

To sum up, with the exception of SADC and maybe also COMESA, regional organizations in SSA do not have the competence to conclude IIAs. Notwithstanding, they can serve as forum to coordinate the wide range of interests of their Member States during the negotiation of an IIA with the EU and, by doing so, could ensure that their Member States are not played against each other. The negotiated IIA has to be signed by the IO's Member States. Although so far most treaties aiming at protecting foreign investors are only bilateral, the examples of the TFEU, containing provisions on intra-EU investments, the *North American Free Trade Agreement (NAFTA)*,<sup>101</sup> and the ECT clearly indicate that plurilateral treaties aiming at protecting foreign investors are possible.

### C. Introducing the Current Standard Clauses Into the New Investment Treaty Regime

The mere presence of a treaty aiming at protecting foreign investors does evidently not suffice in order to provide sufficient investment protection. Ever since the very first BIT was concluded in 1959 between Germany and Pakistan, all 2,000+ BITs contain certain standard clauses. Among these clauses are the definition of the investments covered by the respective BIT (regularly 'any asset'), a clause determining that the investment has to be in accordance with the laws and regulations of the host State upon establishment of the investment ('accordance with the law clause'), a 'most-favorable nation treatment clause' (also referred to as a 'MFN clause'), a 'national treatment clause' (also referred to as a 'NT clause'), a 'fair and equitable treatment clause' (also referred to as a 'FET clause'), a provision limiting expropriations of foreign investors and outlawing

January 2014).

<sup>101</sup> *North American Free Trade Agreement*, 17 December 1992, 32 ILM 289 & 32 ILM 605.

any expropriation not accompanied by the payment of a compensation (also referred to as an ‘expropriation/compensation clause’), and an ‘investor-State-dispute settlement clause’ (also referred to as an ‘ISDS clause’). As these clauses virtually constitute the basis for investment protection worldwide, they should be also included in possible new IIAs covering European investments in SSA. As explicated above, the EU has the competence to negotiate and conclude IIAs containing these clauses.<sup>102</sup> Similarly, SADC and COMESA comprise the competence to negotiate and conclude IIAs containing these clauses.<sup>103</sup> In fact, an interpretation of the relevant provisions of the constituent treaties of the EU, SADC, and COMESA can be solely based on the *effet utile* principle and does not lead to an (exceptionally allowed) interpretation *contra legem*.<sup>104</sup> However, with regard to the EU, this finding might not be applicable to the ‘expropriation/compensation clause’, as the inclusion of such a clause into a future EU IIA potentially constitutes a violation of Article 345 TFEU. Pursuant to this provision, the “[t]reaties shall in no way prejudice the rules in Member States governing the system of property ownership”.<sup>105</sup> Thus, the EU competence does not encompass the right to expropriate. It has to be noted, though, that the usual ‘expropriation/compensation clause’ stipulates the requirements for a lawful expropriation which are considered to be part of customary international law.<sup>106</sup> Consequently, the inclusion of an ‘expropriation/compensation clause’ in a future EU IIA would not interfere with the domestic rules governing the system of property ownership in the EU Member States, and therefore would not violate Article 345 TFEU. Beyond that, the scope of Article 345 TFEU only concerns the right of Member States to nationalize private property or to privatize public property.<sup>107</sup> Therefore, “Article 345 TFEU does not deal with the determination of the conditions under which an expropriation might take

<sup>102</sup> *Supra*, section B. II. 1.

<sup>103</sup> Of course the Member States of the other IOs in SSA, not having the competence to conclude an IIA with the EU, can agree on an IIA containing these standard clauses because of their sovereignty.

<sup>104</sup> Cf. Karl, *supra* note 61, 420.

<sup>105</sup> TFEU, Art. 345, *supra* note 37.

<sup>106</sup> Under customary international law, an expropriation is considered to be lawful if the expropriation is (i) in the public interest or for a public purpose, (ii) accomplished in a non-discriminatory fashion, (iii) in conformity with due process, and (iv) accompanied by a prompt, adequate and effective compensation. Cf. U. Kriebaum & A. Reinisch, ‘Property, Right to, International Protection’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII (2012), 522, 525-528, paras 19-31.

<sup>107</sup> See, e.g., *Fearon and Irish Land Commission*, Case C-182/83, [1984] ECR 3677, 3684-3685, para 6.

place”.<sup>108</sup> This determination still falls within the scope of possible regulation covered by Article 207 TFEU.<sup>109</sup> Further, Article 345 TFEU does not exclude the domestic rules governing the system of property ownership from the fundamental provisions of the TEU and the TFEU.<sup>110</sup> As a result, the general provisions on the common market, competition, State aid, and CCP apply to the domestic rules governing the system of property ownership.<sup>111</sup>

Although the aforementioned standard clauses can be generally included in future EU-SSA IIAs, some alterations are necessary.

## I. Determining the Investor to Be Protected by the New Treaty

All IIAs generally only apply to investments made by an investor who is national of one of the contracting parties and who is investing in the other State.<sup>112</sup> In the absence of a multilateral investment treaty,<sup>113</sup> it is therefore essential to determine the nationality of an investor. Consequently, a future EU-SSA IIA has to include some reference to the nationality of the investor as well.

Currently, there are three possibilities for the determination of the nationality of a legal person. A legal person can be the national of the State of its

<sup>108</sup> Bungenberg, *supra* note 39, 37.

<sup>109</sup> Cf. C. Herrmann, ‘Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon’, 21 *Europäische Zeitschrift für Wirtschaftsrecht* (2010) 6, 207, 211.

<sup>110</sup> D. Booß, ‘Art. 345 AEUV’, in C. O. Lenz & K.-D. Borchardt (eds), *EU-Verträge Kommentar: EUV, AEUV, GRCh* (2013), 3027, 3028, para. 3.

<sup>111</sup> Cf. *ibid.*

<sup>112</sup> See, e.g., 2008 *Germany Model BIT*, Art. 1, *supra* note 68. See, however, 2012 *U.S. Model BIT*, Art. 8 (1), *supra* note 69, 10-11, which makes reference to investors of a non-party. To some extent, the ‘MFN clause’ contained in most IIAs constitutes the exception to this general rule as it allows for the application of another IIA which was concluded between one of the contracting parties to the IIA containing the ‘MFN clause’ and a third State. For more information, see, e.g., M. Hilf & R. Geiß, ‘Most-Favoured-Nation Clause’, in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VII (2012), 384.

