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EDITOR-IN-CHIEF'S AND PRESIDENT'S NOTE

Dear reader,

Hereby we would like to proudly introduce 2nd Issue of the 8th volume of the Groningen Journal of International Law. As all previous issues, this issue is readily available for free on our website at <https://grojil.org> and <https:// ugp.rug.nl/grojil>.

Being an open issue, GroJil 8(2) presents you with several articles on the various topics of International Law. All of the articles have been peer-reviewed. The editorial team worked very hard on them and thus our Publishing Director Medes Malaihollo has created an overview of the articles and the basic concepts they are discussing.

Opening this issue, Atul Alexander & Anushna Mishra discuss the laws on transboundary aquifers. Specifically, the authors discuss the 2008 Draft Articles on the Transboundary Aquifers and cardinal principles that lie at the heart of regulating transboundary aquifers. These principles range from sustainable development to the principle of good faith. Reflecting on the Israel-Palestine dispute and the India-Pakistan Indus Waters Treaty in the context of transboundary aquifers, the authors reveal particular grey spots when it comes to the laws of transboundary aquifers.

The second article in this issue provides a 'blueprint' for bringing an international multi-party climate change case. In doing so, Benjamin Norman Forbes discusses how AOSIS member states can bring a number of claims against the world's leading green house gas emitters. By highlighting the jurisdictional obstacles in climate change litigation, he provides an innovative strategy for AOSIS member states to start a climate change case. In particular, attention is given to proceedings before the International Court of Justice, the International Tribunal for the Law of the Sea and arbitral tribunals under the United Nations Convention on the Law of the Sea. In the end, the proposed blueprint illustrates that jurisdictional obstacles can be overcome to start a climate change case against at last forty-eight of the biggest green house gas emitting states.

Tero Lundstendt's article builds on a politico-historical reading of a international law that takes into account the difference between specific states' readings and existing doctrines and that adopted by Russia. He analyses two interdependent notions of contemporary Russian international law doctrine: the color revolutions and the destruction of statehood. On the one hand, color revolutions refer to the Russian description of events that it categorizes as illegal regime-changes used to remove pro-Russian politicians from power in the name of democracy. The destruction of statehood, on the other hand, refers the doctrine that Russia reserves a right to 'un-recognize' a target state if it categorizes the situation as an illegal regime change that has destroyed the target's statehood. While Russia has not been able to convince the international community to accept its new interpretations, it has been more successful as regards its closes allies in the Collective Security Treaty Organization and in the Commonwealth of Independent States.

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Veena Suresh critically evaluates the International Criminal Court's victim participation scheme for victims of sexual violence. Under International Criminal Law, the inclusion of a victim participation scheme is considered revolutionary since it grants unprecedented rights for victims to participate in proceedings outside of witness capacity. Whereas the inclusion of a participation scheme for victims is more than welcomed, she highlights that there is still a long way to go before victims of sexual violence have access to a meaningful form of participation. For this, several institutional and procedural changes are required.

Finally, Oskari Vaaranmaa examines the matter of frivolous claims in the context of the Energy Charter Treaty. As more robust environmental regulation is made, investors who have been adversely affected in the fossil fuel sector, could threaten to sue states under international investments agreements. In light of this, contracting parties to the Energy Charter Treaty have proposed to include a provision provision on frivolous claims, under which claims that are found to be legally untenable can be summarily dismissed. In the end, it becomes clear that the provision will likely be too weak to effectively address the types of cases that contracting parties to the Energy Charter Treaty are concerned about.

GroJil editorial Board would like like to recognise all the efforts made by the editors in order to prepare the articles for publication and express gratitude for their splendid work. Moreover, we personally would like to thank each Board Member for their great dedication and work on this issue.

Finally, as to organisational matters, GroJIL welcomes its newest Board for academic year 2021-22. Pandemic-permitting, we hope to host author panels and/or webinars with leading academics in international law this year. We have begun revamping our website and social media channels, with a new submission system for authors to be introduced for our next issue 9(1). In the meantime, we invite you to stay connected with us through our Blog, 'International Law under Construction', catered to current affairs and academia.

Happy reading, stay safe and healthy!

Kyrill Ryabtsev
Editor-in-Chief
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About

The Groningen Journal of International Law (GroJIL) is a Dutch foundation (Stichting), founded in 2012. The Journal is a not-for-profit, open-access, electronic publication. GroJIL is run entirely by students at the University of Groningen, the Netherlands, with supervision conducted by an Advisory Board of academics. The Journal is edited by volunteering students from several different countries and reflects the broader internationalisation of law.

Mission

The Groningen Journal of International Law aims to promote knowledge, innovation and development. It seeks to achieve this by serving as a catalyst for author-generated ideas about where international law should or could move in order for it to successfully address the challenges of the 21st century. To this end, each issue of the Journal is focused on a current and relevant topic of international law.

The Journal aims to become a recognised platform for legal innovation and problem-solving with the purpose of developing and promoting the rule of international law through engaging analysis, innovative ideas, academic creativity, and exploratory scholarship.

Publishing Profile

The Groningen Journal of International Law is not a traditional journal, which means that the articles we accept are not traditional either. We invite writers to focus on what the law could be or should be, and to apply their creativity in presenting solutions, models and theories that in their view would strengthen the role and effectiveness of international law, however it may come to be defined.

To this end, the Journal requires its authors to submit articles written in an exploratory and non-descriptive style. For general queries or for information regarding submissions, visit www.grojil.org or contact board@grojil.org.

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Open Submissions

Contribution of General Principles of International Law in Progressive Development of Transboundary Aquifers

Atul Alexander & Anushna Mishra*
DOI: 10.21827/GroJIL.8.2.183-199

Keywords:
TRANSBOUNDARY AQUIFERS; RESOURCES; STATES; ISRAEL-PALESTINE; INDIA-PAKISTAN

Abstract

Man's ruthless exploitation of natural resources means that we are housed in a resource-deprived world. The tug of war for meager resources has led to many conflicts between States that we witness today. At the heart of the whole debate on resource crunch is the issue of shared natural resources between States. International law has formulated several legal instruments to govern the shared transboundary resources, laws on transboundary aquifers being one. The objective of this paper is to unlock the general principles of international law that regulate the transboundary aquifers. In this regard, the paper has been apportioned into three sections. The first section sets the tone by detailing the provisions of the 2008 Draft Articles on the Transboundary Aquifers dealing with general principles. The second segment of the paper lays down the cardinal principles regulating transboundary aquifers, which range from sustainable development to the principle of good faith. The final portion delves into the Israel-Palestine dispute and the India-Pakistan Indus Waters Treaty in the context of transboundary aquifers.

I. Introduction

Water is an indispensable resource for human survival. In recent times, the demand for water has increased significantly. Most countries have found it difficult to accept a mutual agreement governing water resources.[1] The impact of globalisation and the subsequent integration of communication, travel, and so on have also influenced the sharing of water resources.[2]

Groundwater makes up 97 percent of total consumable water.[3] Before World War II, groundwater was a strictly local commodity. However, the spread of vertical turbine pumps paved the way for several disputes, at the heart of which was the Israel-Palestine conflict over shared water resources, especially in relation to transboundary water resources.[4]

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* Mr. Atul Alexander is Assistant Professor (Law) at West Bengal National University of Juridical Sciences Kolkata and Ms. Anushna Mishra is 4th Year candidate at West Bengal National University of Juridical Sciences.

1 'Transboundary Waters' (*United Nations*, 23 October 2014). <https://www.un.org/waterforlifedecade/transboundary_waters.shtml> accessed 10 May 2020.

2 Karen L O'Brien and Robin M Leichenko, 'Climate Change, Globalization And Water Scarcity' <https://www.zaragoza.es/contenidos/medioambiente/cajaAzul/17S6-P2-OBrienACC.pdf> accessed 13 May 2020.

3 'Groundwater' (*Water Encyclopedia)* <http://www.waterencyclopedia.com/Ge-Hy/Groundwater.html> accessed 15 May 2020.

4 'Israeli-Palestinian Conflict' (*Council on Foreign Relations,* 2020) <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> accessed 31 May 2020.

Transboundary aquifers are networks of rock formations beneath the ground that contain water straddled between more than two countries.[5] Estimates suggest that there are more than 270 transboundary aquifers worldwide.[6] Transboundary aquifers constitute a critical element of the global water resource system. However, unlike transboundary rivers, transboundary aquifers have neither been sufficiently recognised by international agreements nor through customary practices. Understanding the various nuances of this becomes crucial, as almost 96% of the planet's freshwater is found in underground aquifers that mostly straddle across national boundaries.[7] This requires a multi-pronged approach as it encompasses disciplines like politics, engineering, hydrology, economics, and international law.[8]

While various binding and non-binding laws are available for governing transboundary aquifers, there is an absence of a comprehensive legal instrument for groundwater resource governance.[9] Due to the significance of water as a pivotal resource, any source of water may be the starting point of a dispute, both on the national and international planes.[10] Bearing these points in mind, international law (hereinafter also referred to as IL) has carved out several conventions for the sharing of water resources between States. This includes the 1992 Helsinki Convention[11] concerning the protection and use of transboundary watercourses and international lakes and the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the Watercourse Convention),[12] along with scores of regional and bilateral treaties on the sharing and utilisation of water resources.[13]

However, most of the abovementioned conventions deal with surface water. Moreover, the laws pertaining to aquifers are not covered under these conventions. In this regard, the role of the International Law Association needs to be underscored. The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are to study, clarify and develop international law, both public and private, and to further international understanding and respect for international law. The Association adopted the Seoul Rules on the Law of International Groundwater Resources[14] which defined an international aquifer as an 'international drainage basin'. Following the Seoul Rules, the

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5 ILC, 'Draft Articles on the Law of Transboundary Aquifers with Commentaries' (2008) UN Doc (A/63/10) (DALTA).

6 Alfonso Rivera, 'Transboundary Aquifers Along The Canada–USA Border: Science, Policy And Social Issues' (2015) 4 Journal of Hydrology: Regional Studies 623, 624.

7 UNESCO, 'Internationally Shared (Transboundary) Aquifer Resources Management Their Significance And Sustainable Management' (November, 2001) SC-2001/WS/40.

8 'Towards the Concerted Management of Transboundary Aquifer Systems: A Methodological Guide' (UNESCO, 5 January 2011) <http://www.unesco.org/new/en/media-services/single-view/news/towards_the_concerted_management_of_transboundary_aquifer_sy/> accessed 17 May 2020.

9 CB Bourne, 'International Groundwater Law. By Ludwik A. Teclaff and Albert E. Utton. London, Rome, New York: Oceana Publications, Inc., 1981. Pp. Xiv, 490. $50.' (1982) 76 American Journal of International Law 692.

10 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entry into force 6 October 1996) 1936 UNTS 269.

11 ibid.

12 Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entry into force 17 August 2014) 2999 UNTS 869.

13 Molly Espey and Basman Towfique, 'International Bilateral Water Treaty Formation' (2004) 40 Water Resources Research 5, 7.

14 Committee on International Water Resources, 'The Seoul Rules on International Groundwaters' in International Law Association Report of the Sixty-Second Conference (Seoul 1986) (International Law Association, Seoul 1986) 251.

Association's Water Resource Law Committee produced a detailed summary of all customary international law pertaining to water resources, including the Berlin Rules.

Chapter VIII of the Berlin Rules discusses aquifers in detail.[15] The significance of the Berlin Rules was that it highlighted the need for an integrated approach to aquifer management and outlined the precautionary principle, as well as principles of sustainability and no significant harm, most of which were subsequently codified under the Draft Articles on the Laws of Transboundary Aquifers, 2008 (hereinafter referred to as DALTA).[16] However, it was not until 2008 that a comprehensive codification of the laws of transboundary aquifers took place. The International Law Commission (hereinafter also referred to as the ILC) acting under the aegis of the United Nations General Assembly (hereinafter also referred to as UNGA) came up with DALTA to tackle the disputes relating to aquifers between straddled States. DALTA continued to be the *grundnorm* in the sphere of transboundary aquifers, notwithstanding the emergence of customary law and the existing bilateral arrangements.[17]

The post-2008 period witnessed rapid growth in the principles of international law; for instance, the Sustainable Development Goals, which emphasised the sustainable management of water and sanitation for all.[18] More often than not, the issue of transboundary aquifers is seen as a peripheral issue in the broader context of political disputes, as evident in the conflict pertaining to the Israel-Palestine territorial aquifers. Moreover, the importance of transboundary aquifers cannot be over-emphasised; most of the landlocked European States rely entirely on aquifers.[19] This paper is a minor attempt to deliberate constructively on the entire gambit of the principles on transboundary aquifers, acknowledging the fact that the existence of IL is not sufficient to deal with the complications on the subjects.

Further, the principles of transboundary aquifers have tremendous potential to compel States to adhere to and respect the international conventions. The purpose of this work is to focus on these fundamental principles and unravel how these principles have contributed to the progressive development of the law on transboundary aquifers. According to the Water Resource Research Center, 'transboundary aquifers are a source of groundwater that defy political boundary'.[20] Due to the indistinct boundaries associated especially with groundwater aquifers, several challenges have surfaced amongst which include: a) access to transboundary aquifer data, b) boundary intersection, c) the binding nature of the principles of transboundary harm and d) the difficulty of persuading States to comply with the principle of transboundary aquifers. The advent of transboundary aquifers in the backdrop of customary international law has not been well explored; the international law rhetoric operates at the level of rules, whereas the acceptance of customary international law is especially relevant in the case of the participation of a few States in the decision-making process. The process of custom formation

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15 Water Resources Committee, 'Berlin Rules on Water Resources' (International Law Association, Berlin 2004).

16 Joseph W. Dellapenna, 'The Customary Law Applicable To Internationally Shared Groundwater' (2011) 36 Water International 584, 589.

17 ibid 591.

18 United Nations University Institute for Water, Environment and Health, UN Office of Sustainable Development and Stockholm Environment Institute, 'Water For Sustainability: Framing Water Within The Post-2015 Development Agenda.' (2013) <https://i.unu.edu/media/ourworld.unu.edu-en/article/8495/Catalyzing-Water.pdf> accessed 20 May 2020.

19 Tomasz Nałęcz, *Transboundary Aquifers In The Eastern Borders Of The European Union* (Springer 2012), 1732.

20 'Transboundary Aquifers: Water Wars or Cooperative Conservation?' (*The Arizona Board of Regents*, 2011) <https://wrrc.arizona.edu/awr/sp11/transboundaryaquifer> accessed 23 May 2020.

in the realm of water law has accelerated in the past decade because of the myriad of claims made by States, which then perhaps turned into law.

For example, widespread industrialisation prompted the diversion of water from its natural setting by upper riparian States. The vogue was that the upper riparian States claimed blanket sovereignty,[21] regardless of its impact on the other riparian States. The downstream States started demanding that the right of the upper riparian State be limited, and voiced a claim that upper riparian States should not do things that reduce water quality. The claims and counterclaims which resulted between the upper riparian and lower riparian States resulted in the unfolding of the customary principle of 'equitable utilisation'.

It is to be noted that major principles relating to transboundary aquifers thrived because of the divergent views adopted by the States, yet for that same reason, the elevation of the principles in water law as customary law has traditionally stalled. However, the modern constructions of these principles after the 1990s have meant that it is highly possible for these principles i.e. the no significant harm rule, sustainable development, equitable utilisation, exchange of information and prior informed consent, to find an active place in the discourse on transboundary aquifers as customary principles.[22]

Another visible sign of this trend is the unwinding of the 'strict sovereignty doctrine' giving way to the restricted notion of sovereignty[23] through the negotiation process and international cooperation. The proliferation of States has undoubtedly meant that international cooperation stands at the heart of the sharing of water resources. The principle of international cooperation[24] will be detailed in the upcoming sections of this paper. Hence, there needs to be a delicate balance between treaty and customary law in order to get a comprehensive picture of the *lex lata*. Most of the treaties on shared water resources have a common denominator, i.e. assuring 'equal share' between the States. For instance, The Treaty of Peace, Friendship, and Arbitration between the Dominican Republic and Haiti signed in 1929[25] assured 'just and equitable use'. The challenge for international academia is to broaden the relevant principles and its customary character, which will ensure respect and enforcement of these principles. The *opinio juris* on transboundary groundwater aquifers is currently too narrow to establish any form of customary practice with the exception of the Donauversinkung Case.[26]

The Donauversinkung dispute concerned the upper course of the Danube River, which is characterised by a particular geographical phenomenon: at several places in the former territories of Baden and Württemberg the water sinks into the limestone ground and flows in subterranean passages into the River Aach, a tributary of the Rhine River in Baden. Württemberg, supported by Prussia, claimed that Baden should take measures to stop the

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[21] Stephen C McCaffrey, 'The Harmon Doctrine One Hundred Years Later: Buried, Not Praised' (1996) 36 Natural Resources Journal 965, 980.

[22] DALTA (n 5) art 7.

[23] Nadia S Castillo, 'Differentiating between Sovereignty over Exclusive and Shared Resources in the Light of Future Discussions on the Law of Transboundary Aquifers: Sovereignty Over Exclusive and Shared Resources' (2015) 24 Review of European, Comparative & International Environmental Law 4, 5.

[24] Dante A Caponera, 'Patterns of Cooperation in International Water Law: Principles and Institutions' in Albert E Utton and Ludwik A Teclaff (eds), *Transboundary Resources Law* (Westview Press 1987) 569.

[25] Milagros Ricourt, *The Dominican Racial Imaginary: Surveying the Landscape of Race and Nation in Hispaniola* (Rutgers University Press 2016) 31; Dante A Caponera, 'Patterns of Cooperation in International Water Law: Principles and Institutions' (1985) 25 Natural Resources Journal 563.

[26] Matthias Herdegen, 'Donauversinkung Case' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (10th edn, North Holland Publishing Company 1987) 137-8.

increased sinking of water caused by a barrage and that it should remove sediments in the bed of the river. Württemberg had closed natural cracks and pores in the bed of the river and had diverted water for the use of a power station. Baden, in turn, asked for an injunction requiring Württemberg to restore the original conditions.[27] It was held in the said case that, the law applicable to surface water applies to groundwater.