<sup>113</sup> Such an agreement was proposed by the Organisation for Economic Co-operation and Development (OECD) in 1995 (the draft is available at <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf> (last visited 31 January 2014)), but was never adopted (see for more information S. J. Kobrin, ‘The MAI and the Clash of Civilizations’, *Foreign Policy* (1998) 112, 97; J. Kurtz, ‘NGOs, the Internet and International Economic Policy Making: The Failure of the OECD Multilateral Agreement on Investment’, 3 *Melbourne Journal of International Law* (2002) 2, 213; C. Warkentin & K. Mingst, ‘International Institutions, the State, and Global Civil Society in the Age of the World Wide Web’, 6 *Global Governance* (2000) 2, 237).

incorporation, of the State of its *siège social*, or of the State in which the majority of its shareholders reside.<sup>114</sup> Regardless of the question of which one of these three theories is to be followed, it has to be taken into account that the EU itself is not a State and thus there is – besides the construct of EU citizenship pursuant to Article 20 TFEU – no nationality linked to the EU.<sup>115</sup> Hence, the nationality of a legal person cannot be determined solely under EU law, but has to take into account the laws of the respective Member State. As a result, the definition of a (European) foreign investor has to cope with this fact by defining a European foreign investor as a legal person who is incorporated in one of the EU's Member States, has its *siège social* in one of the EU's Member States, or whose majority of shareholders reside within the EU.

## II. Determining the Decisive Laws and Regulations of the Host Entity Pursuant to the 'Accordance With the Law Clause'

As neither the EU nor any of the SSA regional organizations are States,<sup>116</sup> the current standard clause cannot be directly included in a treaty aiming at protecting foreign investors.

Even if 'host State' is replaced by 'host IO' or 'host entity', the notion of 'laws and regulations' is of concern. Due to the very nature of an IO, there is no general, all-encompassing body of laws and regulations available. Instead, the laws and regulations of the particular IO primarily consist of the law within its founding treaty – the so-called primary law<sup>117</sup> with regard to the IO in question. Most provisions of the founding treaties deal with the functioning

<sup>114</sup> Cf. R. D. Sloane, 'Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality', 50 *Harvard International Law Journal* (2009) 1, 1, 38.

<sup>115</sup> The same applies to the two IOs in SSA which have the competence to conclude IIAs, SADC, and COMESA.

<sup>116</sup> *Convention on the Rights and Duties of States*, 26 December 1933, Art. 1, 165 LNTS 19, 25 – which is considered to be part of customary international law (see, e.g., M. N. Shaw, *International Law*, 6th ed. (2009), 198) – determines that a State is defined as having a defined territory, a permanent population, an effective government, and the capacity to enter into relations with other States. *Prima facie*, the EU and most SSA regional organizations fulfill these criteria. However, in order to be considered a State the 'effective government' has to be politically independent (see, e.g., J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (2012), 129-130) – a requirement no IO can fulfill because of its large dependency on its Member States and its limited 'sovereign' rights.

<sup>117</sup> See, e.g., M. Benzling, 'International Organizations or Institutions, Secondary Law', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VI (2012), 74, 74, para. 1.

of the respective IO and allocating competences to its various organs.<sup>118</sup> Other provisions govern the relations between the IO and its Member States.<sup>119</sup> In fact, there are only very few, if any, general provisions directly applicable to the citizens of the Member States.<sup>120</sup> Consequently, these provisions do not constitute a proper body of laws and regulations within the meaning of the ‘accordance with the law clause’.

Neither does the so-called secondary law,<sup>121</sup> consisting of regulations and other sources of law adopted by the respective IO. Despite the vast, incomparable competences of the EU for adopting regulations and directives, there is still no contemporary all-encompassing ‘European law’ available which is directly applicable to the ‘EU’s citizens’. In fact, most legislative measures adopted by the EU are directives firstly requiring transformation into domestic law by the Member States.<sup>122</sup> The same applies to the various IOs in SSA.

However, the ‘accordance with the law clause’ can be included in IIAs despite the lack of an all-encompassing body of laws and regulations. Throughout the world, States with a federalist order such as the United States of America, Brazil, Germany, Austria, Switzerland, Nigeria, and Australia are facing the same challenge. IIAs concluded by these States include an ‘accordance with the law clause’<sup>123</sup> which is interpreted as to refer to both federal and state law.<sup>124</sup> That is to say, if an investor wants to do business in Nigeria, for example, the investment has upon establishment to be in accordance with the laws and regulations of

<sup>118</sup> See the TEU (*supra* note 19) in which most of the 55 provisions govern the functioning of the EU. Similarly, most of the 358 provisions of the TFEU are concerned with the functioning of the EU.

<sup>119</sup> See, e.g., TFEU, Art. 175, *supra* note 37.

<sup>120</sup> For example, provisions on the common market contained in the TFEU are considered to be directly applicable. See, e.g., P. Craig & G. de Búrca, *EU Law: Text, Cases and Materials*, 5th ed. (2011), 180. Similarly, the provisions on non-discrimination are equally considered to have horizontal direct effect. Rather critical in this regard M. de Mol, ‘The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?’, 18 *Maastricht Journal of European and Comparative Law* (2011) 1, 109, 123-130. See in general on the direct effect of treaty provisions *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*, Case C-26/62, [1963] ECR 1, 16.

<sup>121</sup> See, e.g., Benzing, *supra* note 117, 74-75, paras 2-3.

<sup>122</sup> See TFEU, Art. 288, *supra* note 37. For exceptions to this requirement, see, e.g., *Van Duyn v. Home Office*, Case C-41/74, [1974] ECR 1337, 1347-1349, paras 9-15; Craig & de Búrca, *supra* note 120, 191-194.

<sup>123</sup> See 2008 *Germany Model BIT*, Art. 2 (1), *supra* note 68, 5.

<sup>124</sup> See 2012 *U.S. Model BIT*, Art. 3 (3), *supra* note 69, 7.

Nigeria as well as with the laws and regulations of the particular State of Nigeria in which the investment will be made.

This interpretation of the ‘accordance with the law clause’ can certainly be transferred to a possible future EU-SSA IIA as well. The clause has simply to be altered in a way as to provide that upon establishment the investment shall comply upon establishment with the laws and regulations applicable within the IO and the particular Member State in which the investment will be made.