There are nearly thirty major principles pertaining to groundwater resource management; however, this paper delimits to the major principles codified under DALTA, which have undeniably attained the status of customary international law.[28]

II. Overview of the Adoption of the Draft Articles

The DALTA has contributed significantly to the field of governing transboundary aquifers. The ILC at its 2008 session forwarded the DALTA to the General Assembly.[29] The initial work by the ILC in formulating the principles on the management of transboundary waters was to complement its previous work on the law of the non-navigational uses of water resources.[30] The draft articles are categorised into four primary parts which include General Principles, Protection, Preservation and Management, and Miscellaneous Provisions.[31] Certain provisions of the relevant articles are a reproduction of the corresponding provisions of the Convention on the Law of the Navigational Uses of International Watercourses. The draft articles relevant to the paper are discussed as follows.[32]

Article 3 is the first of the seven articles included in part II of DALTA; it deals with the concepts of the sovereignty of aquifer States over the portions of the aquifer present in its territory.[33] Article 4 elucidates the principle of equitable and reasonable utilisation.[34] Subsequently, the draft elaborates on how this principle is applicable in the context of aquifers. A non-exhaustive list of factors that are considered while ensuring the equitable and reasonable utilisation of a transboundary aquifer is laid down in Article 5.[35] Another important principle is the 'obligation not to cause significant harm', which is enshrined in Article 6 of DALTA. A pivotal aspect of Article 6 is that it puts the responsibility of no significant harm not only on the States sharing the transboundary aquifers, but also on the States 'in whose territory a discharge zone is located'.[36]

Article 7 of DALTA focuses on the 'general obligation to cooperate' and puts forth how the States that share water should have mechanisms in place to ensure the same.[37] The States sharing aquifers are required to engage in the regular exchange of data and information

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27 ibid.

28 Gabriel Eckstein and Francesco Sindico, 'The Law of Transboundary Aquifers: Many Ways of Going Forward, but Only One Way of Standing Still' (2014) 23 Review of European, Comparative & International Environmental Law 32, 41.

29 DALTA (n 5); UNGA 'Report on International Law Commission' UN Doc A/63/10 (2008).

30 Convention on the Law of the Non-navigational Uses of International Watercourses (n 12).

31 ibid art 1.

32 Stephen C McCaffrey, 'The International Law Commission Adopts Draft Articles on International Watercourses' (1995) 89 American Journal of International Law 395, 398.

33 DALTA (n 5) art 3.

34 ibid art 4.

35 ibid art 5.

36 ibid art 6.

37 ibid art 7.

according to Article 8 of DALTA.[38] Article 9 focuses on the aspect of 'Bilateral and Regional Agreements and Arrangements', which is a modified reproduction of a part of Article 3 of the UNWC.[39] Article 10 focuses on the 'Protection and Preservation of Ecosystems'.[40] Article 11 of DALTA deals with recharge and discharge zones. These zones are highly important as an aquifer is replenished or recharged through the surface land; it also includes surface areas from where the aquifer emerges into another watercourse like a lake, stream or sea.[41] It is essential to preserve and protect these recharge zones to avoid any contamination of the aquifers. This article mandates both aquifer and non-aquifer States to work together in ensuring the protection of the aquifers and by extension, the ecosystem. Article 13 provides for the 'monitoring of a critical case of groundwater', which implies that there is a need for monitoring of groundwater by the States that share the aquifers jointly.[42]

III. Sovereignty over Exclusive and Shared Resources

'Transboundary aquifers' are defined in DALTA as 'a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation'.[43] Furthermore, DALTA has incorporated a novel principle, i.e., sovereignty. The recognition of sovereignty over transboundary aquifers is controversial because the principle of Permanent Sovereignty over the Natural Resource (hereinafter referred to as PSNR) is applied to the shared aquifer by reference to the UNGA Resolution 1803 (XVII) as reflected in the preamble of DALTA.[44] During the drafting of DALTA, an intensive debate took place on the incorporation of the phrase 'PSNR' wherein it was agreed to place the term in the preamble. This was a paradox, considering the point that sovereignty and the sharing of aquifers are conceptually contradictory, and the challenge is to reconcile these opposites.

Although DALTA refers to sovereignty as a sacrosanct principle, it is limited by the other principles embedded in DALTA. These principles include equitable use, no harm, information exchange, and cooperation.[45] The exercise of sovereignty over shared water natural resources requires revisiting in terms of finding alternate models, such as drastically vitiating sovereignty from the paradigm of the transboundary aquifer. Otherwise, the recognition of sovereignty over shared natural resources would certainly dissuade international cooperation, as States would perceive that any effort to cooperate would dilute their sovereignty. Therefore, the right approach would be to maintain limited sovereignty.[46]

The other rules, i.e. the no-harm rule and the theory of limited territorial sovereignty, have done very little to protect the environment as a shared natural resource. Unlike the principle of sovereignty, the principle of no-harm is grounded on due diligence and is based on specific circumstances.[47] The basis of all these principles rests on the protection of territorial

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38 ibid art 8
39 ibid art 9.
40 ibid art 10.
41 ibid art 11.
42 ibid art 13.
43 ibid art 2(c).
44 Castillo (n 23) 11.
45 DALTA (n 5) art 7.
46 Gabriel Eckstein and Yoram Eckstein, 'A Hydrogeological Approach to Transboundary Ground Water Resources and International Law' (2003) 19 The American University International Law Review 201, 230.
47 Eckstein and Sindico (n 28) 41.

sovereignty.[48] The no-harm principle attempts to provide a balanced approach to territorial sovereignty rather than an eco-centric angle to preserve the environment and the sovereignty principle is not sustainable because of the cyclical nature of water movement.[49]

The language of DALTA is more inclined towards protecting the interests of sovereign States by allowing States to exercise their sovereign right (PSNR) over a shared resource. It is interesting to compare DALTA with other international law instruments, namely the Charter of Economic Rights and Duties of States (CERDS),[50] The Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (the UNEP Draft Principles)[51] and the Watercourse Convention.[52] The common denominator in all these instruments is the protection of interests over a shared resource. Despite the reluctance of the States to incorporate the term 'shared', the special rapporteur Chusei Yamada[53] was persuaded to add the term 'shared' because of the acceptance of the principle of 'equitable utilisation'.

The principle of PSNR is exercised over the exclusive jurisdiction of the State; this was affirmed in the UNGA Resolution 3171 (XXVIII).[54] However, the shared resource is distributed over the international boundaries of two or more States; the resource could be groundwater, oil, natural gas etc. Because of the nature of the resource, it is difficult to partition the same. The utilisation of resources in one portion of the territory significantly affects the other part. For instance, the water abstraction in part of the territory will alter the flow of water in other parts of the territory.[55] Therefore, the States must cooperate and manage the resources jointly. The shift from exclusive sovereignty to shared sovereignty was codified for the first time in the Stockholm Declaration in 1972.[56] Further, the contribution of the UNGA resolutions addressed the need for prior consultation and harmonious exploitation of resources. The UNEP Draft Principles, in paragraph three outlines the elements of shared resources as a) equitable utilisation, b) exchange of information and consultation c) no harm rule and d) transboundary cooperation. All these rules are equally applicable in the case of transboundary aquifers.[57] This paper attempts to decipher each of these concepts in detail. The fact remains, the post-globalisation world is heading from sovereignty to shared or limited sovereignty for resources, forming a single unit and distributed amongst two or more States. The principle of PSNR took off in the backdrop of decolonalisation in order to strengthen the

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48 Nico Schrijver, *Sovereignty Over Natural Resources: Balancing Rights And Duties* (Cambridge University Press 1997) 218–237.

49 Gabriela M Kutting, *Conventions, Treaties And Other Responses To Global Issues - Volume I* (EOLSS Publications 2009) 354.

50 UNGA Res 3281 (XXIX) (6 November 1974).

51 Governing Council of UNEP, 'Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by two or More States' (19 May 1978).

52 Convention on the Law of the Non-navigational Uses of International Watercourses (n 12).

53 'Analytical Guide to the Work of the International Law Commission' (*United Nations*, 29 May 2019) <https://legal.un.org/ilc/guide/8_6.shtml> accessed 20 May 2020.

54 Castillo (n 23) 9; UNGA Res 3171 (XXVIII) (17 December 1973) UN Doc A/RES/3171.

55 Igor S Zektser and Lorne G Everett, *Groundwater Resources Of The World And Their Use* (UNESCO 2004) 19.

56 'Report of the United Nations Conference on the Human Environment' (Stockholm 5 June-16 June 1972) (November 1973) UN Doc A/CONF.48/14/REV.1.

57 Governing Council of UNEP (n 51).

colonised States' exercise of self-determination and protect the economic autonomy of the colonised States.[58]

The resolutions of the UNGA 523, 626 (VII), 1515(XV) augmented the sovereign right and recognised PSNR as an integral facet of the 'right to self-determination'. DALTA included these principles in the preamble and rightfully omitted the phrase 'shared natural resource'. The developing States articulated the inclusion of PSNR as a safety valve against the emergence of neo-colonialism in terms of tackling specific scenarios concerning States and foreign investors, enforcement of investment agreements, etc. The dawn of environmental consciousness witnessed a palpable drift towards shared resources and congestion between PSNR, and shared resources reached new heights.[59]

The 1970s is regarded as the age of environmental enlightenment in the sphere of ecological governance[60] as principles like the state responsibility for transboundary harm were codified. International cooperation became the buzzword, and UNGA resolutions further strengthened this stance through resolutions 3129(XXVIII) and 2995 (XXVII). The UNEP Draft Principles Principle 3[61] also acknowledges the existence of different regimes for exclusive and shared resources. The UNEP Draft Principles are not binding; but most of the principles have attained customary law status. DALTA including the principle of PSNR to protect territorial sovereignty certainly diverges from the recent developments concerning shared resources.

IV. Transboundary Water Cooperation and Sustainable Development Goals

Transboundary water cooperation has become an integral part in ensuring sustainable development.[62] The Brundtland Report defines sustainable development as the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[63] The two primary concepts of sustainable development include, first, the essential needs of the world's poor, which gets overriding priority. Second, it recognises the limitations of the environment and requires states to take this into account when meeting the needs of the present.

The groundwater that is found in aquifer systems forms the safest source of drinking water, thereby becoming the world's most extracted raw material.[64] It accounts for a substantial amount of everyday freshwater used for irrigation purposes, cooking, drinking, and hygienic purposes.[65] The pressure on groundwater usage has been increasing exponentially. Still, the statutory and legal attention given for its safeguard has not been taken up as a priority

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58 Eckstein and Eckstein (n 46) 10.

59 ibid 10.

60 Adil Najam, Mihaela Papa and Nadaa Taiyab, *Global Environmental Governance: A Reform Agenda* (International Institute for Sustainable Development 2006) 44.

61 Governing Council of UNEP (n 51) principle 3.

62 Francesco Sindico, 'Transboundary Water Cooperation and the Sustainable Development Goals' (United Nations Educational, Scientific and Cultural Organisation 2016) 1–48.

63 UNGA 'Report of the World Commission on Environment and Development: Our Common Future' (4 August 1987) UN Doc A/42/427, 41.

64 Zektser and Everett (n 55) 97.

65 'WWDR1: Water for People, Water for Life' (*UNESCO*, 2013) <http://www.unesco.org/new/en/natural-sciences/environment/water/wwap/wwdr/wwdr1-2003/> accessed 20 May 2020.

either in the international policy framework or among various legislatures.[66] Aquifers can range from small localised aquifers to a regional aquifer system such as the Iullemeden Aquifer System or Nubian Sandstone Aquifer System;[67] even then, the development of rules and regulations on them has been very nascent. The mismanagement of water as a natural resource also becomes an integral factor in drawing considerable attention.

UNESCO's International Hydrological Program (IHP) that studied these systems thoroughly observed that with the water scarcity crisis in the coming years, the presence of transboundary aquifers will be a source of conflict.[68] This program holds abundant importance as it has successfully established cooperation concerning sharing aquifer systems between countries.[69] If these are not managed efficiently with adequate safeguards, States can suffer adversities like groundwater pollution, among others. The consequences of the same will be experienced not only by the States which use the source but also by the neighbouring States. Therefore, it becomes essential to keep in place sustainable development goals for the judicious use of this precious natural resource.

The importance of sustainable development can be understood not only in its 'logical necessity' but also in the general recognition it has gained worldwide.[70] Another issue that was addressed by Judge Christopher Gregory Weeramantry in the *Gabcikovo-Nagymaros case* was the appropriateness of using the rules of *inter partes* litigation to determine *erga omnes* obligations.[71] Such *inter partes* issue might need reconsideration in the times to come as that could lead to catastrophic environmental danger to stakeholders other than the immediate parties in the dispute. Here, he addressed an ongoing debate between sustainable development versus the right to develop. This form of inadequacy in technical judicial rules primarily in the decisions on scientific matters has been a matter of criticism by various scholars.[72] The consequences of a particular environmental change are not restricted to only the parties but have a larger impact. International environmental law should account for the global concerns which impact the world holistically rather than merely confining it to the rights and obligations of the parties.[73]

Transboundary aquifers traverse through international borders, and their management becomes complicated as multiple nations which have different institutional arrangements and

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66 Albert E Utton, 'The Development of International Groundwater Law' (1982) 22 Nat Resources Journal 95, 104.

67 Elena Quadri, 'The Nubian Sandstone Aquifer System – A case of cooperation in the making' (2017) International Water Resources Association, 1–10; The Nubian Sandstone Aquifer System (NSAS) is the largest known fossil aquifer in the world, home to one of the largest reserves of non-recharging groundwater. It lies in the eastern part of the Sahara consisting of two large basins: the Nubian Sandstone Aquifer (NSA), which is the more ancient and the larger of the two, and straddles the political borders of four North-eastern African States, i.e., Chad, Egypt, Libya and Sudan; and the more recent Post-Nubian Aquifer (PNA), which underlies only Egypt and Libya.

68 Alice Aureli and Raya M Stephan, 'Transboundary Aquifers: International Law And Politics?' (2008) 102 Proceedings of the ASIL Annual Meeting 356, 356–359.

69 ibid 356.

70 ibid 402.

71 See the Separate Opinion of Judge Weeramantry, *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*) (Judgement) [1997] ICJ Rep 7, 117–118.

72 ibid 118.

73 ibid 118.

policy frameworks are involved.[74] In the last few decades, the rampant growth of population, increasing reliance on groundwater for various purposes, have stressed the use of transboundary aquifer systems.[75] The preamble of DALTA enshrines the principle of sustainable development. It emphasises the optimal use of these resources for the present and future generations.[76]

The implementation of the Sustainable Development Goals in a nuanced manner becomes vital as the management of transboundary water resources includes issues of sharing, maldistribution, misuse, and over-exploitation.[77]

V. Equitable and Reasonable Utilisation or the No Significant Harm Principle

Groundwater being the most extracted resource, it is vital to ensure an equitable and reasonable utilisation. The Watercourse Convention mandates watercourse States to utilise any course of international water equitably and reasonably.[78] Article 6 of the Watercourse Convention carries a non-exhaustive list of factors which may be equitable and reasonable.[79] It includes factors like the geographical, hydrological and other natural character concerning factors, the dependency on the watercourse by the population of a State, socio-economic factors influencing the use of water, conservation, protection and development of water , and the availability of alternatives of a comparable nature.[80] This concept is primarily utilitarian and aims to ensure maximum utility of the available resources by sharing the water resource in the territories where the aquifers are found. However, this concept has been questioned, and other alternate concepts have also been a matter of discussion. Certain objections were raised by the ILC and the sixth committee of UNGA to determine whether the concept of 'equitable and reasonable utilisation' can be used to manage transboundary aquifers.[81]

The 'no significant harm' principle enshrined in Article 7 of the Watercourse Convention states that watercourse States must 'take all appropriate measures to prevent the causing of any significant harm to other watercourse States'.[82] However, the definition of 'significant harm' or the threshold to be attained is unclear. Further, since surface water and groundwater sources have differing characteristics, applying the same standards to both is problematic. It is vague whether the harm must be tangible and have an effect on the usage of water by another State or whether environmental terms can be used to define harm to the

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74 Werner Aeschbach-Hertig and Tom Gleeson, 'Regional Strategies for the Accelerating Global Problem of Groundwater Depletion' (2012) 5 Nature Geoscience 853, 858.

75 Yoshihide Wada and Lena Heinrich, 'Assessment of Transboundary Aquifers of the World–Vulnerability Arising from Human Water Use' (2013) 8 Environmental Research Letters 2, 4.

76 See also DALTA (n 5) art 23.

77 Nurit Kliot, Deborah Shmueli and Uri Shamir, 'Institutions for Management of Transboundary Water Resources: Their Nature, Characteristics and Shortcomings' (2001) 3 Water Policy 229, 230.

78 Convention on the Law of the Non-navigational Uses of International Watercourses (n 12) art 5.

79 ibid art 6.

80 ibid art 6.