### III. Alterations to the Standard ‘NT Clause’

According to the ‘NT clause’, foreign investors have to be treated in the same way as national corporations. This leads only to a ‘relative’ standard of treatment.<sup>125</sup> What it indicates is that the determination of whether a national measure violates the ‘NT clause’ requires a comparison between a foreign investor and a national investor or corporation. Precisely, it stipulates that foreign and national investors are comparable, which is more commonly referred to as ‘likeness’.<sup>126</sup>

The inclusion of a simple ‘NT clause’, similar to Article 4 (1) (1) of the 2007 *France–Bahrain BIT*<sup>127</sup> for example, which just states that the contracting Party applies to the nationals of the other contracting Party a treatment not less favorable than the treatment applied to its own nationals, might yield undesirable legal consequences. As will be elaborated in more detail below, future EU-SSA IIAs will have to include clauses on environmental protection, labor standards, and human rights.<sup>128</sup> Especially less and least developed States in SSA might not want to impose as far reaching environmental regulations as the EU has, or in the future will have, in order to ensure that domestic corporations remain competitive. If an EU investor, unlike national investors or corporations, had to comply with rather far reaching environmental protection standards, the ‘NT clause’ would be violated. Thus, this clause has to be altered and drafted

<sup>125</sup> Dimopoulos, *supra* note 57, 155.

<sup>126</sup> *Ibid.*

<sup>127</sup> 2007 *France–Bahrain BIT*, Art. 4 (1) (1), *supra* note 67.

<sup>128</sup> *Infra*, section D.

more subtly nuanced in order to ensure that it is inapplicable to clauses on environmental protection, labor standards, and human rights.<sup>129</sup>

#### IV. Alterations to the Standard ‘MFN Clause’

The same conclusion can be drawn in respect of the ‘MFN clause’. A simple ‘MFN clause’, such as Article 3 (1) 2005 *Germany–Afghanistan BIT*,<sup>130</sup> provides that foreign investments covered under the IIA containing the ‘MFN clause’ are granted the same favorable treatment as foreign investments covered under another IIA. If the clauses on environmental protection, labor standards, and human rights in the future EU-SSA IIAs are not contained in other IIAs applicable to SSA,<sup>131</sup> foreign investors may be inclined to circumvent the clauses in the EU-SSA IIA by referring to the ‘MFN clause’ and the absence of these clauses in other IIAs. Consequently, the ‘MFN clause’ in future EU-SSA IIAs has to be altered as well.<sup>132</sup> Such an exception is provided for example in Article 12 2008 *U.S.–Rwanda BIT*<sup>133</sup> pertaining to environmental protection.

In addition, the scope of the ‘MFN clause’ is currently discussed amongst legal scholars. This discussion relates to the question of whether the ‘MFN clause’ can be construed extensively, providing the foreign investor with the opportunity to refer to any – from its point of view more favorable – treatment of other foreign investors under other IIAs.<sup>134</sup> Such an interpretation would, however, be too broad and no longer in accordance with the law.<sup>135</sup> Nevertheless

<sup>129</sup> Cf. European Parliament, *supra* note 60, paras 25 & 30 which welcomes the fact that a number of IIAs currently have a clause which prevents the watering-down of social and environmental legislation in order to attract investment. An example of such a clause can be found in 2008 *U.S.–Rwanda BIT*, Art. 12 (1), available at [http://www.unctad.org/sections/dite/iaa/docs/bits/US\\_Rwanda.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/US_Rwanda.pdf) (last visited 31 January 2014), 15. See also 2012 *U.S. Model BIT*, Art. 12 (3), *supra* note 69, 17, which allows balancing environmental concerns against investment protection.

<sup>130</sup> 2005 *Germany–Afghanistan BIT*, Art. 3 (1), *supra* note 67.

<sup>131</sup> It has to be noted in this context that a few recently adopted Model BITs and BITs contain already clauses on environmental protection, labor standards, and human rights. Examples are the aforementioned 2008 *U.S.–Rwanda BIT* (*supra* note 129) and the 2005 *U.S.–Uruguay BIT*, available at [http://www.unctad.org/sections/dite/iaa/docs/bits/US\\_Uruguay.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/US_Uruguay.pdf) (last visited 31 January 2014).

<sup>132</sup> Cf. European Parliament, *supra* note 60, paras 25 & 30.

<sup>133</sup> 2008 *U.S.–Rwanda BIT*, Art. 12, *supra* note 129.

<sup>134</sup> See Dimopoulos, *supra* note 57, 160.

<sup>135</sup> Cf. Sornarajah, *supra* note 78, 322. However, it has to be noted that an ICSID tribunal held in the case *Emilio Augustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000, 40 ILM 1129, 1132-1133, para. 21, that a ‘MFN clause’

it is suggested that the drafters of future EU-SSA IIAs should be aware of this leeway and therefore should draft the ‘MFN clause’ in a way that excludes the possibility of a broad interpretation of the clause, thus ensuring that the ‘MFN clause’ can only operate in respect of the same matter and cannot be extended to matters different from those actually envisaged by the basic treaty.<sup>136</sup>

## V. Alterations to the Standard ‘FET Clause’

Whereas ‘NT and MFN clauses’ provide only a ‘relative’ standard of treatment,<sup>137</sup> the ‘FET clause’ provides an ‘absolute’ standard of treatment,<sup>138</sup> thus providing protection for foreign investments against national measures irrespective of their discriminatory character.<sup>139</sup> Regularly, the wording of the ‘FET clause’ in an IIA is rather vague.<sup>140</sup> For example, Article 2 (2) 2005 *Germany–Afghanistan BIT* simply states that “[e]ach Contracting Party shall in its territory in any case accord investments by investors of the other Contracting State fair and equitable treatment”.<sup>141</sup> Unsurprisingly, the ‘FET clause’ is one of the most, if not the most, interpreted clauses in investor-State arbitration.<sup>142</sup> Arbitration tribunals greatly extended the scope of the ‘FET clause’,<sup>143</sup> which subsequently spurred a fierce discussion about its exact scope, first among legal scholars,<sup>144</sup> and subsequently among States.<sup>145</sup> In order to ensure that a future

applies to more favorable clauses on dispute settlement in other IIAs as well. This finding was later upheld in *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence of 19 June 2009, para. 220.

<sup>136</sup> Dimopoulos, *supra* note 57, 161.

<sup>137</sup> *Supra* note 125.

<sup>138</sup> Dimopoulos, *supra* note 57, 163.

<sup>139</sup> Generally, this clause has been considered as an expression of the principle of good faith, protecting foreign investors from abusive conduct by host States, ensuring the application of regulatory fairness and transparency, and safeguarding legitimate expectations of investors. See, e.g., Sornarajah, *supra* note 78, 349-359 for a detailed analysis of the ‘FET clause’.

<sup>140</sup> Cf. *ibid.*, 204.

<sup>141</sup> 2005 *Germany–Afghanistan BIT*, Art. 2, *supra* note 67.

<sup>142</sup> Sornarajah, *supra* note 78, 349.

<sup>143</sup> Cf. *ibid.* with further references.