81 UNGA 'Second Report on Shared Natural Resources: Transboundary Groundwater' (2004) UN Doc A/CN.4/539, 40.

82 Convention on the Law of the Non-navigational Uses of International Watercourses (n 12) art 7.

aquifer.[83] Considering the difficulties and expenses associated with aquifer remediation, more stringent standards must be in place to account for the threshold of the 'significant harm' principle when any harm occurs to an aquifer.[84]

VI. Israel-Palestine Transboundary Water Management

The rationale behind choosing the Israel-Palestine dispute pertaining to transboundary aquifers over other bilateral disputes is because of its massive international involvement in terms of players like the United Nations. The United Nations' fixation over this dispute is evident from the fact that the United Nations Security Council (UNSC) has passed an unprecedented number of 79 resolutions on Arab-Israel conflict as per 2010 data.[85]

The transboundary water conflict between Israel and Palestine is presently more than 20 years in the making.[86] The impact of water scarcity is nowhere felt more than in the region of the Middle East. Since World War II, the crisis in the Middle East on resources has been brought to the fore. Groundwater is considered to be one of the hardest fought resources. The groundwater resource in the Middle East is mostly shared between two or more States. The two Oslo Agreements regulate the law governing the sharing of water resources in the region,[87] and were entered between Israel and Palestine in September 1994 and 1995, respectively. The Israel-Palestine conflict over the water resource is acute as the recharge zone for the Juda aquifer is distributed over Samaria, Hebron, and Judea, which are located in the disputed Israel-occupied West Bank part excluding eastern Jerusalem. At this juncture, more than hydrology and geography, it is pivotal to decipher the agreements linking Israel and Palestine the transboundary conflict.[88]

By the first Oslo Agreement in 1994, it was agreed by Israel to transfer control over the Palestinian water supply in Gaza to Palestine.[89] Further, it was agreed that Israel would transfer 5 million cubic metres per year (hereinafter referred to as 'MCM/Y') to Gaza through a pipeline. The second Oslo Agreement was signed in 1995. This concurred with the view that Palestine's needs in the future would be 70-80 MCM/Y, and it was further decided to develop new water resources for seawater desalination in the region of Judea and Samaria. The mechanism to implement the Agreement was to take place through a Joint Water Commission (JWC) with the joint supervision of both of the States. The Commission consists of four committees, i.e., hydrological, engineering, sewage, and pricing committees, which look into the aspects of drilling to solve issues pertaining to payment. Since the establishment of the JWC, the dispute persists on various fronts, with the frontrunner being the fact that the water

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[83] Gabriel E Eckstein 'Protecting A Hidden Treasure: The U.N International Law Commission and the International Law of Transboundary Ground Water Resources' (2005) 5 Sustainable Development Law & Policy 5, 8.

[84] Second Report on Shared Natural Resources: Transboundary Groundwater (n 82) 21.

[85] Jeremy Hammond, 'Israeli Violations Of U.N. Security Council Resolutions' (*Foreign Policy Journal*, 2021) <https://www.foreignpolicyjournal.com/2010/01/27/rogue-state-israeli-violations-of-u-n-security-council-resolutions/> accessed 17 June 2020.

[86] Alon Tal, 'International Water Law and Implications for Cooperative Israeli-Palestinian Transboundary Water Management' in Clive Lipchin, Eric Pallant, Danielle Saranga and Alysson Amster (eds), *Integrated Water Resources Management and Security in the Middle East* (Springer 2007) 213–236.

[87] 'Shared Water Resources in Palestine' (*Fanack*, 5 June 2015) <https://water.fanack.com/palestine/shared-water-resources/> accessed 21 May 2020.

[88] ibid.

[89] ibid.

resource of Palestine is controlled by Israel along with endogenous aquifers.[90] The important principle of equitable utilisation governing transboundary aquifers has been flouted by Israel through over-exploitation and pollution in the West Bank through the incessant dumping of industrial and agro-chemical wastes.

Further, when discussing the Israel-Palestine aquifer, it is pertinent to delve into the application of the principles of transboundary aquifers in the said context. The first doctrine is the Harmon doctrine,[91] i.e. the absolute sovereignty of every nation within its territory, while the opposite to the Harmon doctrine is the historical rights doctrine[92] which is that if the State enjoys the water flowed into an area under her control, then she is entitled to receive the water. The second Oslo Agreement provided the JWC wide authority to operate the aquifer. Palestine was always in favour of the principle of 'riparian use'[93] and demanded Israel to return all the water from the mountain aquifer. In contrast, Israel claimed the right over the aquifer based on historical use. The subsequent negotiation made very little headway, and the sustainable solution to the water crisis in Palestine requires consensus across the board. Amjad Aliewi points towards a four-pronged approach to the water crisis, which includes that:

a) Palestinian water rights should be resolved according to international legal principles, which will guarantee sufficient quantities and grant sovereignty to Palestinians to utilise and control their water resources.
b) Palestinian water rights should extend to their indigenous and shared groundwater aquifers as well as surface water, including the Jordan River.
c) Final agreements will have to ensure the removal of any obstacles in Palestinian lands that limit Palestinian rights (e.g., access to wells currently controlled by Israel inside the West Bank, the separation wall constraints imposed by Israeli settlements, etc.).
d) Bilateral and multilateral cooperation remain key elements in any final status negotiations over Palestinian water rights.

The second Oslo Agreement has been defined as an interim agreement while many portions of the agreement remain vague. The accusations and counter-accusations are ubiquitous. Israel accuses Palestine of digging wells, while Palestine accuses Israel of overexploitation, the breach from both sides means that the principles enshrined under Article 40 of the second Oslo Agreement (Annex III)[94] are blatantly violated. As the second Oslo Agreement envisages, deepening negotiation could go a long way in resolving the outstanding disputes.

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[90] Haim Gvirtzman, 'The Israeli-Palestinian Water Conflict: An Israeli Perspective' (2012) Mideast Security and Policy Studies No. 40, 23 <https://www.pseau.org/outils/ouvrages/besa_the_israeli_palestinian_water_conflict_an_israeli_perspective_2012.pdf accessed> accessed 23 May 2020.

[91] Philip A Baumgarten, 'Israel's Transboundary Water Disputes' (2009) Pace Law School Publications, 2 <https://digitalcommons.pace.edu/lawstudents/2> accessed 23 May 2020.

[92] Gvirtzman (n 91) 19.

[93] Juliette Niehuss, 'The Legal Implications of the Israeli-Palestinian Water Crisis' (2005) 5 Sustainable Development Law & Policy 13, 15.

[94] UNSC 'Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip' (28 September 1995) UN Doc S/1997/357.

VII. India-Pakistan Indus River Water Plain Aquifers: Need For A Comprehensive Legal Framework

The Indian subcontinent encompasses 23 percent of the world population within the limited land area of about 3 percent, thereby becoming the most densely populated region of the world.[95] The importance of transboundary aquifers is thus immense as various issues pertaining to food and water security are dependent on them. In India, the transboundary nature of these water resources has led to several 'acrimonious issues' over the usage of water.[96] Taking into consideration various nuances of groundwater management, it becomes essential to understand the continuous and extensive management of transboundary aquifers. It is crucial to implement various laws concerning the governing of transboundary aquifers. One of such aquifers which has recently been in the limelight is the India-Pakistan Indus River Water Plain Aquifers.[97]

The Indus River water flows from the Tibetan Plateau and flows through India and Pakistan and its source supports an estimated 215 million people.[98] The Indus water is regulated by the Indus Water Treaty. One of the salient features in the Treaty is international cooperation and the creation of the Permanent Indus Commission (PIC) to undertake periodic inspections.

However, due to the relatively recent focus on the subject of groundwater, the Indus Water Treaty does not deal with groundwater but primarily focuses on surface water. This is problematic, as India and Pakistan also share the Indus Water Plain Aquifer, an unconfined/semi-confined groundwater source located beneath the Indus Basin that is currently experiencing several problems associated with over-exploitation.[99]

The rampant exploitation of groundwater in the region has meant that the water table is on the decline. One study conducted by NASA revealed that the Indus Basin was the second-most overstressed aquifer in the world.[100] Scholars have argued in favour of incorporating provisions on groundwater aquifers in the Indus Water Treaty, which would go a long way in addressing the issue of groundwater depletion in the region.[101] Moreover, the aquifers could be governed by the principle of equitable utilisation and principle of no harm, as these principles have been invoked with regard to surface water. The legitimacy of using these principles is also derived from the fact that they have been elevated to the status of customary international law. The initiation of dialogue on an agreement on groundwater aquifers requires political commitment and compromise, and there are very few bilateral

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95 Abhijit Mukherjee et. al, 'Groundwater Systems Of The Indian Sub-Continent' (2015) 4 Journal of Hydrology: Regional Studies 1, 1.

96 ibid 1.

97 Hassan Abbas and Asghar Hussain, 'To Save Pakistan, Look under Its Rivers' (*The Third Pole*, 27 September 2019) <https://www.thethirdpole.net/2019/09/27/pakistans-riverine-aquifers-may-save-its-future/> accessed 21 June 2020.

98 Fazila Nabeel, 'How India and Pakistan Are Competing over the Mighty Indus River' (*DownToEarth*, 21 February 2019) <https://www.downtoearth.org.in/news/water/how-india-and-pakistan-are-competing-over-the-mighty-indus-river-63321> accessed 21 June 2020.

99 Sahana Rao, 'Governance of Water Resources Shared by India and Pakistan Under the Indus Waters Treaty: Successful Elements And Room for Improvement' (2017) 25 New York University Environmental Law Journal 108, 129.

100 'Indus Basin Is World's Second Most "overstressed" Aquifier' (*Hindustan Times*, 18 June 2015) <https://www.hindustantimes.com/india/indus-basin-is-world-s-second-most-overstressed-aquifier/story-kzOWAy5q0R26rgBiksJ1hI.html> accessed 21 June 2020.

101 Rao (n 99) 130.

precedents to rely upon for either State.[102] The ideal principle that may be incorporated in the bilateral treaty could be the precautionary principle. Considering the fact that the data on the quantification is impossible to ascertain, the precautionary principle would be difficult to infuse into the existing Indus Treaty because of the absence of the principle in the said Treaty. One possible way to overcome the situation is to incorporate the phrase 'groundwater' in the provisions of the Indus Treaty alongside surface water and demarcate the allowable use.

VIII. Significance of Good Faith Obligation in Complying with the Principles of Transboundary Aquifers

The popular and contemporary definition of good faith stems from the landmark *Nuclear Tests judgment*.[103] The International Court of Justice (ICJ) in the said case observed:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt sevanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.[104]

The principle of good faith also finds resonance in Article 26 of the Vienna Convention on Law of Treaties (VCLT)[105]. The jurisprudence of Article 26 of VCLT is vast and hence requires a cogent interpretation, which forms a pillar of international law.

In the sphere of transboundary aquifers, the principle of good faith is cardinal, as treaties and resolutions on transboundary aquifers in the context of shared resources are mainly soft law mechanisms.[106] The negotiation between the competing rights and interests is evident from the cases involving aquifer States, where the compromise between States happens at the level of the source State and affected State. However, in certain instances, the negotiations are caught in the tussle of power politics wherein one State holds the upper hand, as seen in the case study of Israel-Palestine, the Oslo Agreements and subsequent interim agreements signed against the backdrop of a volatile political environment.[107] However, States have an obligation to negotiate in good faith, avoid coercion and establish a 'sanctity of obligations'. A good faith obligation finds a mention in Article 7 of DALTA[108] as a general obligation to cooperate. The good faith obligation encompasses both substantive and

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[102] Pilar C Villar, 'Transboundary Aquifers Archives' (*International Water Law Project Blog*, 16 November 2020) <https://www.internationalwaterlaw.org/blog/category/transboundary-aqufers/> accessed 19 June 2020.

[103] *Nuclear Tests (Australia v France)* (Judgement) [1974] ICJ Rep 253.

[104] ibid [46].

[105] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entry into force 27 January 1980).1155 UNTS 331 (VLCT), art 26.

[106] Cameron J Hutchison, 'Coming in from the Shadow of the Law: The Use of Law By States to Negotiate International Environmental Disputes in Good Faith' (2006) 43 Canadian Yearbook of International Law 101, 101.

[107] 'Israeli-Palestinian Conflict' (*Council on Foreign Relations,* 2020) <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict> accessed 31 May 2020.

[108] DALTA (n 5) art 7.

procedural limbs; the latter of which is reflected in Article 8,[109] i.e. the regular exchange of data and information. The provision states that:

> Pursuant to draft Article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifers or aquifer systems, as well as related forecasts.

One of the bones of contention in the Israel-Palestine transboundary aquifer conflict is the available data being skewed. The difficulty of accessing the relevant data in the field of transboundary aquifers is because of the diverse data that exist with regard to aquifers. For instance, the Franco-Swiss Genevese Aquifer Management Commission[110] had difficulties harmonising the data as a result of the two sides interpreting according to their own standards.

One of the germane concepts that requires more clarity is the substantive content of good faith. Presently, good faith merely rests on the doctrine of 'reasonableness'.[111] That said, in practice, the legal indeterminacy on the substantive content will not be a problem as States will have the incentive to settle or arrive at a political solution.[112] It can be deciphered that, when the rules are narrower, negotiations take place in good faith, essentially implying that good faith fills the gap left unaddressed by the treaty framework. The application of good faith requires accommodation of the rights and interests of the two or more States, and in the domain of shared resources, good faith plays a crucial role in facilitating consensus amongst States.

As stated, good faith covers legal indeterminacy and offers clarity to the uncertain realm of transboundary resources, an uncertainty which stems from scientific ambiguity (cause, effect, and risk) and complexity of social choices, in terms of cost and benefits analysis. The essence of soft law is to protect the legitimate interest and thus ward-off self-interest in interpretation.[113] In the *Lake Lanoux arbitration*,[114] the rule of good faith meant that the upstream State is under an obligation to consider various interests. The reconciliation of the riparian State was recognised as an important factor for the equitable utilisation of the shared watercourse.

Primarily, good faith encompasses reconciliation of the legitimate interests of the States. In *Gabcikovo-Nagymaros case*, a landmark case of the ICJ involving the negotiating of legitimate interests,[115] the two interests that the ICJ had to evaluate were the social and economic needs of the watercourse State and protection of drinking water supply. The ICJ's interpretation in an integrated manner reconciled the no significant harm principle with

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[109] ibid art 8.

[110] 'Franco-Swiss Genevese Aquifer' (*International Waters Governance*) <http://www.internationalwatersgovernance.com/franco-swiss-genevese-aquifer.html> accessed 1 June 2020.

[111] Robert Kolb, 'Principles as Sources of International Law (With Special Reference to Good Faith)' (2006) 53 Netherlands International Law Review 1, 16.

[112] DALTA (n 5) art 9.

[113] ibid art 16.

[114] *Lake Lanoux Arbitration (France v Spain)* (1957) Arbitral Tribunal 12 RIAA 281.

[115] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)* (Judgement) [1997] ICJ Rep 7.

equitable utilisation and favoured harm in certain exceptional circumstances, as the risk of the harm was a mere possibility. Of course, it was criticised in the sense of sustainable development. It is widely held that good faith norms, when recognised, will enable attainment of environmental protection goals. Apart from the shared transboundary resources, good faith norms are also reflected in the areas of laws regulating trade, straddling fish stock management, etc.[116] As mentioned in DALTA, information on the aquifers is crucial to realise the equitable sharing of water resources. The good faith doctrine in the context of aquifers finds affinity in terms of exchange of data and information. As reflected in Article 8 of DALTA, which uses the language of 'best efforts', States are required to make use of the best means at their disposal to share data as the sharing of data is especially productive when the aggrieved States are the developing economies. The data to be provided includes, inter alia, geological, meteorological and hydrogeological information. The sharing of data usually takes place jointly and includes all available research and analysis of aquifers. Through this joint management, as with the Nubian Sandstone System or the EU Water Framework Directive,[117] the purpose of collective management is to ensure transparency and accountability.

IX. Conclusion

This paper has revealed the significance of the general principles of international law in resolving disputes relating to transboundary aquifers. The challenge, however, is to urge States to comply with these general principles in good faith. Since contemporary disputes on transboundary aquifers are resolved by resorting to regional or bilateral treaties, these treaties ought to incorporate the general principles in substance and spirit, especially in the backdrop of international politics. Also, there is a requirement for balancing treaty and customary law to ensure the smooth enforcement of these principles, as most of these principles have attained the status of customary international law. Hence, State compliance needs to be rephrased from the commonly held soft law conception. The onset of globalisation had set the stage for principles like sustainable development, the no harm principle and limited sovereignty in the context of the transboundary aquifer to thrive. Nevertheless, the reticence of States to enhance the scope and content of some of these principles has meant that these principles have not transformed beyond soft laws.

Through this doctrinal study, the authors have identified certain grey spots which require an amicable solution; firstly, the authors contend that rather than being confined to rights and obligations, international law should apply the general principles with consistency in order to render equitable solutions to the volatile crises over hard-fought shared resources. Secondly, the need to reconcile these principles ought to be emphasised, as some of these principles contradict the rights and interests of different States. This would ensure a legal solution to the political struggle. Thirdly, in the course of this research, the authors were able to identify the gap in terms of data on the transboundary aquifer where the developed economies have access to the most sophisticated and accurate data and technologies, hence hold an upper hand in the bargaining process. The authors believe that enhancing better international cooperation and transfer of technology can go a long way in bridging the gap between developed and developing economies and thus ensuring equitable resource distribution.

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[116] DALTA (n 5) art 7.

[117] Council Directive 2000/60/EC of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L327/1 (Water Framework Directive).

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AOSIS v The World: A Blueprint for the First International Multi-Party Climate Change Case

Benjamin Norman Forbes LL.M*
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CLIMATE CHANGE; LITIGATION; JURISDICTION; ALLIANCE OF SMALL ISLAND DEVELOPING STATES

Abstract

This article is innovative in providing a Blueprint for bringing the first international multi-party climate change case. The Blueprint allows for AOSIS member states to bring a number of group claims against a Respondent Pool made up of the world's leading greenhouse gas emitters, before a variety of international bodies, on a variety of legal bases. International litigation presents substantial jurisdictional barriers, not least in regard to climate change litigation. It is these barriers that necessitate the group litigation strategy advocated for here. Specifically, the article envisages proceedings before the ICJ, ITLOS, and UNCLOS arbitral tribunals. The legal bases that the Blueprint requires are inventoried, however the focus is on the jurisdictional issues of the bodies. The practicalities involved in AOSIS bringing group cases before each body are explored and solutions for overcoming the jurisdictional barriers of each are offered. Ultimately, the article shows that the jurisdictional barriers are far from insurmountable, with the Blueprint allowing for all AOSIS member states to be involved in proceedings, before at least one body, against at least forty-eight respondents, including the US, China, and the EU.

I. Introduction

'[W]e have served as ports for trade and of conquest, and as both bases and targets for the missiles of war. Today, as we confront climate change, we find ourselves effectively in the same role, not of our choosing; facing a threat, not of our making'.[1]

Ever since its first assessment report, the Intergovernmental Panel on Climate Change (IPCC) has recognised Small Island Developing States (SIDS) as being highly vulnerable to climate change, notably sea level rise.[2] In 1990 it stated that a 30-50cm sea level rise (projected by 2050) would threaten low islands, while a one-meter rise by 2100 would 'render some island countries uninhabitable'.[3] More than twenty years later, the IPCC's latest assessment report continued to confirm the high level of vulnerability of SIDS, pointing out that while SIDS 'represent only a fraction of total global damage projected to occur as a result of a SLR [sea-level rise] of 1m by 2100, the actual damage costs for the

* Benjamin Norman Forbes LL.M, University of Groningen.

1 Tuiloma N Slade (former AOSIS Vice-Chairman) in a speech to the High-Level Segment of the First Conference of Parties to the UNFCCC quoted in Epsen Ronneberg, 'Small Islands and the Big Issue: Climate Change and the role of the Alliance of Small Island States' in Kevin Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (OUP 2016) 762, 764.

2 Categories of high vulnerability include small islands. See Intergovernmental Panel on Climate Change, 'Climate Change: The IPCC Impacts Assessment' (Report of Working Group II, Australian Government Publishing Service 1990) 21.

3 IPCC, 'Policymakers' Summary' (1990) 4 <https://www.ipcc.ch/site/assets/uploads/2018/03/ipcc_far_wg_II_spm.pdf> accessed 30 December 2020.

small island states is enormous in relation to the size of their economics, with several small island nations being included in the group of 10 countries with the highest relative impact projected for 2100'.[4]

It is no wonder then that a number of SIDS have previously threatened climate litigation, such as Tuvalu, Palau, and most recently Vanuatu.[5] However, Tuvalu and Palau's threats appear to have been dropped, and it is unclear whether Vanuatu intends to follow through on its threat and actually commence litigation. While any climate change case faces challenges at the merits stage, SIDS face substantial jurisdictional barriers in even commencing proceedings before an international court or tribunal. With ever more convincing scientific consensus around the causes and effects of climate change, perhaps it is the jurisdictional barriers and not the challenges posed at the merits stage that have so far quelled SIDS litigation threats. This article examines these jurisdictional barriers and seeks to show that they are not as insurmountable as they may at first appear. In doing so, the article is innovative in providing a Blueprint for the first international multi-party climate change case.

At the heart of the Blueprint is the Alliance of Small Island Developing States (AOSIS), with the author advocating that AOSIS members build on their history of success in working together in relation to climate change to bring a multi-party claim against a group of high emitting states across multiple international fora. A group litigation strategy allows AOSIS to overcome the jurisdictional barriers that would be faced by many of its members if they attempted to bring a case alone. AOSIS can utilise both the International Court of Justice (ICJ) and the dispute settlement procedure under the United Nations Convention on the Law of the Sea (UNCLOS)[6] to bring proceedings against at least forty-eight respondents, from a 'Respondent Pool' that is constructed in Section 3, including the two biggest greenhouse gas (GHG) emitters, the US and China, as well as the European Union (EU).[7] While the final decision on who to include as respondents lies with AOSIS, the Blueprint makes it possible to include the entire Respondent Pool in proceedings, guaranteeing that each member, bar one, can definitely be involved in proceedings before at least one court or tribunal. The one exception is Turkey, which can nevertheless potentially be involved through the solutions offered in Section 4. Importantly, the evasive high emitting US and China are not excluded, nor is the interesting option of the EU.

Section 2 illustrates why AOSIS are suitable climate change litigants, charting their collective successes in climate change negotiations and evidencing their existing desires for pursuing litigation. The Section then compiles a Respondent Pool of forty-eight states plus the EU, for AOSIS to consider and choose respondents from. Finally, the Section debunks the common argument that some high emitting states should be exempted from climate change litigation due to their economic and development status and the argument that responsibility should be borne by more developed states due to their historical emissions.

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4 IPCC, 'Climate Change 2014: Impacts, Adaptation, and Vulnerability' (Working Group II's contribution to the Fifth Assessment Report, 2014) Part B, 1618.

5 See Rebecca Jacobs, 'Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice' 14 *Pacific Rim Law and Policy Journal* (2005) 103; 'Palau seeks UN World Court opinion on damage caused by greenhouse gases' (*UN News*, 22 September 2011) <https://news.un.org/en/story/2011/09/388202#.Ur2V2Bk-YaJ> accessed 30 December 2020; Lisa Cox, 'Vanuatu says it may sue fossil fuel companies and other countries over climate change' (*The Guardian,* 22 May 2019) <https://www.theguardian.com/world/2018/nov/22/vanuatu-says-it-may-sue-fossil-fuel-companies-and-other-countries-over-climate-change> accessed 30 December 2020.

6 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

7 The thesis envisages initiating proceedings against forty-eight States and the EU, however, Turkey is the only State that AOSIS is unable to guarantee including in proceedings before at least one court or tribunal.

The method of construction of the Respondent Pool strikes a balance between capturing the most desirable states and providing a sound legal basis for their inclusion in proceedings.

Section 3 briefly discusses the legal bases that the Blueprint envisages invoking. This article is concerned with providing a Blueprint for overcoming the jurisdictional barriers to international climate change litigation and does not intend to analyse the merits of the legal arguments that would be involved.[8] Indeed, the latter has been extensively written about elsewhere and this article is informed by such literature, while the former remains a gap in existing scholarship which the article seeks to fill. Nevertheless, in order to provide legal context for the litigation proceedings, it is helpful to at least compile an inventory of legal bases. This is because the Blueprint envisages AOSIS invoking a range of legal arguments in order for all AOSIS members to bring claims against the full Respondent Pool. These arguments are drawn from the climate change treaty regime, the law of the sea regime, and customary international law. However, the Section limits itself to an inventory, and stops short of pondering the ultimate success or failure of such arguments, suffice to say that the author is optimistic in this regard.

Section 4 discusses the jurisdictional rules of the ICJ and the UNCLOS Part XV dispute settlement procedure, the barriers to climate litigation that these present, and how they can be overcome. The Section takes a step by step approach in detailing which applicants and respondents can be involved at which forum and how, beginning with the ICJ, moving to ITLOS, and finally to the arbitral and special arbitral tribunals.

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[8] For fuller analysis of the legal arguments involved in international climate change litigation see Laura Horn, 'Is Litigation an Effective Weapon for Pacific Island Nations in the War Against Climate Change?' (2009) 12(1) Asia Pacific Journal of Environmental Law 169; Luke Elborough, 'International Climate Change Litigation: Limitations and Possibilities for International Adjudication and Arbitration in Addressing the Challenge of Climate Change' (2018) 21 New Zealand Journal of Environmental Law 89; M Wilder, 'Well Below 2C' (2016) 20 Law Society of New South Wales Journal 24; Daniel Bodansky, 'Paris Climate Change Agreement: A New Hope' (2016) 110(2) American Journal of International Law 2888; M Mace, 'Mitigation Commitments under the Paris Agreement and the Way Forward' (2016) 6(1-2) Climate Law 21; Charlotte Streck and others, 'Paris Agreement – A New Beginning' 13(1) (2016) Journal of European Environmental and Planning Law 3; Lavanya Rajamani and Emmanuel Guerin, 'Central Concepts in the Paris Agreement and How They Evolved' in Daniel Klein and others (eds), *The Paris Climate Agreement: Analysis and Commentary* (OUP 2017) 74; Ved Nanda and George R Pring, *International Environmental Law and Policy for the 21st Century* (2nd ed, Brill 2013); Christina Voigt, 'State Responsibility for Climate Change Damages' (2018) 77 Nordic Journal of International Law 1; Roda Verheyen, *Climate Change Damage in International Law* (Brill 2005); Roda Verheyen and Cathrin Zengerling, 'International Dispute Settlement' in Kevin Gray, Richard Tarasofsky and Cinnamon Carlarne (eds), *The Oxford Handbook of International Climate Change Law* (OUP 2016) 418; Alexander Zahar, 'The Contested Core of Climate Law' (2018) 8 Climate Law 244; Saheed Alabi, 'Using Litigation to Enforce Climate Obligations under Domestic and International Laws' (2012) 6(3) Carbon and Climate Law Review 209; Alan Boyle, 'Law of the Sea Perspectives on Climate Change' (2012) 27 The International Journal of Marine and Coastal Law 831; Meinhard Doelle, 'Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention' (2006) 37(3-4) Ocean Development and International Law 319; Brian Preston, 'Climate Change Governance - The International Regime Complex' (2011) 5(2) Carbon & Climate Law Review 244; William Burns, 'A Voice for the Fish? Litigation and Potential Causes of Action for Impacts under the United Nations Fish Stocks Agreement' (2008) 11(1) Journal of International Wildlife Law and Policy 30; Darin Bartram, 'International Litigation Over Global Climate Change: A Skeptic's View' (2007) 101 American Society of International Law 65; Benoit Mayer, 'State Responsibility and Climate Change Governance: A Light through the Storm' (2014) 13(3) *Chinese Journal of International Law* 539; Jacobs (n 5).

II. Applicants and Respondents

This article advocates for AOSIS building on their history of success in working together in relation to climate change in order to bring a multi-party case across multiple fora. As such, Part A explains why AOSIS is a suitable group to do so. Part B then compiles a forty-nine strong member Respondent Pool which it is suggested AOSIS use as a guideline when determining who all to name as respondents in the proceedings. Finally, Part C dispels the idea that relatively recent high emitting states should be exempted from such a Respondent Pool.

A. AOSIS as Applicants

AOSIS is composed of forty-four members[9] representing 28% of developing states and 20% of UN membership.[10] It is a heterogeneous collection of countries, with a range of geographical, cultural, social, and economic differences.[11] The majority of members are SIDS, although not all, for example, Belize, Guyana, and Suriname. Regardless, all AOSIS members 'are at the frontline of climate change impacts, with induced existential threats'.[12] More important for litigation purposes is that seven AOSIS members are not UN members nor states: American Samoa, the Cook Islands, Guam, Netherlands Antilles, Niue, Puerto Rico, United States Virgin Islands. These members are therefore precluded from ICJ proceedings, as only states may be parties in cases before the Court[13] and currently the parties to the ICJ Statute are the same as those that are members of the UN.[14] Their lack of statehood does not *per se* preclude these seven AOSIS members from proceedings under the UNCLOS.[15] Indeed, the Cook Islands and Niue have ratified the UNCLOS, as well as the UNFCCC[16] and the Paris Agreement,[17] although the other five have not ratified any. All other AOSIS members are parties to the UNFCCC, the Paris Agreement, and the UNCLOS. Notwithstanding the jurisdictional barriers, which will be discussed in Section 4, this leaves thirty-seven AOSIS members free to pursue litigation at the ICJ, with thirty-nine free to do so under the dispute settlement procedures of the UNCLOS Part XV.

AOSIS came together in 1990 when they recognised their disproportionate vulnerability to the negative consequences of climate change.[18] Island states worldwide recognised their commonality early, as well as the need to cooperate given their limited individual influence.[19] Forming at the Second World Climate Conference, AOSIS was

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[9] Antigua and Barbuda, American Samoa, Bahamas, Barbados, Belize, Cabo Verde, Comoros, Cook Islands, Cuba, Dominica, Dominican Republic, Fiji, Federated States of Micronesia, Grenada, Guam, Guinea-Bissau, Guyana, Haiti, Jamaica, Kiribati, Maldives, Marshall Islands, Mauritius, Nauru, Netherlands Antilles, Niue, Palau, Papua New Guinea, Puerto Rico, Samoa, Singapore, Seychelles, Sao Tome and Principe, Solomon Islands, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname, Timor-Leste, Tonga, Trinidad and Tobago, Tuvalu, United States Virgin Islands, Vanuatu.

[10] Timothee Ourbak and Alexandre Magnan, 'The Paris Agreement and climate change negotiations: Small Islands, Big Players' 18 Regional Environmental Change (2018) 2201, 2202.

[11] ibid.

[12] ibid.

[13] Statute of the International Court of Justice 1945 UKTS 067/1946 (ICJ Statute), art 34(1).

[14] ibid; 'End Note 2' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-3&chapter=1&clang=_en> accessed 30 December 2020.

[15] UNCLOS (n 6) art 20(2).

[16] United Nations Framework Convention on Climate Change 1992 (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

[17] Paris Agreement under the United Nations Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2015) 55 ILM 743 (Paris Agreement).

[18] Carola Betzold, Paula Castro and Florian Weiler, 'AOSIS in the UNFCCC negotiations: from unity to fragmentation?' 12(5) *Climate Policy* (2012) 591, 592.

[19] ibid 593.

among the first groups to bring the international community's attention to the dangers posed by GHG emissions, particularly the threat of sea level rise.[20] The group made its first formal appearance at the first meeting of the International Negotiating Committee (INC) in 1991.[21] Its early work focused on getting recognition for the specific problems of SIDS and on getting the necessary representation in the negotiations. In both areas AOSIS succeeded, receiving special recognition in UNGA Resolution 45/212 (1990) and being granted access to the special fund for participation.[22] AOSIS received further recognition as a severely affected group of countries, with special travel assistance being granted to SIDS to participate in INC meetings between 1992 and 1994.[23] Having gained recognition as a group facing a physical threat to the survival of its member countries, an INC Vice-Chairman position was allocated to SIDS through an 'extra' seat, despite being 'inconsistent' with normal practice.[24] AOSIS has managed to keep this position and to obtain a SIDS seat in other UNFCCC bodies, such as the Executive Board of the Clean Development Mechanism (CDM) and the boards of the Adaptation Fund and the Green Climate Fund.[25] Further reflecting the emergence of SIDS as a distinct group facing distinct challenges was the Global Conference on the Sustainable Development of SIDS in 1994 which focused specifically on the concerns of SIDS, with one of the main chapters of the program resulting from the Conference dedicated to climate change.[26]

Despite the relatively small size and modest demographical, economic and political weight of its members, AOSIS became one of the key players in the UNFCCC negotiations.[27] They succeeded in developing 'a specific negotiating agenda addressing areas which are of overriding concern to them and succeeded in having those concerns incorporated in a legally binding Convention of historic importance [the UNFCCC]'.[28] Former AOSIS negotiators Ashe, Lierop, and Cherian count the UNFCCC as a 'singular triumph' for AOSIS and highlight twelve goals that AOSIS had coming into the UNFCCC negotiations, ten of which were achieved, albeit to varying degrees.[29] Of these, some of the most notable will now be briefly discussed.[30]

AOSIS was 'completely successful' in achieving their objective that 'the preamble should expressly recognise the particular problems and special needs of small island countries'.[31] Preambular paragraph 12 recalls the provisions of the UNGA Resolutions 44/206 and 44/172, both of which recognise islands and low-lying coastal areas as vulnerable to the adverse effects of sea-level rise.[32] Preambular paragraph 19 recognises the vulnerability of small island countries and countries with low-lying coastal areas. Furthermore, paragraph 14 makes reference to the Ministerial Declaration of the Second World Climate Conference which refers to the special needs of small islands and low-lying

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20 Ronneberg (n 1) 762.
21 ibid 763.
22 ibid.
23 ibid.
24 ibid 768.
25 Betzold, Castro and Weiler (n 18) 594.
26 Ronneberg (n 1) 764.
27 Betzold, Castro and Weiler (n 18) 591; Ourbak and Magnan (n 10) 2202.
28 John Ashe, Robert van Lierop and Anilla Cherian, 'The role of the Alliance of Small Island States (AOSIS) in the negotiation of the United Nations Framework Convention on Climate Change (UNFCCC)' 23 *Natural Resources Forum* (1999) 209, 209.
29 ibid.
30 For a full discussion see Ashe, Van Lierop and Cherian (n 28).
31 ibid 212.
32 UNFCCC (n 16) para 12 of the Preamble.

coastal states.[33] AOSIS also had the objective that 'the special needs of small island countries should be addressed in the body of the Convention'.[34] The achievement of this objective is seen in Articles 3 and 4 UNFCCC.[35] Article 3(2) refers to 'the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change'.[36] Article 4(4) enjoins the developed country Parties to assist those countries 'which are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects'.[37] Article 4(8) requests that full consideration be given to 'actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of … small island countries [and] countries with low-lying coastal areas.[38] Article 4(9) asked the developed country Parties to 'take full account of the specific needs and special situations of the least developed countries', including island countries and low-lying coastal states.[39] AOSIS sought for the Convention 'to establish funding mechanisms to assist developing countries to comply with the terms of the Convention' and that 'in the dispersal of monies … priority should be given to the low-lying, coastal and small vulnerable island countries'.[40] Further, that funding 'must also be applied to compensate Developing Countries for foregoing development opportunities by performing critical actions in the fight against climate change, such as preserving vital sinks for [GHGs] and adopting appropriate technologies'.[41] Here, the UNFCCC 'goes significantly beyond what AOSIS could reasonably have expected to achieve'.[42] The UNFCCC establishes a funding mechanism[43] which is to meet the 'agreed full costs' relating to the implementation by developing country Parties to the Convention[44] and provide for the costs of adaptation and mitigation.[45] AOSIS was 'reasonably successful' in its objective that the 'Convention must include obligations of the Parties to transfer appropriate environmentally acceptable technologies to enable rapid, consistent and effective response to the prospect of climate change'.[46] Article 4(3) and 4(5) require the developed country Parties to either provide financial resources for the transfer of technology, or to 'take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to … developing country Parties'.[47] Article 4(8) designates 'small island countries' for special consideration, while Article 11 specifies the financial mechanism that would fund the transfer of technology from developed to developing country Parties.[48] Finally, the establishment of the Conference of the Parties and a secretariat, as well as a subsidiary body for scientific and technological advice[49] and a subsidiary body for implementation[50] can be seen as 'extremely successful'

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33 Ashe, Van Lierop and Cherian (n 28) 212*;* ibid paras 14 and 19.
34 Ashe, Van Lierop and Cherian (n 28) 212.
35 UNFCCC (n 16) arts 3-4.
36 ibid art 3(2).
37 ibid art 4(4)
38 ibid art 4(8).
39 ibid art 4(9).
40 Ashe, Van Lierop and Cherian (n 28) 214.
41 ibid.
42 ibid.
43 UNFCCC (n 16) art 11.
44 ibid art 4(3).
45 ibid art 4(4).
46 Ashe, Van Lierop and Cherian (n 28) 214.
47 UNFCCC (n 16) arts 4(3) and 4(5).
48 ibid arts 4(8) and 11.
49 ibid art 9.
50 ibid art 10.

for AOSIS, who had the objective of 'existing United Nations and regional institutions working with whatever organisation bodies established by the Convention … to implement the mandate of the Parties'.[51]

The Paris Agreement is considered 'a good outcome, albeit not a great one' for AOSIS.[52] For the Paris negotiations, AOSIS had three main positions, of which Ourbak provides a succinct analysis.[53] Firstly, they fought for the recognition of the special circumstances and needs of small islands as particularly vulnerable countries. SIDS are explicitly mentioned five times in the Paris Agreement regarding mitigation, finance, capacity building, and transparency.[54] AOSIS succeeded in maintaining their special circumstances regarding flexibility in the reporting system and the new transparency framework and avoiding any additional burden in terms of reporting activities. The language related to finance in the Paris Agreement 'might be considered as a victory for SIDS',[55] although they did not succeed in obtaining one of their key tasks related to the 'provisions to enhance SIDS access, especially to public, grant-based support for adaptation, given our unique challenges and the existential threat…'.[56] Ultimately, this represents a success for developing countries as a whole, not only SIDS. Secondly, they fought for a legally binding, ambitious agreement. AOSIS succeeded in the run up to COP21 of initiating a negotiating item called the 'structured expert dialogue' that led to a final report that mentioned the +1.5°C target. Thirdly, they fought for the recognition of loss and damage. AOSIS succeeded in attaining a stand-alone article on loss and damage, although this was reduced by the decision attached to the Paris Agreement, clearly mentioning that 'Article 8 of the Agreement does not involve or provide a basis for any liability or compensation'.[57] Overall, the Paris Agreement struck a delicate balance of position among all groups and countries. The final document agreed upon contained the main AOSIS positions of no 'watering down' of their status, the inclusion of the below +1.5°C target as a long-term goal along with the below +2°C target, and the permanence of the concept of loss and damage with a separate article.