<sup>144</sup> Cf. *ibid.*, 353.

<sup>145</sup> One of the biggest critics of the ‘FET clause’ is the Republic of South Africa which decided not to renew its BIT with Belgium and Luxembourg and announced its intention not to renew other BITs with European countries because of the overly extensive interpretation of the ‘FET clause’ by arbitration tribunals. Cf. South African Department of Trade and Industry, ‘Bilateral Investment Treaty Policy Framework Review: Executive

EU-SSA IIA is acceptable to these States, the drafters of a future EU-SSA IIA should be aware of this criticism and, therefore, should adopt the 'FET clause', in as far as to result in both a limited scope and a limited possibility for arbitration tribunals to interpret this clause extensively. One example of such an adopted 'FET clause' is Article 5 2012 *SADC Model Bilateral Investment Treaty Template*.<sup>146</sup>

## VI. Alterations to the Standard 'Expropriation/Compensation Clause'

It can be assumed that any 'expropriation/compensation clause' in a future EU-SSA IIA will be modeled after the current standard 'expropriation/compensation clause' reflective of customary international law.<sup>147</sup>

However, there is currently an ongoing debate among legal scholars and States with regard to the extensive interpretation by arbitration tribunals of indirect expropriations as expropriations within the meaning of the 'expropriation/compensation clause'.<sup>148</sup> For instance, arbitration tribunals have

Summary of Government Position Paper', *Government Gazette/Staatskoerant No. 32386* (7 July 2009), available at <http://www.northernlaw.co.za/images/stories/files/actsbills/BILATERAL%20INVESTMENTS%20TREATY%20POLIVY.pdf> (last visited 31 January 2014), 10-11. Similarly, Indonesia decided to terminate its IIA with the Netherlands per 1 July 2015 and indicated the termination of all other IIAs (see, e.g., Netherlands Embassy in Jakarta, Indonesia, 'Termination Bilateral Investment Treaty', available at <http://indonesia.nlembassy.org/organization/departments/economic-affairs/termination-bilateral-investment-treaty.html> (last visited 22 April 2014). Whether Indonesia is asking for 'modern' IIAs, or whether the country's move is somehow related to the rejection of its jurisdictional challenges by the ICSID Tribunal in *Churchill Mining and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case Nos ARB/12/14 & 12/40, Decision on Jurisdiction of 24 February 2014, is currently unclear. See C. Tevendale & V. Naish, 'Indonesia Indicates Intention to Terminate All of Its Bilateral Investment Treaties?' (20 March 2014), available at <http://www.lexology.com/library/detail.aspx?g=96317cf9-e366-4877-b00c-a997ed3389c5> (last visited 22 April 2014). Cf. also European Parliament, *supra* note 60, para. 24.

<sup>146</sup> *SADC Model Bilateral Investment Treaty Template*, Art. 5, *supra* note 71.

<sup>147</sup> Cf. *supra*, section C.

<sup>148</sup> See, e.g., R. Dolzer & C. H. Schreuer, *Principles of International Investment Law*, 2nd ed. (2012), 101 *et seq.*; Y. Fortier & S. L. Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor', 19 *ICSID Review Foreign Investment Law Journal* (2004) 2, 293; *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award of 17 February 2000, 39 ILM 1317, 1329, paras 69-74.

considered even environmental measures to be indirect expropriations and have awarded compensation thereupon.<sup>149</sup> Such a broad interpretation of the term ‘expropriation’, resulting in the limitation of possible legislative acts of the host State, is – if at all – only barely in accordance with public international law, as the host State’s sovereignty – one of the most fundamental principles of public international law – is at stake. Consequently, it does not wonder that some States favor an alteration of the ‘expropriation/compensation clause’.<sup>150</sup> The drafters of a future EU-SSA IIA should take this criticism into consideration when drafting their ‘expropriation/compensation clause’ in order to ensure that this clause is acceptable to the contracting parties of the EU-SSA IIA. An example for such an altered ‘expropriation/compensation clause’ is Article 6 (7) of the 2012 *SADC Model Bilateral Investment Treaty Template*, which states that a non-discriminatory “measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement”.<sup>151</sup>

Further, the determination of the scope of the ‘expropriation/compensation clause’ in a future EU-SSA IIA has to comply with primary EU law. In order to avoid potential conflicts with Article 17 of the *Charter on Fundamental Rights of the European Union* (CFREU),<sup>152</sup> the ‘expropriation/compensation clause’ has to be drafted carefully.<sup>153</sup> It is argued that a clause providing that non-discriminatory and transparent measures, aiming at achieving legitimate public policy objectives, such as the protection of public health, the environment, and workers’ and consumers’ rights, do not amount to indirect expropriation as long as they are proportionate, would sufficiently clarify the rules, protect the right to regulate, and achieve coherence with the CFREU.<sup>154</sup> The same applies of course

<sup>149</sup> See, e.g., Sornarajah, *supra* note 78, 398 with references to the case law.

<sup>150</sup> Cf. South African Department of Trade and Industry, *supra* note 145, 10-11. See also European Parliament, *supra* note 60, para. 23.

<sup>151</sup> *SADC Model Bilateral Investment Treaty Template*, Art. 6 (7), *supra* note 71.

<sup>152</sup> *Charter on Fundamental Rights of the European Union*, 7 December 2001, Art. 17, 40 ILM 266, 269.

<sup>153</sup> Dimopoulos, *supra* note 57, 191.

<sup>154</sup> *Ibid.*, 192.

with regard to Article 14 of the 1981 *African Charter on Human and Peoples' Rights* (ACHPR, also referred to as *Banjul-Charter*).<sup>155</sup>

## VII. Attributing Violations of the 'Expropriation/Compensation Clause' and the 'FET Clause' to the Host Entity

Of even greater concern is the attribution of violations of the 'expropriation/compensation clause' and the 'FET clause' to the host entity. In principle, under an IIA concluded between two States, such a violation would constitute an internationally wrongful act within the meaning of Article 2 of the 2001 *Articles on State Responsibility* (ASR).<sup>156</sup> Consequently, the attribution of the wrongful act to the respective host State would be governed by Articles 4 to 11 ASR. According to these provisions, the respective State is basically responsible for any violation of the clauses committed by any State organ, including *ultra vires* acts.<sup>157</sup> As a result, the ASR provides a significant level of protection against wrongful acts by States.

The ASR are inapplicable to IOs. The International Law Commission (ILC) has elaborated a parallel body of norms, and adopted in 2011 the *Draft Articles on the Responsibility of International Organizations* (DARIO).<sup>158</sup> So far, the DARIO are not binding, but are considered to codify, at least in part, customary international law. Despite several similarities, the DARIO vary extremely from the ASR especially in the context of attribution of a wrongful act.<sup>159</sup> As a function thereof, the level of protection against wrongful acts by IOs is lower than the level of protection against wrongful acts by States.

Therefore, a possible future EU-SSA IIA concluded between the EU on the one side and SADC and/or COMESA on the other side should include provisions on the attribution of wrongful acts to the respective IO in order

<sup>155</sup> *African Charter on Human and Peoples' Rights*, 27 June 1981, Art. 14, 1520 UNTS 217, 248.

<sup>156</sup> *Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 2, GA Res. 56/83 annex, UN Doc A/RES/56/83, 28 January 2002, 2, 2.

<sup>157</sup> *Ibid.*, Art. 7, 3.

<sup>158</sup> *Draft Articles on the Responsibility of International Organizations*, UN Doc A/66/10 (2011), 54, para. 87.

<sup>159</sup> Cf. C. Ahlborn, 'The Use of Analogies in Drafting the Articles on the Responsibility of International Organizations: An Appraisal of the 'Copy-Paste Approach'', 9 *International Organizations Law Review* (2012) 1, 53, 64.

to ensure a similar level of protection for foreign investors as provided by the current BITs concluded between States.

### VIII. Settling Disputes Between Host State and Foreign Investor Through International Arbitration

Most IIAs contain an 'ISDS clause' which allows the foreign investor to challenge an alleged violation of the IIA directly through investment arbitration. In fact, this clause is an important aspect of investment protection as it entitles an alien to directly seek judicial remedies against a foreign State in front of an international tribunal, something which is highly exceptional under public international law.<sup>160</sup> Public international law is characterized as the legal regime governing mainly the relations between States – and not granting the individual any enforceable rights against foreign States. Instead, the individual's home State has to enforce the individual's rights against that foreign State.<sup>161</sup> Most 'ISDS clauses' stipulate that a dispute should be settled by the ICSID. With the exception of the Republic of Poland, all EU Member States are contracting parties to the *ICSID Convention*.<sup>162</sup>

The ICSID tribunal only has jurisdiction if both parties to the treaty referring any dispute to ICSID arbitration are equally parties to the *ICSID Convention*. So far, neither the EU nor SSA regional organizations are parties. Given that Article 67 *ICSID Convention* states that only States can be parties, a simple accession of EU and/or SSA regional organizations is not possible. Similarly, pursuant to Article IX (1) of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention),<sup>163</sup> only States fulfilling the criteria laid down in its Article VIII can accede to it. According to Article VIII, only members to the United Nations – and thus only States – qualify for accession. Even the – for the EU and the IOs in SSA – quite

<sup>160</sup> J. Dugard, 'Diplomatic Protection', in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. III (2012), 114, 117, para. 10.

<sup>161</sup> For further information, see, e.g., R. McCorquodale, 'The Individual and the International Legal System', in M. D. Evans, *International Law*, 3rd ed. (2010), 284; Shaw, *supra* note 116, 258-259; and K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (2011).

<sup>162</sup> ICSID, 'List of Contracting States and other Signatories of the Convention' (11 April 2014), available at <https://icsid.worldbank.org/ICSID/Servlet?requestType=ICSID-DocRH&actionVal=ShowDocument&language=English> (last visited 11 April 2014).

<sup>163</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, Art. IX (1), 330 UNTS 3, 44.

relevant exception in Article VIII which allows members of specialized agencies to accede to the Convention is futile, as the whole *New York Convention* only refers to “Contracting States”. Hence, the EU cannot accede to the *New York Convention*.

The examples of the World Trade Organization (WTO) and the *European Convention of Human Rights* show that multilateral treaties can be adapted to allow for the accession of IOs (in both cases of the EU) to the respective treaty regime.<sup>164</sup> Consequently, one way to overcome the current inapplicability of the Conventions would be to either adapt Article 67 *ICSID Convention* and Article IX *New York Convention* in a manner that it would allow IOs to become party to the *ICSID Convention* or to the *New York Convention*, or to conclude a special protocol allowing IOs to accede to the respective treaty. Given the protracted and problematic procedures of adapting an international treaty, the latter possibility seems more feasible. The conclusion of a special protocol is possible, as has been shown with respect to the so-called *Additional Facility Rules*, allowing States to appear before ICSID tribunals despite the fact that they are not a contracting party to the *ICSID Convention*.<sup>165</sup>

Another possibility for overcoming the problem that only States can be party to the *ICSID Convention* would be to seek a different forum for the settlement of investment disputes. Already today, a few other forums exist which are capable of deciding investment disputes through arbitration, such as the Permanent Court of Arbitration in The Hague (PCA), the International Court of Arbitration of the International Chamber of Commerce in Paris (ICC-ICA), the London Court of International Arbitration (LCIA) and its affiliate, the Mauritius International Arbitration Centre (LCIA-MIAC), the Stockholm Chamber of Commerce (SCC), the Dubai International Arbitration Centre (DIAC), and the Singapore International Arbitration Centre (SIAC). Usually, these forums apply arbitration rules modeled after the 2006 amended 1985 *UNCITRAL Model Law on International Commercial Arbitration*,<sup>166</sup> applying

<sup>164</sup> For more information, see J. L. Mortensen, ‘The World Trade Organization and the European Union’, in K. E. Jørgensen (ed.), *The European Union and International Organizations* (2009), 80 and J. P. Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’, 48 *Common Market Law Review* (2011) 4, 995.

<sup>165</sup> *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for the Settlement of Investment Disputes*, 1 January 2003, Art. 2, Doc ICSID/11/Rev.1, 10, 10-11.

<sup>166</sup> *UNCITRAL Law Model on International Commercial Arbitration*, 21 June 1985, 24 ILM 1302 (amended in 2006).

likewise to investor-State arbitration and are in fact quite similar to the provisions of the *ICSID Convention*.