Aside from negotiating, states within AOSIS have demonstrated their openness to pursuing litigation. During the negotiations to the UNFCCC, several SIDS joined in tabling a submission that the polluter pays principle could serve as an appropriate legal framework to address liability and compensation issues.[58] When this was not acceptable to the industrialised countries, Fiji, Nauru, Papua New Guinea, and Tuvalu filed a declaration that signature 'shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change'.[59] Others have gone further, with Tuvalu threatening to bring the US to the ICJ in 2002, however, this never materialised.[60] In 2011, Palau considered asking the ICJ for an

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51 Ashe, Van Lierop and Cherian (n 28) 214-5.
52 Ian Fry, 'The Paris Agreement: an insider's perspective – the role of Small Island Developing States' 46(2) *Environmental Policy Law* (2016) 105, 105.
53 Ourbak and Magnan (n 10) 2203.
54 Paris Agreement (n 17) arts 4(6), 9(4), 9(9), 11(1), 13(3).
55 Darren Hoad, 'The 2015 Paris Climate Agreement: outcomes and their impacts on small island states' 11(1) *Island Studies Journal* (2016) 315, 318.
56 Ourbak and Magnan (n 10) 2205.
57 UNFCCC, 'Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015' (Adoption of the Paris Agreement) FCCC/CP/2015/10/Add.1 <https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties> accessed 30 December 2020.
58 Ronneberg (n 1) 773.
59 Paris Agreement (n 17).
60 Jacobs (n 5).

Advisory Opinion on whether countries have a legal responsibility to ensure that any activities on their territory that emit GHGs do not harm other states, although again, this was not followed through.[61] More recently, Vanuatu has announced that it is 'exploring all avenues' for climate litigation.[62]

Due to the track record of AOSIS' success, this article advocates for continued cooperation amongst SIDS when it comes to climate change litigation. The severe and disproportionate effects of climate change on AOSIS members, coupled with the passion and dedication they have consistently brought to combating climate change, make the group ideal climate change litigants. In pursuing climate litigation, one of the first problems for AOSIS is identifying suitable respondents.

B. Respondents

This Section does not attempt to provide a definitive or exhaustive list of respondents. Rather, it suggests a method for selecting respondents that balances both the competing complex considerations and concerns in making such a selection and provides a sound legal basis for doing so. The outcome is a Respondent Pool from which AOSIS could then compile a definitive list at their own discretion.

The starting point for constructing the Respondent Pool is the UNFCCC and its Annexes. Under Article 3(1) UNFCCC, it is the 'developed country Parties that should take the lead in combating climate change and the adverse effects thereof'.[63] Further, Article 4(1) imposes specific mitigation obligations on 'developed country Parties and other Parties included in Annex I', while Article 4(1) places adaptation obligations on 'the developed country parties and other developed Parties in Annex II'.[64] The latter group is also given financial obligations in relation to both mitigation and adaptation.[65] From this basis comes a Respondent Pool compiled from Annex I of forty-two states and the European Union (EU), listed in *Table 1* below.

[61] 'Palau seeks UN World Court opinion on damage caused by greenhouse gases' (n 5).
[62] Cox (n 5).
[63] UNFCCC (n 16) art 3(1).
[64] ibid arts 4(1) and 4(4).
[65] ibid arts 4(3) and 4(4).

Table 1

UNFCCC Annex I Countries (*also Annex II Countries)

Australia*	Hungary	Portugal*
Austria*	Iceland*	Romania
Belarus	Ireland*	Russia
Belgium*	Italy*	Slovakia
Bulgaria	Japan*	Slovenia
Canada*	Latvia	Spain*
Croatia	Liechtenstein	Sweden*
Cyprus	Lithuania	Switzerland*
Czech Republic	Luxembourg*	Turkey*
Denmark*	Malta	Ukraine
Estonia	Monaco	UK*
EU*	Netherlands*	USA*
Finland*	New Zealand*	Germany*
France*	Norway	
Greece	Poland	

The obligations under the UNFCCC have been extended in the Paris Agreement, with mitigation and adaptation obligations now addressed to 'Each Party' and financial obligations extended to developed country Parties.[66] Thus, all members of the Respondent Pool compiled from Annex I can be held accountable regarding mitigation, adaptation, and financial obligations in relation to both.

A Respondent Pool based solely on the UNFCCC Annexes leaves out a number of high emitting non-annex states. However, the Paris Agreement is to be 'implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, *in the light of different national circumstances*'.[67] This qualification represents a political signal of flexibility and dynamism.[68] As national circumstances evolve, so too will the common but differentiated responsibilities of the states. This idea permeates throughout the Paris Agreement and allows for an extension of the Respondent Pool beyond the confines of the UNFCCC's annex system. If the annexes were indeed sacrosanct, as argued by non-Annex I parties, then such states would escape inclusion in a Respondent Pool regardless of their contributions to climate change and any changes in their 'national circumstances'. However, the qualification of 'national circumstances' limits the ability of states to continue to hide behind the annexes and evade culpability.[69]

The most notable excluded high emitting states are China, India, Brazil, Indonesia, Iran and Mexico. As seen in *Table 2* and *Table 3* below, not only are these states amongst the largest post-1990 emitters, but their position as high GHG emitters, relative to other states, has been significant from the start of the 20th century and, in the case of India, Indonesia, and Mexico, the beginning of their significant levels of emissions pre-date the turn of the 20th century.[70]

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66 Paris Agreement (n 17) arts 4(2), 7(1), 7(6), 7(9).
67 ibid art 2(2).
68 Bodansky (n 8) 221; Rajamani and Guerin (n 8) 84.
69 Bodansky (n 8) 123; Rajamani and Guerin (n 8) 83.
70 World Resources Institute, 'CAIT Climate Data Explorer' <https://www.wri.org/our-work/project/cait-climate-data-explorer> accessed 30 December 2020.

Table 2

World Ranking: Cumulative GHG Emissions up to 2014[71]

	2014 only	*1990-2014*	*1850-2014*
China	1st	1st	2nd
India	3rd	4th	7th
Brazil	6th	7th	19th
Indonesia	8th	11th	24th
Iran	10th	15th	17th
Mexico	11th	10th	13th

Table 3

World Ranking: Cumulative GHG Emissions pre-1990[72]

	1850-1990	1850-1950	1850-1900
China	5th	12th	Outside Top 50
India	12th	10th	18th
Brazil	22nd	34th	Outside Top 50
Indonesia	33rd	27th	34th
Iran	24th	21st	Outside Top 50
Mexico	18th	18th	36th

While these states' high levels of emissions make them attractive additions to the Respondent Pool, the precise obligation of 'Each Party' rests also upon their national circumstances. None of these six non-annex states have relatively low GDPs, the lowest being Iran, which is still the world's 28th largest economy.[73] On the contrary, China is the world's second largest economy, India and Brazil are in the top 10, and Mexico and Indonesia are in the top 20.[74] However, each has a GDP *per capita* of below US$10,000[75] and while China, Brazil, Mexico and Iran are classified by the World Bank as upper-

[71] The World Bank, 'GDP' <https://data.worldbank.org/indicator/ny.gdp.mktp.cd?view=map> accessed 30 December 2020.

[72] ibid.

[73] The World Bank, 'GDP per capita' <https://data.worldbank.org/indicator/ny.gdp.pcap.cd> accessed 30 December 2020.

[74] The World Bank, 'World Bank Country and Lending Groups' available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 30 December 2020.

[75] The World Bank, 'GDP per capita' <https://data.worldbank.org/indicator/ny.gdp.pcap.cd> accessed 30 December 2020.

middle-income economies, India and Indonesia are lower-middle-income economies.[76] While there are several competing national circumstances to take into consideration, 'Each Party' nonetheless has at least some adaptation and mitigation obligations, while whether they also have financial obligations is dependent upon their status as a developed or developing nation. Further, being at the bottom of the chain when it comes to climate change, AOSIS are unlikely to be deterred from bringing a case against these non-Annex countries and may even wish to expand their net wider. Therefore, China, India, Brazil, Mexico, Indonesia, and Iran are added to the Respondent Pool for consideration by AOSIS. This brings the Respondent Pool to forty-nine members: forty-eight states plus the EU.

C. The Historical Argument Debunked

Relatively recent high emitting states such as China, India, Brazil, Mexico, Indonesia, and Iran typically raise the historical emissions argument when attempting to deny culpability and escape liability for their emissions. The argument for exemption rests upon the assumption that liability for GHG emissions should be determined on a strict basis, rather than a negligence approach.[77] A strict liability approach would take into account all historical emissions. That the existing level of climate change is arguably predominantly caused by decades-old emissions, dating back to the industrial revolution, raises the question of whether it is reasonable to hold more recent large emitters accountable for the damage that they have contributed relatively very little to. On the other hand, a negligence approach to liability would make states responsible only for GHG emissions 'since sometime between the early 1960s and the early 1990s, when a scientific consensus grew on the occurrence of climate change and on its anthropogenic causes'.[78] The question then becomes whether it is reasonable to hold historically high emitters accountable for damages that they did not reasonably foresee. The Seabed Disputes Chamber of ITLOS in its Advisory Opinion on *Responsibilities in the Area* stated that the due diligence standard required from states 'may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity … [and] be more severe for the riskier activities'.[79] Thus, it can be asserted that the standard of care had increased by 1992 with the adoption of the UNFCCC. It could be argued that the increased standard could be applied earlier, either from 1990 with the first IPCC assessment report, 1988 with the UN General Assembly Resolution on climate change, or even 1979 with the First World Climate Conference. It can be further asserted that this standard has been periodically increasing, in light of new scientific and technological knowledge, which is most authoritatively contained in IPCC reports, and recognised by the international community through a succession of climate change negotiations, the most recent and important result of which is the Paris Agreement. Finally, again drawing upon *Responsibilities in the Area*, it could be asserted that, while not determining the exact substance of the standard, the now well-known 'risks' of GHG

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[76] The World Bank, 'World Bank Country and Lending Groups' available at <https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups> accessed 30 December 2020.

[77] See Benoit Mayer (n 8).

[78] ibid 554.

[79] *Responsibilities and Obligations of States Sponsoring Person and Entities with Respect to Activities in the Area (*Advisory Opinion) [2011] ITLOS Reports 2011, paras 115 and 117.

emitting activities warrant the standard being 'severe', and that this move towards greater severity also increased in step with new scientific and technological knowledge.

D. Conclusion

This Section has highlighted AOSIS' suitability as applicants in climate change litigation. The Section then provided a Respondent Pool of 49 members, 48 states and the EU, from which it is suggested that respondents are selected. The basis of the Respondent Pool was built upon the UNFCCC Annexes, before both the obligations of each member and the scope of the membership were expanded in light of the Paris Agreement. Finally, the Section showed that non-annex states could not escape inclusion in the Respondent Pool by hiding behind the historical emissions argument. Having identified both applicants and respondents, Section 3 now showcases the inventories of legal bases that AOSIS could invoke in proceedings between the groups.

III. Inventory of Legal Bases

In order to overcome the jurisdictional barriers posed by international litigation, a variety of legal bases must be utilised before multiple international bodies. This Section briefly inventories these legal bases, providing context for the legal proceedings before each body, and for Section 4 which lays out how the jurisdictional barriers of each body can be overcome, completing the Blueprint for the first international multi-party climate change case.

A. Climate Change Treaty Law

The UNFCCC[80] established the governance structure for the international climate regime, and, after more than two decades, it remains the foundation of the regime.[81] The Paris Agreement,[82] 'a monumental triumph'[83] is the latest development and lays down a framework for the management of climate change from 2020 onwards. While the Paris Agreement establishes a new regime for the future management of climate change, it rests on the foundations of, and is intended to extend, the provisions of the UNFCCC.[84] The regime lays down mitigation and adaptation commitments as well as financial commitments related to both. A court or tribunal could rule that states are legally required to do more to meet these commitments and fulfil the objective of the regime.[85]

While the Paris Agreement has 186 ratifications, notable exceptions include Russia, Turkey, and Iran, which are all included in the Respondent Pool. States not party to the Paris Agreement do not of course fall outside the reach of customary international law.

B. Customary International Law

The no-harm rule is 'the most basic prescriptive rule and the backbone of international environmental law'[86] and the most important customary law rule in the context of climate

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80 UNFCCC (n 16).
81 Bodansky (n 8) 118.
82 Paris Agreement (n 17).
83 'COP21: UN Chief hails new climate change agreement as "monumental triumph"' (*UN News,* 12 December 2015) <http://www.un.org/apps/news/story.asp?NewsID=52802#.Vrh45fl96Uk> accessed 30 December 2020.
84 Philipe Sands, *Principles of International Environmental Law* (2nd edn, 2003) 300.
85 See Horn (n 8) 177; Jacobs (n 5) 112; Elborough (n 8) 96; Wilder (n 8); Bodansky (n 8); Mace (n 8); Streck (n 8); Rajamani and Guerin (n 8).
86 Nanda and Pring (n 8) 23.

change.[87] AOSIS could base an argument on the no-harm rule and claim compensation for damages resulting from violations of the rule.[88] They could also ask a court or tribunal to rule that states must do more in order to comply with the rule, and further, that current efforts are not sufficient. Such arguments would most naturally be invoked before the ICJ and, as explained later in Section 4, only nine AOSIS members and thirty-three Respondent Pool states are Parties to the ICJ Statute, and so only these states could be directly involved in ICJ proceedings. This notably excludes the US and China, as well as Russia, Turkey, and Iran, which are still seemingly out of the law's reach. Those states not parties to the ICJ Statute can however be brought into proceedings through the utilisation of the law of the sea regime.

C. Law of the Sea

The law of the sea, governed by UNCLOS, provides another legal regime that could be utilised by AOSIS and, when used in conjunction with the climate change treaty regime and the no-harm rule, ensures that all AOSIS members can be involved in proceedings. AOSIS can base an argument on UNCLOS that through their GHG emissions, states are polluting the marine environment.[89] Additionally, an argument can be made under the Fish Stocks Agreement that such pollution is adversely affecting the conservation and sustainable use of fish stocks.[90] The Fish Stocks Agreement offers the unique advantage of being able to bring a case directly against the US and Iran, as it applies the UNCLOS dispute resolution mechanism to any dispute under the Fish Stocks Agreement, even where one or more of the disputants are not Parties to UNCLOS.[91] Indeed, while offering a further legal argument, the utilisation of the Fish Stocks Agreement is mainly to ensure that these states, especially the US, can definitely be subject to litigation proceedings. China and Russia are also caught in the law of the sea net; however, Turkey remains the sole outlier.

D. Conclusion

By invoking a range of legal bases, all AOSIS member states are afforded the opportunity of being involved in proceedings. From the Respondent Pool, all but Turkey are captured. Section 4 now discusses the jurisdictional issues that would be involved and shows how they can be overcome, potentially even bringing Turkey into proceedings.

IV. Forum and Jurisdiction

Having identified possible legal arguments and the applicants and respondents, the next step in successful climate litigation is overcoming the jurisdiction barriers and actually having the case heard before a court or tribunal. This Section shows that it is in fact possible to overcome these barriers so that the AOSIS members can bring proceedings against the

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87 Voigt (n 8) 7.

88 For support of the no-harm rule in climate litigation see Verheyen (n 8) 225; Verheyen and Zengerling (n 8) 428; Voigt (n 8) 7-9; Bodansky (n 8) 44; Mayer (n 8) 552-4. For a rebuke of the applicability of the no-harm rule to climate change litigation see Zahar (n 8) 244.

89 See Alabi (n 8); Boyle (n 8); Doelle (n 8); Jacobs (n 5) 116-117; Horn (n 8) 182-184.

90 Preston (n 8) 260; Burns (n 8) 9; Verheyen and Zengerling (n 8) 430. For a critique of the use of these so-called 'strained' legal bases see Bartram (n 8).

91 Agreement for the Implementation of the Provision of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force 11 December 2001) 2167 UNTS 3 (Fish Stocks Agreement), art 30(1).

full Respondent Pool. To do so, the ICJ, ITLOS, and arbitral tribunals will all need to be utilised. Solutions for overcoming the jurisdictional barriers these bodies present are therefore offered: through *forum prorogatum* with regard to respondents, and intervention with regard to applicants.

Part A first addresses the jurisdictional issues faced by AOSIS member states in bringing a case before the ICJ. The ICJ poses jurisdictional problems to AOSIS on both the applicant and respondent side, especially as top-emitting states such as the US and China have not consented to the jurisdiction of the Court. Although Vanuatu is the most recent AOSIS member to make public its intention to litigate, even it would be unable to go before the ICJ alone for the same reason. However, it will be seen that together AOSIS can overcome such obstacles.

Part B outlines how the dispute settlement procedure under UNCLOS Part XV can be utilised to ensure that all AOSIS Members are able to bring a case against the full Respondent Pool. Under UNCLOS, the litigation strategy entails procedures before both ITLOS and an Annex VII arbitral tribunal, or an Annex VIII special arbitral tribunal, and so Part B discusses the jurisdictional procedures in seizing each of these bodies. The Section outlines how those AOSIS members unable to directly bring a case before the ICJ can bring one before ITLOS, and in turn, those unable to seize even ITLOS, can seize an Annex VII tribunal, with Annex VIII also being available.

A. The ICJ

i. Jurisdiction

As the principal judicial organ of the UN,[92] the ICJ could play a central role in facilitating and directing necessary action by states. Achieving a favourable decision at the ICJ would be a significant victory for AOSIS, providing immediate relief as well as 'an authoritatively sanctioned reference point around which public opinion can crystallize'[93] and that resonates through international society.[94] Nevertheless, decisions of the Court are only binding 'between the parties and in respect of that particular case'.[95] This is significant to climate litigation, as the impact of a favourable decision greatly depends upon who the parties to the dispute are. Further, in accordance with the principle of state sovereignty, the Court only has jurisdiction over states that have consented to this.[96] This presents a substantial obstacle as relatively few AOSIS members have consented to the Court's jurisdiction, while, on the respondent side, neither have a number of the Respondent Pool.

This Section discusses the ways in which jurisdiction can be conferred upon the Court, beginning with special agreements under Article 36(1) ICJ Statute,[97] then treaties and compromissory clauses, and finally optional clauses under Article 36(2) ICJ Statute.[98] Given the complications this presents, the potential of the multi-party litigation strategy advocated by this article in overcoming jurisdictional obstacles is then examined.

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92 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter), art 92.

93 Andrew Strauss, 'Climate Change Litigation: Opening the Door to the International Court of Justice' in William Burns and Hari Osofsky (eds), *Adjudicating Climate Change: State, National and International Approaches* (2009) 334, 337.

94 Gleider Hernandez, *The International Court of Justice and the Judicial Function* (2014) 5.

95 ICJ Statute (n 13) art 59.

96 ibid art 36.

97 ibid art 36(1).

98 ibid art 36(2).

a. Conferring jurisdiction

1. Special Agreement

The simplest way to confer jurisdiction is for the parties to enter into an agreement to that effect. This method of 'special agreement' is one of the two methods mentioned in Article 36(1) ICJ Statute.[99] Such an agreement will define the dispute, usually record that the decision of the Court will be accepted as binding, and may indicate applicable law.[100] There are unlikely to be jurisdictional problems as the consent of the parties is clear and obvious, given they have concluded a treaty specifically to confer jurisdiction for a specific case.

While, in theory, jurisdiction conferred *via* special agreement may be the simplest method, with little danger of jurisdictional problems, it is unlikely that AOSIS members could persuade states to agree to conclude such an agreement.[101] Thus, other methods must be analysed.

2. Treaties and compromissory clauses

A treaty may be concluded providing for future disputes to be submitted to the Court. This may be a general treaty on the settlement of disputes contemplating a role for the ICJ, of which there are three: the General Act for the Pacific Settlement of International Disputes,[102] the American Treaty on Pacific Settlement,[103] and the European Convention for the Peaceful Settlement of Disputes.[104] The General Act has only eight parties, none of which are AOSIS members, and the regional scope of the European Convention deems it inapplicable for use by AOSIS. The American Treaty on Pacific Settlement is slightly more useful, with the Dominican Republic, Haiti, Brazil and Mexico being Parties.[105] Thus, the Dominican Republic and Haiti could choose to bring a case against Brazil and Mexico before the ICJ by virtue of the American Treaty on Pacific Settlement.[106] As discussed in the following Section and shown in *Table 4,* the Dominican Republic, Haiti, and Mexico are Parties to the ICJ Statute anyway and so the American Treaty on Pacific Settlement is therefore made somewhat redundant. However, it could still be used to include Brazil in any ICJ proceedings, although only so far as they relate to proceedings between the Dominican Republic, Haiti and Brazil.

A compromissory clause may be inserted into a treaty providing for any dispute on the interpretation or application of the treaty to be referred, under certain conditions, to the ICJ.[107] Of particular relevance is Article 14(2) UNFCCC which provides for the possibility of states to recognise 'as compulsory *ipso facto*, and without special agreement' the submission to the Court of disputes 'concerning the interpretation or application of the

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[99] ibid art 40(1).
[100] Hugh Thirlway, *The International Court of Justice* (2016) 43; Robert Kolb, *The Elgar companion to the International Court of Justice* (2014) 197.
[101] Strauss (n 93) 340.
[102] Revised General Act for the Pacific Settlement of International Disputes (adopted 28 April 1949, entered into force 20 September 1950) 71 UNTS 101.
[103] American Treaty on Pacific Settlement (adopted 30 April 1948, entered into force 6 May 1949) 30 UTS 55.
[104] European Convention for the Peaceful Settlement of Disputes (adopted 29 April 1957, entered into force 30 April 1958) 329 UNTS 243.
[105] American Treaty on Pacific Settlement (n 101); Signatories and Ratifications are available at <http://www.oas.org/juridico/english/Sigs/a-42.html> accessed 30 December 2020.
[106] ibid art XXXI.
[107] Kolb (n 100) 188.

Convention'.[108] Article 24 Paris Agreement states that Article 14 UNFCCC 'shall apply *mutatis mutandis*' to the Paris Agreement.[109] Submission of a case to the Court is only one of two options provided for by Article 14(2), the other being arbitration, which must be selected by way of a written declaration and has effect only 'in relation to any Party accepting the same obligation'.[110] Article 14(2) has never been used, and the Netherlands is the only state that has submitted a declaration recognising the Court as compulsory.[111] Thus, AOSIS members are unable to utilise the compromissory clause in bringing a case.

3. The Optional Clause System

Under Article 36(2) ICJ Statute, a State may deposit with the UN Secretary-General a declaration that it accepts the jurisdiction of the Court.[112] Article 36(5) ICJ Statute preserves any declarations made under the PCIJ Statute.[113] This method of acceptance of jurisdiction is made in advance of, and unrelated to, any disputes arising. Such declarations are regarded as unilateral acts, as whether a declaration is made at all, and if so upon what terms, is solely a matter of the will of the declarant state.[114] However, due to the reciprocity principle, they necessarily become bilateral in their operation.[115] This is contemplated by the phrase 'in relation to any other State accepting the same obligation'.[116] The Court, in *Military and Paramilitary Activities in and against Nicaragua*, described how this operates in practice, explaining that, once an optional clause declaration has been submitted the coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings.[117] The Court has then to ascertain whether, at that moment, the two states accepted 'the same obligation' in relation to the subject matter of the proceedings'.[118] The optional clause system creates, as far as possible, a system of compulsory jurisdiction, where each state can unilaterally bring before the Court a claim against another state.[119] This compulsory jurisdiction is not established among all state parties to the ICJ Statute by virtue of ratification, but only among those state parties that have issued an optional declaration.

Only seventy-three states have made optional declarations.[120] The lack of favour in the mechanism brings difficulties for AOSIS. From the Respondent Pool, Belarus, Brazil, China, Croatia, Czech Republic, France, Iceland, Indonesia, Iran, Latvia, Russia, Slovenia, Turkey, Ukraine, and the US have not submitted optional declarations, while the EU is inapplicable in this regard. The other thirty-three members of the Respondent

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[108] UNFCCC (n 16) art 14(2).
[109] Paris Agreement (n 17) art 24.
[110] UNFCCC (n 16) art 14(2).
[111] Verheyen and Zengerling (n 8); See also UNFCC, 'Declarations by Parties' <https://unfccc.int/process/the-convention/status-of-ratification/declarations-by-parties> accessed 30 December 2020.
[112] ICJ Statute (n 13) art 36(2).
[113] ibid art 36(5).
[114] Thirlway (n 100) 46; Kolb (n 98) 189.
[115] Vanda Lamm, 'The Legal Character of the Optional Clause System' 42 Acta Juridica Hungarica (2001) 25, 33.
[116] Thirlway (n 100) 46; ICJ Statute (n 13) art 36(2).
Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v United States of America) (Jurisdiction and Admissibility) [1984] ICJ Rep 392 (Nicaragua).
[118] ibid para 64.
[119] Malgosia Fitzmaurice, 'The Optional Clause system and the law of treaties: issues of interpretation in recent jurisprudence of the International Court of Justice' 20 Australian Yearbook of International Law (1990) 127, 130; Kolb (n 100) 190.
[120] See list of declarations recognizing the jurisdiction of the International Court of Justice as compulsory, available at <https://www.icj-cij.org/en/declarations> accessed 30 December 2020.

Pool have submitted declarations.[121] On the applicants' side, only nine AOSIS members have submitted optional clause declarations. While the other members 'may at any time' submit a declaration, it is common for states to attach to their declarations the qualification that they do not consent to the Court's jurisdiction in regard to disputes in respect of which another Party has accepted jurisdiction only in relation to or for the purpose of the dispute, or where the declaration was deposited less than twelve months prior to the filing of the application bringing the dispute before the Court. Indeed, a number of Respondent Pool members have such a reservation qualifying their acceptance of jurisdiction.[122] Thus, if other AOSIS members were to submit an optional clause declaration, it would at best delay proceedings by another year and even then would probably not allow them to take part in proceedings as it would be easy to assert that they have submitted the declarations for the purpose of the climate change dispute.

On the face of it, it would appear that only nine AOSIS members could bring a case against the thirty-three members of the Respondent Pool that have submitted declarations. Brazil could also be added if the Dominican Republic and or Haiti choose to utilise the American Treaty on Pacific Settlement. The states involved are shown in *Table 4.*[123] However, on the applicant side, other AOSIS members may be able to join the proceedings through intervention, while on the respondent side, it can be attempted to bring states into the proceedings by virtue of *forum prorogatum*. Both of these will be discussed in detail, but before doing so, the complications resulting from the possibility of attaching reservations to optional clause declarations must be addressed.

Table 4

ICJ Proceedings

AOSIS	***Respondent Pool***			
Barbados	Australia	Germany	Luxembourg	Romania
Dominica	Austria	Greece	Malta	Slovakia
Dominican Republic	Belgium	Hungary	Mexico	Spain
Guinea-Bissau	Bulgaria	India	Monaco	Sweden
Haiti	Canada	Ireland	Netherlands	Switzerland
Marshall Islands	Cyprus	Italy	New Zealand	UK
Mauritius	Denmark	Japan	Norway	Brazil (*only in relation to the Dominican Republic and/or Haiti)*
Suriname	Estonia	Liechtenstein	Poland	
Timor-Leste	Finland	Lithuania	Portugal	

[121] See declarations of Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Denmark, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Japan, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, UK.

[122] See Declarations recognising the jurisdiction of the Court as compulsory: Australia, Bulgaria, Germany, Greece, Hungary, India, Italy, Japan, Lithuania, Malta, New Zealand, Poland, Portugal, Romania, Slovakia, Spain, UK <https://www.icj-cij.org/en/declarations> accessed 30 December 2020.

[123] Remaining States are Australia, Japan, Belgium, Canada, Denmark, Finland, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, and the UK.

4. Reservations to Optional Clauses

Not only is consent to the Court's jurisdiction under Article 36 ICJ Statute an entirely voluntary act, but a state is also absolutely free to specify the limits of its consent.[124] Article 36(3) provides for the possibility of making an optional clause declaration either 'unconditionally', or with reservations attached.[125] Specifically, the reservations foreseen were 'a condition of reciprocity on the part of several or certain states' and acceptance 'for a certain time'.[126] The content of reservations is not limited by Article 36(3), which has never been regarded as laying down an exhaustive list.[127] There are a number of potentially problematic reservations for AOSIS.

Firstly, a common reservation that numerous Respondent Pool members have is one which excludes jurisdiction in cases where the parties have agreed to settle disputes by other means of peaceful settlement. Article 14 UNFCCC, which, by virtue of Article 24 Paris Agreement 'shall apply *mutatis mutandis*' to the Paris Agreement, could be interpreted as constituting other means of peaceful settlement.[128] Article 14(1) UNFCCC provides that parties can jointly seek settlement of their dispute 'through negotiation or any other peaceful means of their own choice'.[129] Article 14(2) provides that Parties can submit declarations recognising the compulsory jurisdiction of either the ICJ or arbitration.[130] If the parties have failed to settle their dispute through the methods mentioned in Article 14(1), or subject to declarations made under Article 14(2), then the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.[131]

The fact that states have not submitted a declaration under Article 14(2) granting the ICJ jurisdiction should not preclude the Court adjudicating climate claims pursuant to their declarations made under Article 36 ICJ Statute as states only need to consent to the Court's jurisdiction once.[132] Moreover, that only the Netherlands has accepted the ICJ's jurisdiction by way of an Article 14(2) UNFCCC declaration, and that neither the procedures for arbitration nor conciliation envisaged by the Article have ever been carried out by the parties, could be interpreted as meaning that there is no final agreement providing for another means of peaceful settlement under the parties Article 36(3) ICJ Statute reservations.[133] In addition, opting into ICJ jurisdiction under Article 36 ICJ Statute could be argued to make ICJ dispute settlement an 'other peaceful means of [the Parties'] own choice' under Article 14(1) UNFCCC and so to have also opted in under Article 14(2) UNFCCC would have been redundant.[134] An argument could therefore be made by AOSIS members that the ICJ has jurisdiction over a climate case despite the existence of Article 14 UNFCCC.

Other problematic reservations are Poland, Romania, and Slovakia's which exclude disputes regarding environmental protection.[135] Arguably this could prevent them being respondents in a climate change case before the ICJ. Bulgaria excludes 'disputes arising under [UNCLOS] or any other multilateral or bilateral agreement on the law of the sea, or

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[124] Fitzmaurice (n 119) 131.
[125] ICJ Statute (n 13) art 36(5).
[126] ibid.
[127] *Aerial Incident of 10 August 1999 (Pakistan v India)* ICJ Rep 12 (2000), para 37.
[128] UNFCCC (n 16) art 14; Paris Agreement (n 17) art 24.
[129] UNFCCC (n 16) art 14(1).
[130] ibid art 14(2).
[131] ibid art 14(5).
[132] ICJ Statute (n 13) art 36(2)(a).
[133] Strauss (n 93) 343; Verheyen and Zengerling (n 8) 420; Boyle (n 8) 837-838; Elborough (n 8) 96.
[134] ibid.
[135] Declarations recognising the jurisdiction of the Court as compulsory, available at <https://www.icj-cij.org/en/declarations> accessed 30 December 2020.

customary international law on the sea, including but not limited to disputes concerning … protection and preservation of the marine environment'.[136] Similarly, Norway's reservation states that the 'limitations and exceptions relating to the settlement of disputes pursuant to the provisions of, and the Norwegian declarations applicable at any given time to … [UNCLOS] and the [Fish Stocks Agreement] shall apply to all disputes concerning the law of the sea'.[137] Thus, arguments based on the UNCLOS may not be able to be used against Bulgaria and Norway, although customary international law and climate treaty arguments are unaffected and UNCLOS arguments can still be raised before ITLOS or an arbitral tribunal. India excludes 'disputes concerning the interpretation or application of a multilateral treaty unless all the parties to the treaty are also parties to the case before the Court or the Government of India specially agree to jurisdiction'.[138] This may prevent climate treaty arguments being used against India, although India leave open the possibility of nevertheless agreeing to jurisdiction and the UNCLOS and customary international law arguments are unaffected.

Ultimately, it will be for the Court to decide whether a reservation prevents a state's participation, not the respondent states themselves, and so none of the above reservations should deter AOSIS members from pursuing their cause through the ICJ. Nevertheless, one of the problems that persist is that very few AOSIS members and some of the most sought-after respondents have not submitted declarations under Article 36 ICJ Statute. However, suggestions will now be offered on how these obstacles can be overcome.

b. Overcoming the obstacles to jurisdiction

1. *Forum prorogatum*

Respondent Pool members that have not submitted an optional clause declaration *may* be brought into a case before the ICJ by virtue of the principle *forum prorogatum.* The ICJ Statue only requires an application to specify 'the subject of the dispute and the parties', while the Rules of the Court only require that it indicates 'as far as possible' the basis of jurisdiction relied on.[139] Thus, AOSIS members would be permitted to make an application that invites states to consent to jurisdiction only for that specific case. It would require that they do not raise preliminary objections and act inconsistently with an intention to contest the competence of the court.[140]

Forum prorogatum has been used against states whose attitude to judicial settlement made it unlikely that jurisdiction would be established, the object being to gain publicity for the claim and demonstrate the applicant's desire and readiness for judicial settlement.[141] An addition was made to the Rules of Court in 1978, whereby an application of this kind would be treated as ineffective until the respondent's consent was forthcoming, meaning that, until then, the application would not be circulated to the Members under Article 40(3) ICJ Statute, nor would the case be entered on the General List maintained under Article

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[136] ibid.
[137] ibid.
[138] ibid.
[139] ICJ Statute (n 13) art 40; See Rules of Court (1978) <https://www.icj-cij.org/en/statute> accessed 30 December 2020; see Thirlway (n 100) 51.
[140] Kolb (n 100) 198.
[141] Thirlway (n 100) 52; *Aerial Incident of 7 November 1954 (United States of America v. Union of Soviet Socialist Republics)* ICJ Press Release 1959/34 <https://www.icj-cij.org/files/case-related/28/12335.pdf> accessed 30 December 2020; *Antarctica (United Kingdom v. Chile)* ICJ Press Release 1955/26 <https://www.icj-cij.org/files/case-related/27/12325.pdf> accessed 30 December 2020.