Since the seat of arbitration should be neutral,<sup>167</sup> the various forums located in Europe are rather unlikely to be agreed upon in a treaty between the EU and SSA. The same applies *prima facie* to the LCIA-MIAC as its neutrality might be challenged due to its seat in Mauritius, a SSA State. However, due to its affiliation with the LCIA, the LCIA-MIAC provides a very interesting combination of European and African links and therefore might represent an ideal forum for the settlement of investment disputes between European investors and SSA States.<sup>168</sup> Alternatives to the LCIA-MIAC are the DIAC and the SIAC. For assuming jurisdiction, all three relevant forums only require that the parties agreed on the respective forum for arbitration in writing.<sup>169</sup> This requirement could be fulfilled by replacing the referral to ICSID arbitration in the current standard clause on investment arbitration by a referral to LCIA-MIAC, DIAC, or SIAC investment arbitration in the future EU-SSA IIA. In addition, a referral to this arbitration clause should be included in any agreement between foreign investors and SSA IOs or SSA States.<sup>170</sup>

Furthermore, the competences of the ECJ have to be respected when introducing an 'ISDS clause' into a future EU-SSA IIA.<sup>171</sup> Pursuant to Article 19 (1) TEU, the EU Member States are under an obligation to create efficient judicial remedies for every field of law covered by EU law, thus also in the field of the CCP in general and the law on foreign investments in particular. In the latter field, judicial remedies are however very limited. Investment disputes are

<sup>167</sup> Cf. J. Fry, 'Arbitration and Promotion of Economic Growth and Investment', 13 *European Journal of Law Reform* (2011) 3 & 4, 388, 390.

<sup>168</sup> Cf. R. Baruti, 'Is Africa Finally Confronting its Challenges on Investment Treaty Arbitration?' (4 November 2011), available at <http://www.kluwarbitrationblog.com/blog/2011/11/04/is-africa-finally-confronting-its-challenges-on-investment-treaty-arbitration/> (last visited 31 January 2014).

<sup>169</sup> In addition to a simple choice of seat of arbitration, the parties have to agree on various other issues as well, such as applicable law, nomination of arbitrators, nationality of arbitrators, and so on.

<sup>170</sup> An even wider approach would be to include the procedural rules into the IIA. Such an approach is currently being pursued by the EU in the context of its negotiations with the United States of America about the *Transatlantic Trade and Investment Partnership Agreement* (TTIP). Cf., e.g., European Commission, 'Fact Sheet: Investment Protection and Investor-to-State Dispute Settlement in EU Agreements' (November 2013), available at [http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc\\_151916.pdf](http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151916.pdf) (last visited 22 April 2014), 7-8.

<sup>171</sup> Bungenberg, *supra* note 39, 37.

regularly dealt with by arbitration in front of international tribunals without the requirement of a previous exhaustion of local remedies. The drafters of a future EU-SSA IIA have to make sure that effective judicial remedies are available for any dispute arising in the context of a foreign investment covered under the future EU-SSA IIA and that the competences of the ECJ are well observed. The same applies with regard to Article 7 ACHPR.

Moreover, the inclusion of new clauses in a future EU-SSA IIA on environmental protection, labor standards, and human rights, thus clauses imposing obligations upon the foreign investor, will only be effective if they are also enforceable against the investor.<sup>172</sup> Therefore, the 'ISDS clause' in a future EU-SSA IIA has also to provide a possibility for the State to at least bring counter-claims, or even original claims against the investor in ISDS proceedings.<sup>173</sup> In fact, although many tribunals are rather reluctant to allow such counter-claims, nearly all arbitration rules provide for the right to assert them in investor-State disputes.<sup>174</sup> It is argued that tribunals are already today more likely to do so if the IIA contains a broader 'ISDS clause' which is not limited to obligations specifically provided by the IIA.<sup>175</sup> The reluctance of some tribunals to assert counter-claims can be explained by referring to the possible lack of consent. Consent to arbitration is one of the cornerstones of arbitration as it provides and limits the competence for the arbitrators to decide a dispute.<sup>176</sup> Current 'ISDS clauses' regularly refer to "disputes [...] concerning an obligation of the latter [the State]" and thus limit the jurisdiction to claims brought by investors about obligations of the host State.<sup>177</sup> Consequently, if there is no consent with regard to counter-claims, the tribunal lacks jurisdiction to adjudicate on these

<sup>172</sup> Cf. – with regard to human rights – T. Weiler, 'Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order', 27 *Boston College International & Comparative Law Review* (2004) 2, 429, 429.

<sup>173</sup> Counter-claims are characterized by their defensive nature. They purport to undermine the primary claim and have to relate to the substance of the already initiated dispute. Cf. C. H. Schreuer, 'Article 46', in C. H. Schreuer, *The ICSID Convention: A Commentary*, 2nd ed. (2009), 731, 749-750, paras 64-71. In contrast, original claims initiate a new dispute.

<sup>174</sup> Y. Kryvoi, 'Counterclaims in Investor-State Arbitration', 21 *Minnesota Journal of International Law* (2012) 2, 216, 218.

<sup>175</sup> *Ibid.*, 230 (with a substantial analysis of case law on the previous pages).

<sup>176</sup> See, e.g., M. L. Moses, *The Principles and Practice of International Commercial Arbitration* (2008), 2.

<sup>177</sup> *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011, 142, para. 869; Kryvoi, *supra* note 174, 228.

claims.<sup>178</sup> Therefore, it is suggested that a future EU-SSA IIA should explicitly provide for original claims of host States.<sup>179</sup>

## D. Introducing New and Adapting Existing Concepts

It has been shown that the current standard clauses can be introduced into a future EU-SSA IIA, although some of them do need some adaptation in order to be reasonable and not to undermine especially the new, non-investment related concepts. These new concepts encompass provisions on human rights, environmental protection, and sustainable development, and will be included in a future EU-SSA-IIA.

Considering that a future treaty between the EU and SSA aiming at protecting foreign investors would be a tool of the EU's CCP, it has to comply with the provisions governing the CCP, thus the principles and objectives of the EU's external action have to be observed pursuant to Article 207 (1) TFEU. Article 205 TFEU determines that these principles and objectives are based on the general provisions of Articles 21 and 22 TEU. Basically, pursuant to Article 21 (1) TEU, any external action – thus also a new treaty aiming at protecting foreign investors – shall be guided by democracy, the rule of law, human rights and fundamental freedoms, respect for human dignity, and respect for the principles of the *United Nations Charter*.<sup>180</sup> As a result, a new treaty aiming at protecting foreign investments concluded between the EU and SSA must

<sup>178</sup> It has to be noted though that the parties to a dispute regularly refer to a certain set of arbitration rules which usually include the procedural right to submit counter-claims (see *Convention on the Settlement of Investments Disputes Between States and Nationals of Other States*, 18 March 1965, Art. 46, 575 UNTS 159, 188; *United Nations Commission on International Trade Arbitration Rules*, 6 December 2010, Art. 21 (3), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> (last visited 31 January 2014), 15; *Rules of Arbitration of the International Chamber of Commerce* (2012), Art. 5 (5), available at <http://www.iccwbo.org/WorkArea/DownloadAsset.aspx?id=2147489109> (last visited 31 January 2014), 13; *London Court of International Arbitration (LCIA) Arbitration Rules*, Art. 2 (1), available at [http://www.lcia.org/Dispute\\_Resolution\\_Services/LCIA\\_Arbitration\\_Rules.aspx](http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx) (last visited 31 January 2014); and *Rules of the Arbitration Institute of the Stockholm Chamber of Commerce*, 1 January 2010, Art. 5 (1) (iii), available at [http://www.sccinstitute.com/filearchive/3/35894/K4\\_Skiljedomsregler%20eng%20ARB%20TRYCK\\_1\\_100927.pdf](http://www.sccinstitute.com/filearchive/3/35894/K4_Skiljedomsregler%20eng%20ARB%20TRYCK_1_100927.pdf) (last visited 31 January 2014), 7.