36(1)(b) ICJ Statute.[142] Although the new rule may have reduced the attractiveness of the approach, such applications have not disappeared completely. Equatorial Guinea brought an application against France in 2012,[143] Argentina brought one against the US in 2014,[144] and in the same year the Marshall Islands sought to rely on *forum prorogatum* in six separate applications regarding the same subject matter against China, France, Israel, North Korea, Russia, and the US.[145] While in no instance have the intended respondents engaged with the request and so jurisdiction has not been established, the fact that the ICJ still issues a press release noting the fact of application means that the matter is still publicised despite the new rule and, indeed, news agencies did report it.[146] In 2016, Equatorial Guinea brought a fresh application against France regarding the same subject matter, this time seeking to confer jurisdiction through various treaties and compromissory clauses.[147] The case is ongoing before the ICJ and the Court has ruled on preliminary objections, confirming its jurisdiction.[148]

While publicity of an application by AOSIS members would certainly bring public attention to the issue, that is only a by-product of the end goal of actually bringing those states before the ICJ. There have been two instances, both against France, where such a 'naked attempt' at establishing jurisdiction has succeeded, and even the US itself has previously employed the principle.[149] It is therefore not outside the realm of possibility that Respondent Pool members that have not accepted the Court's jurisdiction could nevertheless successfully be brought before the ICJ as part of a multi-party case by virtue of *forum prorogatum*. Climate change is currently one of the most, if not the most, reported global issues and public pressure for governments to take more action is intense and ever increasing. Further, the states would come under strong political pressure from the other listed respondents, as well public pressure from their own populations, not to shy away

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[142] Rules of the Court (n 139) art 38(5).

[143] *Application instituting proceedings including a request for provisional measures (Republic of Equatorial Guinea v France)* ICJ Press Release 2012/26 <https://www.icj-cij.org/public/files/press-releases/6/17096.pdf> accessed 30 December 2020.

[144] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* ICJ Press Release 2014/15 <https://www.icj-cij.org/public/files/case-related/118/18258.pdf> accessed 30 December 2020.

[145] *Applications against nine States for their alleged failure to fulfil their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament (Republic of the Marshall Islands v China and others)* ICJ Press Release 2014/18 <https://www.icj-cij.org/public/files/press-releases/0/18300.pdf> accessed 30 December 2020.

[146] See Reuters Staff, 'Argentina seeks legal case against U.S. in the Hague' (*Reuters,* 7 August 2014) <https://uk.reuters.com/article/uk-argentina-debt-usa-courts-idUKKBN0G724U20140807> accessed 30 December 2020; 'Marshall Islands nuclear arms lawsuit thrown out by UN's top court' (*The* Guardian, 6 October 2016) <https://www.theguardian.com/world/2016/oct/06/marshall-islands-nuclear-arms-lawsuit-thrown-out-by-uns-top-court> accessed 30 December 2020; 'Equatorial Guinea sues France over corruption inquiry' (*BBC News*, 26 September 2012) <https://www.bbc.com/news/world-africa-19732360> accessed 30 December 2020.

[147] *Immunities and Criminal Proceedings (Equatorial Guinea v. France) (*Application Initiating Proceedings) General List No 163 [2016] <https://www.icj-cij.org/public/files/case-related/163/163-20160613-APP-01-00-EN.pdf> accessed 30 December 2020.

[148] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections) [2017] <https://www.icj-cij.org/public/files/case-related/163/163-20170330-WRI-01-00-EN.pdf> accessed 30 December 2020.

[149] Sienyo Yee, '*Forum Prorogatum* Returns to the International Court of Justice' (2003) 16 Leiden Journal of International Law 701, 702; *Certain Criminal Proceedings in France (Republic of Congo v France),* Summary 2003/3 <https://www.icj-cij.org/public/files/case-related/129/8206.pdf> accessed 30 December 2020; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* ICJ Report [2008] 177; *Aerial Incident of 7 October 1952 (United State of America v Union of Soviet Republics)* ICJ Press Release 1955/31 <https://www.icj-cij.org/public/files/case-related/28/12335.pdf> accessed 30 December 2020.

and to join them in answering for and defending their position as high GHG emitters. Perhaps this coupling of public and political pressure could be enough to persuade states to accede to proceedings.

2. Intervention

The lack of AOSIS members who may submit an application before the ICJ may be overcome through intervention. There are two possibilities for intervention under the ICJ Statute. Firstly, Article 63 provides for a right of intervention by a state that is party to a convention of which the construction and interpretation is in question in the dispute.[150] Secondly, Article 62 allows for a state that considers it has an interest of a legal nature which may be affected by the decision in the case to request to be allowed to intervene, which the Court will then decide upon.[151] While intervention is also open to Respondent Pool members, it is unlikely that they would choose to avail of it.

AOSIS members that cannot be applicants could seek to intervene under Article 63 as they are all parties to both the UNFCCC and the Paris Agreement. To the nine AOSIS members that have submitted optional clause declarations, this could add another twenty-eight AOSIS members.[152] Article 63 interventions are rare, although New Zealand successfully intervened in *Whaling in the Antarctic*.[153] In its analysis, the Court reaffirmed that Article 63 confers a 'right' to be admitted to the proceedings, so long as the declaration seeking to exercise this right falls within the provisions of Article 63.[154] This implies that a state can be admitted even when one of the original parties objects.[155] Importantly for AOSIS, judgements are binding upon states that intervene under Article 63.[156]

Article 62 is a less promising tool.[157] The Rules of Court require that a State applying to intervene under Article 62 must set out 'any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case'.[158] AOSIS members would be unable to set out any such basis. However, in *Land, Island and Maritime Boundary Dispute,* a Chamber of the Court concluded that the absence of a jurisdictional link is not a bar to permission being given for intervention that does not confer the status of party.[159] This conclusion was affirmed by the full Court in *Land and Maritime Boundary between Cameroon and Nigeria* and *Sovereignty over Pulau Ligitan and Palau Sipidan.*[160] The

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[150] ICJ Statute (n 13) art 63.
[151] ibid art 62.
[152] Antigua and Barbuda; Bahamas; Belize; Comoros; Cuba; Fiji; Grenada; Guyana; Jamaica; Kiribati; Maldives; Nauru; Palau; Papua New Guinea; Samoa; Singapore; Seychelles; Sao Tome and Principe; Solomon Islands; Saint Kitts and Nevis; Saint Lucia; Saint Vincent and the Grenadines; Tonga; Trinidad and Tobago; Tuvalu; Vanuatu.
[153] *Whaling in the Antarctic (Australia v Japan) (*Declaration of Intervention of New Zealand) ICJ Reports 228 [2014].
[154] ibid para 8.
[155] Thirlway (n 100) 179.
[156] ICJ Statute (n 13) art 63(2).
[157] See Thirlway (n 100) 181-183; For a critique of Article 62 and suggestions for reform see Antonio Cassese, 'The ICJ: It is High Time to Restyle the Respected Old Lady' in Antonio Cassese (ed), *Realising Utopia: The Future of International Law* (2012), 242-3.
[158] Rules of the Court (n 139) art 81(c).
[159] *Land, Island and Maritime Frontier Dispute (El Salvador / Honduras)* (Application by Nicaragua for Permission to Intervene) ICJ Reports [1990] 92, 135.
[160] *Land and Maritime Boundary between Cameroon and Nigeria,* and *Sovereignty (Cameroon v Nigeria)*, (Application by Equatorial Guinea for Permission to Intervene) ICJ Reports [1999]; *Sovereignty over Pulau Ligitan and Palau Sipidan (Indonesia / Malaysia)* (Application by the Philippines for Permission to Intervene) ICJ Reports [2001].

same twenty-eight AOSIS members could, therefore, be allowed to intervene, at the Court's discretion, but, as they wouldn't be parties to the dispute, they could not enforce the judgement against the respondents.[161] Thus, even if the Court allowed the interventions, it is better to rely on Article 63 as a basis for intervention.

Twenty-eight interventions under Article 63 would be an unprecedented occurrence, yet there is nothing preventing it. A climate case before the ICJ would involve the interpretation of both the UNFCCC and the Parties Agreement, the states concerned are parties to both and so carry a right to intervene, have their cases heard, and be bound to the judgement.

ii. Section Conclusion

Conferring jurisdiction by way of special agreement or compromissory clause appears impossible. The optional clause system allows for nine AOSIS members to bring a case against a group of thirty-three states from the Respondent Pool. The remaining Respondent Pool members could potentially be brought within the proceedings by virtue of *forum prorogatum*. Although this depends entirely on the states themselves and thus may be unlikely, it is neither impossible nor unprecedented. For AOSIS, twenty-eight members have a right to intervene under Article 63 ICJ Statute on the basis that they are parties to both the UNFCCC and the Paris Agreement. While unprecedented, if the AOSIS members decided to seek intervention, it appears that such intervention would be permissible.

By working together, the jurisdictional obstacles that an AOSIS Member would face individually at the ICJ can be overcome. It is possible for AOSIS members to bring a case that names all members of the Respondent Pool. Intervention appears more likely to achieve results than *forum prorogatum*, but, even if both fail, at the very least a case can definitely involve nine AOSIS Members against thirty-three respondents. Moreover, if intervention was to fail, the dispute settlement system under UNCLOS[162] presents other options for AOSIS. Those AOSIS members who would be forced to pursue intervention at the ICJ may even prefer to forgo this in favour of bringing a case directly under UNCLOS. It is the UNCLOS system that attention now turns to.

B. Dispute Settlement under UNCLOS

The UNCLOS is one of an extremely small number of treaties that prescribe mandatory jurisdiction for disputes arising from the interpretation and application of its terms, something notably lacking from the UNFCCC regime.[163] Its creation has been hailed as one of the most significant developments in dispute settlement in international law, even as important as the entry into force of the UN Charter,[164] and has been described as 'the most significant regime for the settlement of disputes, in general, found in modern multilateral agreements'.[165] A climate case can be based, solely or in part, upon the UNCLOS. Thus, the dispute settlement system under the UNCLOS provides another important avenue for AOSIS. Following the strategy proposed by this article, AOSIS members that have not submitted declarations recognising the jurisdiction of the ICJ should seek to bring a joint claim under the UNCLOS system. While the UNCLOS provides for multiple fora, the approach entails utilising ITLOS by those AOSIS members

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[161] *Land, Island and Maritime Frontier Dispute* (n 159).
[162] UNCLOS (n 6).
[163] Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge University Press 2009) 2; Boyle (n 8) 831.
[164] ibid.
[165] Jonathan Charney, 'Entry into Force of the 1982 Convention on the Law of the Sea' 35 Virginia Journal of International Law (1995) 381, 389.

able to do so, with those who fall outside its jurisdiction resorting to an Annex VII arbitral tribunal. Alternatively, an Annex VIII special arbitral tribunal, which is available for disputes relating to fisheries, environment, scientific research, and navigation, can be chosen if the relative parties so wish. This Section discusses the jurisdictional issues that call for this approach.

i. Jurisdiction

UNCLOS' Part XV dispute settlement procedures can only be resorted to where no settlement has been reached by other means.[166] States are free to choose any means indicated in Article 33(1) UN Charter, i.e. 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.[167] States are required to 'proceed expeditiously to an exchange of views' regarding the settlement of a dispute.[168] In *Southern Bluefin Tuna,* ITLOS stated that whether the exchange has been undertaken is a subjective determination for the states themselves, with the requirement being satisfied when a state concluded that the possibilities of settlement, without recourse to the UNCLOS procedures, had been exhausted.[169] ITLOS confirmed the subjective approach in *MOX Plant* and *Land Reclamation,*[170] although also indicated that the assessment of the State still had to be reviewed.[171] AOSIS members would simply have to be satisfied that the possibilities for settlement without recourse to the UNCLOS have been exhausted, for instance, as climate negotiations have been unsatisfactory and the ICJ is not available.

No additional form of consent to the Part XV procedures is required once a state is party to the UNCLOS and, once this is done, 'unilateral action is sufficient to vest the court or tribunal with jurisdiction, and that court or tribunal may render a decision whether or not the other party participates in the process'.[172] However, the UNCLOS contains some potential bars to jurisdiction. Under Article 281, if states have selected their own means of dispute settlement, UNCLOS procedures will only apply if no resolution is reached through that means and if the parties have not excluded any further procedure.[173] Further, according to Article 282 UNCLOS, arrangements under another agreement that produces a binding decision will apply in lieu of the UNCLOS procedures unless the parties agree otherwise.[174] Thus, it may be that states that have accepted the compulsory jurisdiction of the ICJ by virtue of Article 36(2) ICJ Statute would be precluded from pursuing compulsory procedures under the UNCLOS without agreement by the parties to the contrary. However, viewing Article 36 declarations as unilateral actions means that 'the mere acceptances do not, of course, constitute any agreement as between states forcing them to refer a given dispute to the ICJ. The declarations express a willingness to accept

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166 UNCLOS (n 6) art 296; Boyle (n 8) 837.
167 UNCLOS (n 6) arts 279, 280; UN Charter (n 92) art 33(1).
168 UNCLOS (n 6) art 282.
169 *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (Requests for Provisional Measures) ITLOS Reports [1999] (*Southern Bluefin Tuna),* para 60.
170 *The MOX Plant Case (Ireland v UK)* (Provisional Measures) ITLOS Reports [2001], para 68; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (Request for Provisional Measures) ITLOS Reports [2003] (*Land Reclamation*), para 48.
171 *Land Reclamation* (n 170) para 48.
172 Myron Nordquist, Shabtai Rosenne and Louis Sohn (eds) *United Nations Convention on the Law of the Sea 1982: A Commentary Volume 5* (1989) 39.
173 UNCLOS (n 6) art 281; Boyle (n 8) 837.
174 UNCLOS (n 6) art 282; Boyle (n 8) 837.

the jurisdiction if another State having made a declaration institutes proceedings'.[175] It is more likely that Article 282 UNCLOS is triggered when both states have submitted Article 36 ICJ Statute declarations.[176]

The previous analysis of Article 14 UNFCCC is also applicable here. Again, it is impossible to say with certainty what a court or tribunal would decide. At worst, it would rule that it lacks jurisdiction. At best, it would disregard the UNFCCC and hear the case on the basis that it has been brought under the UNCLOS Part XV and involves only the application of the UNCLOS.[177] In *Southern Bluefin Tuna,* an Annex VII Arbitral Tribunal ruled that the parties to the dispute had agreed through the Convention for the Conservation of Southern Bluefin Tuna[178] (CSBT Convention) to exclude any dispute from being initiated under UNCLOS Part XV.[179] This ruling has been heavily criticised.[180] It is not binding on future tribunals and it is hoped and anticipated that future tribunals, and ITLOS, would not follow it.[181] Moreover, the CSBT Convention process required the parties to continue their efforts to reach agreement on a mutually acceptable process, whereas the UNFCCC Article 14 process has a definite endpoint: a conciliation commission report of recommendations. However, the parties may not accept the recommendations and so the case may not be resolved. Therefore, there would appear to be no legal impediment to a party initiating a dispute under the UNCLOS Part XV, even if it was considered to be one to which the UNFCCC would take precedence.[182] Much depends on the strength of the case being made by AOSIS as 'Courts do not usually throw out good cases on jurisdictional grounds if they can avoid doing so'.[183]

Article 287 UNCLOS lists four courts and tribunals: ITLOS, ICJ, an arbitral tribunal, and a special arbitral tribunal.[184] States may specify one or more of these as its preferred forum.[185] If the parties have accepted the same forum, then this procedure will apply unless the parties agree otherwise.[186] If the choices are not the same, or if a party has not indicated a preference, the dispute will be dealt with by an Annex VII arbitral tribunal.[187]

Table 5 shows the AOSIS and Respondent Pool members that have ratified UNCLOS and chosen ITLOS as their preferred forum.[188] It is seen that five AOSIS members could thus bring a claim against sixteen Respondent Pool members before ITLOS.

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[175] Shabtai Rosenne, 'The Case-Law of ITLOS (1997-2001): An Overview' in Myron Nordquist and John Norton Moore (eds), *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea* (2001) 139.

[176] Klein (n 163) 44.

[177] Boyle (n 8) 838.

[178] Convention for the Conservation of Southern Bluefin Tuna (adopted 10 May 1993, entered into force 20 May 1994) UNTS 1819.

[179] *Southern Bluefin Tuna* (n 169) para 57.

[180] Doelle (n 8) 330; Boyle (n 8).

[181] ibid.

[182] Doelle (n 8) 331.

[183] Boyle (n 8) 838; see also Doelle (n 8) 330; B Kwiatkowska, 'The Australia and New Zealand v Japan Southern Bluefin Tuna (Jurisdiction and Admissibility) Award of the First Law of the Sea Convention Annex VII Arbitral Tribunal' 16 *International Journal of Marine and Coastal Law* (2001) 239, 240.

[184] UNCLOS (n 6) art 287(1).

[185] ibid.

[186] ibid.