<sup>179</sup> Such a clause can be found for example in *IISD Agreement*, Art. 18, *supra* note 73, 11.

<sup>180</sup> For more information about the CCP, see, e.g., G. Villalta Puig & B. Al-Haddab, 'The Common Commercial Policy After Lisbon: An Analysis of the Reforms', 36 *European Law Review* (2011) 2, 289.

contain provisions on democracy, the rule of law, and human rights, and has to aim at fostering the sustainable development of developing countries<sup>181</sup> as well as at helping to develop international measures to preserve and improve the quality of the environment pursuant to Article 21 (2) TEU.

The protection of the environment plays an exceptionally significant role in the host State's economic development.<sup>182</sup> A developing economy is usually characterized by an energy-intensive industry.<sup>183</sup> This usually leads to an increase in air pollution, which subsequently may have effects on human health,<sup>184</sup> such as chronic and adverse effects on pulmonary development,<sup>185</sup> and even might decrease life expectancy.<sup>186</sup> Obviously, not only does increasing air pollution have a negative impact on human health and life expectancy, but so can any form of environmental pollution.<sup>187</sup> Thus, the introduction of clauses into new IIAs discouraging States to lower their environmental standards in

<sup>181</sup> Generally, economic development is understood to involve economic growth, namely the increase in per capita income, and – if currently absent – the attainment of a standard of living equivalent to that of industrialized States. See R. E. Lucas, Jr., 'On the Mechanics of Economic Development', 22 *Journal of Monetary Economics* (1988) 1, 3, 3, who does, however, consider this definition to be too narrow. The World Bank defines economic development as a "[q]ualitative change and restructuring in a country's economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita (or GDP per capita), reflecting an increase in the economic productivity and average material wellbeing of a country's population. Economic development is closely linked with economic growth." T. P. Soubbotina, *Beyond Economic Growth: An Introduction to Sustainable Development*, 2nd ed. (2004), 133 (emphasis omitted). The World Bank points out that economic growth does not automatically lead to a development of the respective State, and therefore prefers to refer to 'human development'. Cf. T. P. Soubbotina, *Beyond Economic Growth: Meeting the Challenges of Global Development* (2000), 7.

<sup>182</sup> Cf. *Rio Declaration on Environment and Development*, 13 June 1992, Principle 4, UN Doc A/CONF.151/5/Rev. 1, 31 ILM 874, 877.

<sup>183</sup> See, e.g., N. Shafik, 'Economic Development and Environmental Quality: An Econometric Analysis', *Oxford Economic Papers* (1994) Supplement 1, 757, 770.

<sup>184</sup> See, e.g., M. Kampa & E. Castanas, 'Human Health Effects of Air Pollution', 151 *Environmental Pollution* (2008) 2, 362, 362.

<sup>185</sup> W. J. Gauderman *et al.*, 'The Effect of Air Pollution on Lung Development from 10 to 18 Years of Age', 351 *The New England Journal of Medicine* (2004) 11, 1057, 1057.

<sup>186</sup> H. R. Anderson, 'Air Pollution and Mortality: A History', 43 *Atmospheric Environment* (2009) 1, 142, 142.

<sup>187</sup> F. Mariani, A. Pérez-Barahona & N. Raffin, 'Life Expectancy and the Environment', 34 *Journal of Economic Dynamics and Control* (2010) 4, 798, 798; X. Pautrel, 'Pollution and Life Expectancy: How Environmental Policy Can Promote Growth', 68 *Ecological Economics* (2009) 4, 1040, 1040; Shafik, *supra* note 183, 770.

order to attract more FDIs, containing environmental minimum standards, and requiring that foreign investments shall comply with these minimum standards, is not only desirable from an ecological perspective, but is also necessary if the foreign investor should contribute to the host State's economic development.

Similarly, minimum labor standards can ensure higher wages, and thus can increase the *per capita* income, and enable business competition to focus on productivity and product quality rather than workplace conditions.<sup>188</sup> Thus, clauses on minimum labor standards and on ensuring that these standards are met form essential safeguards to ensure that FDIs covered by the respective IIA contribute to the host State's economic development.

In fact, the inclusion of such clauses is not entirely novel. For instance, the 2004 *Canada Model BIT*,<sup>189</sup> the (now outdated) 2004 *U.S. Model BIT*<sup>190</sup> and its successor the 2012 *U.S. Model BIT*,<sup>191</sup> the 2007 *COMESA Common Investment Area Agreement*,<sup>192</sup> and the 2012 *SADC Model Bilateral Investment Treaty Template*<sup>193</sup> contain clauses relating to at least one aspect of environmental protection, labor standards, and human rights. In addition, the 2005 *U.S.–Uruguay BIT*<sup>194</sup> and the 2008 *U.S.–Rwanda BIT*,<sup>195</sup> which are both modeled after the 2005 *U.S. Model BIT*, contain clauses on environmental protection and labor standards. A clause on environmental protection is contained in the 2009 *Canada–Jordan BIT*<sup>196</sup> and the 2006 *Canada–Peru BIT*.<sup>197</sup>

However, it has also to be noted that the inclusion of such clauses is not yet prevailing. Notably, the 2006 *France Model BIT*,<sup>198</sup> the 2008 *Germany*

<sup>188</sup> T. I. Palley, 'The Economic Case for International Labour Standards', 28 *Cambridge Journal of Economics* (2004) 1, 21, 22. Cf. also K. A. Swinnerton, 'An Essay on Economic Efficiency and Core Labour Standards', 20 *The World Economy* (1997) 1, 73. Rather critical in this regard G. van Liemt, 'Minimum Labour Standards and International Trade: Would a Social Clause Work?', 128 *International Labour Review* (1989) 4, 433, 435.

<sup>189</sup> *Supra* note 69.

<sup>190</sup> *Supra* note 69.

<sup>191</sup> *Supra* note 69.

<sup>192</sup> *Supra* note 70.

<sup>193</sup> *Supra* note 71.

<sup>194</sup> *Supra* note 131.

<sup>195</sup> *Supra* note 129.

<sup>196</sup> The BIT is available at <http://www.unctad.org/sections/dite/ia/docs/bits/Canada-JordanFIPA-eng.pdf> (last visited 31 January 2014).

<sup>197</sup> The BIT is available at [http://unctad.org/sections/dite/ia/docs/bits/canada\\_peru.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_peru.pdf) (last visited 31 January 2014).

<sup>198</sup> *Supra* note 68.

*Model BIT*,<sup>199</sup> and the 2003 *Italy Model BIT*,<sup>200</sup> and also the 2009 *Canada–Czech Republic BIT*,<sup>201</sup> the 2009 *Canada–Latvia BIT*,<sup>202</sup> the 2009 *Canada–Romania BIT*,<sup>203</sup> and the 2010 *Canada–Slovakia BIT*,<sup>204</sup> do not contain clauses on environmental protection, despite the fact that these Canadian BITs were concluded subsequent to the adoption of the 2004 *Canada Model BIT* which well does.

Further, it has equally to be noted that the simple conclusion of a new, modern IIA will not be sufficient to increase the host State's economic development significantly and substantially. Instead, the whole national and international regulatory framework facilitating FDI's has to be adapted. According to the so-called *Monterrey Consensus*, key aspects of such a framework are a

“transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact”.<sup>205</sup>

Besides the inclusion of clauses on environmental protection, labor standards, and human rights in a future EU-SSA IIA, it should be taken into consideration that there are linkages between investment law, trade law, and other aspects of international economic law. Therefore, it is not surprising that Article 207 (1) TFEU does not only contain the EU's exclusive competence to negotiate and conclude IIAs, but also to negotiate and conclude

“tariff and trade agreements relating to trade in goods and services, and international agreements relating to the commercial aspects of

<sup>199</sup> *Supra* note 68.

<sup>200</sup> *Supra* note 68.

<sup>201</sup> The BIT is available at [http://unctad.org/sections/dite/ia/docs/bits/canada\\_czech%20republic.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_czech%20republic.pdf) (last visited 31 January 2014).

<sup>202</sup> The BIT is available at [http://unctad.org/sections/dite/ia/docs/bits/canada\\_latvia.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_latvia.pdf) (last visited 31 January 2014).

<sup>203</sup> The BIT is available at [http://unctad.org/sections/dite/ia/docs/bits/canada\\_romania.pdf](http://unctad.org/sections/dite/ia/docs/bits/canada_romania.pdf) (last visited 31 January 2014).

<sup>204</sup> The BIT is available at [http://unctad.org/sections/dite/ia/docs/bits/Canada\\_slovakia\\_new.pdf](http://unctad.org/sections/dite/ia/docs/bits/Canada_slovakia_new.pdf) (last visited 31 January 2014).

<sup>205</sup> International Conference on Financing for Development, ‘Monterrey Consensus on Financing for Development’ (2003), available at <http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf> (last visited 31 January 2014), 9, para. 21.

intellectual property, [...] the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping and subsidies”.<sup>206</sup>

In order to ensure that this competence is used in the most effective and most coherent way, it is suggested that the EU does not conclude single agreements relating to the various aspects of international economic law, but a more general, more concise agreement covering all aspects mentioned in Article 207 (1) TFEU.<sup>207</sup> This agreement could be a free trade agreement (FTA) with other States or IOs, and could be modeled either after the NAFTA, which contains in Chapter 11 substantive provisions on the promotion and protection of foreign investments,<sup>208</sup> or after the so-called *Cotonou Agreement*,<sup>209</sup> to which provisions on the promotion and protection of foreign investments can be rather easily added.

It seems also preferable that such a FTA is concluded with other IOs, rather than with single States – especially in the event of small single States. The conclusion of a few FTAs between IOs instead of the conclusion of many FTAs with single States ensures on the one hand that smaller States, especially, cannot be played against each other, and thus might contribute significantly to the sustainable development of the smaller States, and on the other hand that world trade is further liberalized and harmonized.

## E. Conclusion

Summing up, it has been demonstrated that the new competence of the EU to negotiate and conclude IIAs allows for updating the current level of investment protection in SSA. It is possible to conclude a new IIA between the EU on the one side and SADC and/or COMESA on the other side. The other

<sup>206</sup> TFEU, Art. 207 (1), *supra* note 37.

<sup>207</sup> Cf. S. Woolcock, ‘EU Trade and Investment Policymaking After the Lisbon Treaty’, 45 *Intereconomics* (2010) 1, 22, 24.

<sup>208</sup> See for an analysis of the investment provisions in the NAFTA T. Weiler (ed.), *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (2004).

<sup>209</sup> *Partnership Agreement 2000/483/EC Between the Members of the African, Caribbean and Pacific Group of States of the one Part, and the European Community and its Member States, of the Other Part*, 23 June 2000, OJ (EU) 2000/L 317 (15 December 2000). For more information about the Cotonou Agreement, see S. S. Kingah, ‘The Revised Cotonou Agreement Between the European Community and the African, Caribbean and Pacific States: Innovations on Security, Political Dialogue, Transparency, Money and Social Responsibility’, 50 *Journal of African Law* (2006) 1, 59.

IOs in SSA do not have the competence to conclude IIAs, but might serve well as forum to coordinate the various interests of SSA States and ensure that they are not played against each other.

Further, most current standard clauses in IIAs can be also included in the new future EU-SSA IIA. Solely the 'ISDS clause' referring to ICSID as forum for the settlement of investment disputes cannot be sustained. However, with the LCIA-MIAC, DIAC, and SIAC, sufficient well-repudiated alternatives to ICSID arbitration exist. Other standard clauses need some careful drafting, but can be adapted.

Due to the fact that the future treaty would be a tool of the CCP, it has to comply with other provisions of the TEU and TFEU. This allows, even requires, the introduction of new concepts into the new treaty, such as human rights, labor standards, environmental protection, sustainable development, and so on. Thus, the possible new EU-SSA IIA might not only increase the level of protection for foreign investors in SSA, and thus might stimulate more FDI flowing from Europe to Africa, fostering economic development in SSA, but also foster the further development of the law of foreign investments by intertwining this field of law with other fields of public international law. Finally, it was suggested – in order to ensure a coherent and efficient CCP and also because foreign investments are closely linked to international trade and development – that the future provisions on the promotion and protection of European investments in SSA should not be contained in a single EU-SSA IIA, but should be a chapter in a future EU-SSA FTA, similar to the NAFTA.