[187] ibid arts 287(3) and arts 287(5); see Alabi (n 8) 219.

[188] See UN Division for Ocean Affairs and the Law of the Sea, 'Settlement of disputes mechanism' <https://www.un.org/depts/los/settlement_of_disputes/choice_procedure.htm> accessed 30 December 2020.

Table 5

ITLOS (UNCLOS)

AOSIS	***Respondent Pool***	
Cabo Verde	Australia	Hungary
Fiji	Austria	Italy
St. Vincent and the Grenadines	Bulgaria	Latvia
Timor-Leste	Canada	Lithuania
Trinidad and Tobago	Croatia	Mexico
	Estonia	Netherlands
	Germany	Portugal
	Greece	Spain

The remaining AOSIS members could bring a case against all members of the Respondent Pool, except Liechtenstein and Turkey, before an Annex VII arbitral tribunal. This is because all Respondent Pool members have ratified UNCLOS except Liechtenstein, Turkey, the US, and Iran.[189] However, the US and Iran are parties to the Fish Stocks Agreement and so are subject to UNCLOS dispute settlement procedures, although only in relation to arguments based upon the Fish Stocks Agreement, as it applies the UNCLOS dispute resolution mechanism to any dispute under the Fish Stocks Agreement, even where one or more of the disputants are not Parties to UNCLOS.[190] It is also notable that China and the EU can also be included as respondents before an Annex VII arbitral tribunal, as they too are parties to UNCLOS.[191] Significantly, this is the only forum where China, the EU, Iran, and the US could be involved in proceedings without the use of *forum prorogatum*. The AOSIS and Respondent Pool members that could be involved in proceedings before an Annex VII arbitral tribunal are shown in *Table 6.*

[189] UN Division for Ocean Affairs and the Law of the Sea, *'Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements'* <https://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm> accessed 30 December 2020.

[190] Fish Stocks Agreement (n 91) art 30(1).

[191] ibid.

Table 6

Annex VII arbitral tribunal (UNCLOS/Fish Stocks Agreement*)

AOSIS			***Respondent Pool***		
Antigua and Barbuda	Maldives	Tuvalu	Australia	Germany	New Zealand
Bahamas	Marshall Islands	Vanuatu	Austria	Greece	Norway
Barbados	Mauritius		Belarus	Hungary	Poland
Belize	Nauru		Belgium	Iceland	Portugal
Comoros	Niue		Brazil	India	Romania
Cook Islands	Palau		Bulgaria	Indonesia	Russia
Cuba	Papua New Guinea		Canada	Iran*	Slovakia
Dominica	Samoa		China	Ireland	Slovenia
Dominican Republic	Singapore		Croatia	Italy	Spain
Federated States of Micronesia	Seychelles		Cyprus	Japan	Sweden
Grenada	Sao Tome and Principe		Czech Republic	Latvia	Switzerland
Guinea-Bissau	Solomon Islands		Denmark	Liechtenstein	Ukraine
Guyana	St. Kitts and Nevis		Estonia	Luxembourg	UK
Haiti	St. Lucia		EU	Malta	US*
Jamaica	Suriname		Finland	Monaco	
Kiribati	Tonga		France	Netherlands	

As an alternative to ITLOS or an Annex VII arbitral tribunal, an Annex VIII special arbitral tribunal can be elected. From AOSIS, only Timor-Leste has indicated a preference for an Annex VIII special arbitral tribunal, with Belarus, Mexico, Portugal, Russia, and Ukraine from the Respondent Pool having done so.[192] The attractiveness of Annex VIII tribunals is that the arbitrators are preferably to be chosen from four lists of experts for each of the categories of dispute covered by Annex VIII: fisheries, environment, scientific research, and navigation.[193] The preference for experts means that the arbitrators need not be, and probably will not be, legally qualified.[194] Another potentially attractive feature of Annex VIII tribunals for a climate change case is that they may be used at any time, if the parties to the dispute so agree, 'to carry out an inquiry and establish the facts giving rise to

[192] List of States choices of procedure at UN Division for Ocean Affairs and the Law of the Sea, 'Settlement of disputes mechanism' (n 188).
[193] UNCLOS (n 6) art 2(1).
[194] Robin Churchill, 'The General Dispute Settlement System of the UN Convention on the Law of the Sea: Overview, Context, and Use' 48(3-4) Ocean and Development Law (2017) 216, 220.

the dispute'.[195] An Annex VIII tribunal may be better suited than ITLOS or an Annex VII tribunal to deal with disputes of particular scientific and technical difficulty. A dispute under UNCLOS and/or the Fish Stocks Agreement regarding the effect of climate change upon the marine environment and/or fish stocks would seem to be such a dispute. The lack of favour for Annex VIII as a forum of preference makes its utilisation unlikely. Nevertheless, the option remains open to Timor-Leste.

Finally, it is possible, and not uncommon, for disputes that are subject to compulsory arbitration to subsequently be submitted to ITLOS pursuant to an agreement concluded by the parties after the institution of arbitral proceedings.[196] Such a situation has occurred in five contentious cases.[197] Additionally, intervention in a case before ITLOS is possible. Articles 31 and 32 Statute of the International Tribunal for the Law of the Sea[198] (ITLOS Statute) provide for intervention in the same manner as Articles 62 and 63 ICJ Statute but with one difference: under both categories of intervention under the ITLOS Statute the intervenor is bound by the decision.[199] Both a decision on whether to transfer a case from an arbitral tribunal to ITLOS, and whether or not to attempt to intervene is ultimately one for the relevant parties.

ii. Section Conclusion

It has been contended that the barriers to jurisdiction within UNCLOS, Articles 281 and 282, will not be triggered by the envisaged litigation as the AOSIS members that would bring a case under the UNCLOS Part XV procedure have not submitted optional clauses in regards to the ICJ and it is contended that Article 14(2) UNFCCC is not applicable. Thus, after having satisfied themselves that other avenues have been exhausted and that an exchange of views on this matter has been undertaken, five AOSIS Members could bring a case against nine Respondent Pool states before ITLOS. The remaining thirty-four AOSIS Members that cannot directly bring a claim before either the ICJ or ITLOS, could bring a case against the entire Respondent Pool, except Liechtenstein and Turkey, to an Annex VII arbitral tribunal. The option of an Annex VIII tribunal is only open to Timor-Leste.

C. Conclusion

This Section has discussed the jurisdictional framework of both the ICJ and the dispute settlement procedure under UNCLOS Part XV. The value of a multi-party litigation strategy spearheaded by AOSIS has been illustrated, which ultimately affords the opportunity for all AOSIS member states to be involved in litigation against all members

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[195] UNCLOS (n 6) art 5(1).

[196] Patibandla C Rao and Philippe Gautier, *The International Tribunal for the Law of the Sea: Law, Practice and Procedure* (2018) 106.

[197] *M/V 'SAIGA' (No 2) (St Vincent and the Grenadines v Guinea)* ITLOS Reports 1999; *Conservation and Sustainable Exploitation of Swordfish Stocks (Chile/European Union)* ITLOS Reports 2009; *Delimitation of the marine boundary in the Bay of Bengal (Bangladesh/Myanmar)* ITLOS Reports 2012; *M/V 'Virginia G' (Panama/Guinea-Bissau)* ITLOS Reports 2014*; Dispute Concerning Delimitation of the Maritime Boundary between the Republic of Ghana and the Republic of Cote d'Ivoire in the Atlantic Ocean (Ghana/Cote d'Ivoire)* ITLOS Reports 2017.

[198] UNCLOS (n 6); Annex VI Statute of the International Tribunal for the Law of the Sea (UNCLOS Annex VI) arts 31-32.

[199] UNCLOS (n 6) arts 31(3) and 32(3).

of the Pool, except potentially Turkey,[200] before at least one forum. Possible solutions for overcoming the barriers themselves have been offered, namely through *forum prorogatum* and intervention.

V. Concluding Remarks

An innovative Blueprint for bringing the world's first international multi-party climate change case has been laid out. The jurisdictional barriers associated with climate change litigation have been shown to be far from insurmountable. AOSIS has been identified as an ideal group to bring such litigation. The group has been instrumental in climate change negotiations. While individual members have pondered climate change litigation in the past, none have followed through, being dissuaded not least by jurisdictional barriers. Together AOSIS can overcome these barriers, bringing parallel cases before the ICJ, ITLOS, and arbitral tribunals. Those AOSIS members capable of doing so can initiate proceedings, with others then allowed to join through the doctrine of intervention. Similarly, cases can be brought against groups from the Respondent Pool, with the inclusion of the rest being sought through *forum prorogatum.* Importantly, it is guaranteed that all Respondent Pool members, bar Turkey, would be involved in proceedings before at least one court or tribunal. This includes the infamously evasive high emitting China and the US as well as the intriguing option of the EU. It is impossible to determine for certain what conclusion a court or tribunal would come to at the merits state, and such pondering is beyond the scope of this thesis. Nevertheless, given the technological and scientific developments regarding climate change, as well as universal consensus (a minority of, albeit some powerful, deniers withstanding) it is surely a timely and worthwhile pursuit for AOSIS to utilise the Blueprint and make the world's first international multi-party climate change case a reality.

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[200] Turkey has not submitted an optional clause declaration accepting the jurisdiction of the ICJ and is a party to neither UNCLOS nor the Fish Stocks Agreement. Turkey would have to submit to a *forum prorogatum* request.

The Destruction of Statehood and the Color Revolutions under Russian International Law Doctrine

Tero Lundstedt[1]
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DESTRUCTION OF STATEHOOD; COLOR REVOLUTIONS; CRIMEA

Abstract

Has Russian international law doctrine changed in relation to the post-Soviet states since the annexation of Crimea? This paper analyses two interdependent concepts of the contemporary Russian international law doctrine - the 'color revolutions' and the 'destruction of statehood' - in the context of geopolitical competition over the post-Soviet space. In brief, the term color revolution is used by Russia to describe events that it categorizes as illegal regime-changes used to remove pro-Russian politicians from power under the guise of democracy. In the same context, Russia has developed another key concept, i.e. the 'destruction of statehood'. First referred to in 2008, it has since 2014 become a more encompassing and innovative legal doctrine to counter color revolutions in Russia's neighboring states. Under this doctrine, Russia reserves a right to 'un-recognize' a target state if it categorizes the situation as an illegal regime change that has destroyed the target's statehood. Controversially, this results in Russia no longer being bound by its treaty obligations with this state. Especially since 2014, Russia has developed political and legal tools in multilateral documents to counter future color revolutions. While it has been unable to convince the international community to accept its new interpretations, it has been more successful within its closest allies in the Collective Security Treaty Organization (CSTO) and, to a lesser extent, in the Commonwealth of Independent States (CIS). This may have significant political consequences in the future.

I. Background: 'Near Abroad' and the First Wave of 'Color Revolutions', 1992-2010

In essence, the 'destruction of statehood' doctrine is a way to justify Russian interference with the internal affairs of its post-Soviet neighbor states, which is otherwise in clear violation of the international law doctrine on non-interference. In order to explain this phenomenon, I first establish the rationale behind the Russian perception of its special rights in these states by accounting for the post-Cold War security environment in Europe, which partially explains Russia's negative attitude towards the enlargement of the North Atlantic Treaty Organization (NATO) and the European Union (EU). Following this, I analyze how ex-Soviet states have

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[1] Tero Lundstedt is a PhD candidate from the University of Helsinki, Erik Castrén Institute of International Law and Human Rights. He did his LL.M at the same University, with master's thesis about the legality of Kosovo's independence in 2008. His PhD work – which was defended on 1 August 2020 - focuses on the territorial disputes caused by the socialist federal dissolutions of the USSR and Yugoslavia in the early 1990s, especially by analysing the legal principle of *uti possidetis juris*. His other publication work encompasses Russian international law doctrine and foreign policy. Tero would like to thank KU University Leuven and its Centre of Global Governance Studies, and especially Prof. Dr. Jan Wouters and Dr. Axel Marx for giving him a possibility to present the first version of this article in the form of a presentation in the *Centre of the Global Governance Studies* in September 2018.

become 'near abroad' states, and, subsequently, why the 'color revolutions' are not seen as their internal affairs.

A. The Post-Cold War Security Environment in Europe

In 1990, the Cold War ended with the German reunification and the Warsaw Pact's slow dissolving. The Union of Soviet Socialist Republics (USSR) was worried that the Warsaw Pact countries might seek to join NATO and there were series of high-level discussions between the United States (US) Secretary of State James Baker and the President of the USSR Mikhail Gorbachev. While Gorbachev was unable to secure a pledge that NATO would not take in these countries, he did receive assurances that NATO would revise its strategy and position within a transformed Europe.[2]

The end of the Cold War called for a symbolic peace treaty, and on 21 November 1990, the Charter of Paris for a New Europe was signed by 32 European states, the US and Canada under the auspices of the Conference on Security and Co-operation in Europe (CSCE). In a key phrase, the Charter proclaimed that '[w]ith the ending of the division of Europe, we will strive for a new quality in our security relations while fully respecting each other's freedom of choice in that respect. Security is indivisible and the security of every participating state is inseparably linked to that of all the others'.[3]

In 1994, the CSCE's Budapest Document stated that the participants 'will not strengthen their security at the expense of the security of other States […]. Each will respect the rights of all others in this regard'. In 1996, the now renamed Organization for Security and Co-operation in Europe (OSCE) stated in a Lisbon Declaration that '[w]ithin the OSCE, no State, organization or grouping can […] regard any part of the region as its sphere of influence'.[4]

In 1997, NATO invited the former Warsaw Pact countries of Poland, the Czech Republic and Hungary to join NATO,[5] but attempted to decrease Russian threat perceptions by signing a Founding Act on their mutual relations. It stated that NATO aimed to create 'in Europe a common space of security and stability, without dividing lines or spheres of influence limiting the sovereignty of any state', and that '[p]rovisions of this Act do not provide NATO or Russia, in any way, with a right of veto over the actions of the other'.[6] Following that, in 1999, OSCE produced a Charter for European Security, which gave an expanded definition of security relations in Europe: 'We reaffirm the inherent right of each and every participating State to be free to choose or change its security arrangements, including treaties of alliance, as they evolve […]. Each participating State will respect the rights of all others in these regards. They will not strengthen their security at the expense of the security of other States'.[7]

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2 John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order After Major Wars* (Princeton University Press 2001) 230.

3 Commission on Security and Cooperation in Europe (CSCE) 'The Charter of Paris for a New Europe' (21 November 1991) 30 ILM 1990 (The Charter of Paris).

4 CSCE 'Budapest Document: Towards a Genuine Partnership in a New Era' (21 December 1994).

5 Madrid Declaration on Euro-Atlantic Security and Cooperation [1997] OJ 1 338/1.

6 Founding Act on Mutual Relations, Cooperation and Security between NATO and the Russian Federation [1997] OJ 1 138/166.

7 CSCE Charter for European Security (adopted on 18 November 1999, entered into force on 19 November 1999), art 8.

Therewith, the OSCE's definitions can be read as both giving all the participating states freedom to choose their security alliances, while denying them the right to do so at the expense of other states, as security is indivisible. These ambiguities proved to be detrimental to the security relations in Europe.

B. The 'Near Abroad'

The term 'near abroad' (*ближнее зарубежье*), used extensively in Russia since 1992 to refer to the former Soviet Socialist Republics (SSRs), summarises the main policy issue with Russia and most of its post-Soviet neighbors well. According to Bodie, 'Russia's political classes have difficulty viewing the republics on its periphery as fully sovereign entities; use of the term near abroad, in addition to qualifying their independence, signifies to the "far abroad" that Russia claims certain rights in the region that transcend traditional diplomatic conventions'. Trenin argues that '[f]or many in Russia, the new states are not yet quite states. Interestingly, Moscow's political relations with them are still managed by the Kremlin chief of staff, rather than the foreign minister'.[8]

The Commonwealth of Independent States (CIS) was established on 21 December 1991 by 11 SSRs to accomplish a 'civilized divorce' of the USSR. It produced numerous treaties, especially on economic relations and security.[9] Among them was the Collective Security Treaty in 1992. The signatory states promised not to join other military alliances, to increase their 'close and all-round allied relations in foreign policy', and to 'approve and co-ordinate their foreign policy positions on the international and regional security problems'.[10] All decisions under the Treaty had to be made by consensus, giving all the signatories a virtual veto.

Russia saw the CIS from the very beginning as a useful instrument to retain its influence over the post-Soviet space. In August 1992, the chairman of the Duma Foreign Affairs Committee suggested that Russia should include all the post-Soviet states in its 'sphere of influence'.[11] The CIS Charter of 22 January 1993 obligated the signatories to build their relations with concern for the interests of each other and to coordinate their policy in the field of international security.[12] In 1993, Foreign Minister Kozyrev asked the UN to recognise Russia's special responsibility for keeping the peace in the CIS area. The 1993 Foreign Policy Concept made relations with the CIS states a foreign policy priority and demanded that these relations have to be built on premises that they take Russian interests properly into account, especially by guaranteeing the rights of the Russian diaspora.[13]

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8 William Safire, 'On Language: The Near Abroad' *New York Times* (22 May 1994) 16; and Dmitri Trenin, *Post-Imperium: A Eurasian Story* (Carnegie Endowment for International Peace 2011) 80.

9 Alma-Ata Declaration (adopted on 12 September 1978, entered into force 12 September 1978) 31 ILM 148; The term 'civilized divorce' has been used in the official CIS documents, Yulia Nikitina, 'Security Cooperation in the Post-Soviet Area within the Collective Security Treaty' (2013) ISPI Analysis No. 152, 2.

10 Collective Security Treaty Organization (CSTO) Collective Security Treaty (adopted on 15 May 1992, entered into force 15 May 1992), Preamble, arts 1, 9 and 12; The original signatories were Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Russia, Tajikistan and Uzbekistan.

11 Konstantin Eggert, 'Rossii v roli "evraziiskogo zhandarma"' (Izvestiia, 7 August 1992).

12 Charter of the Commonwealth of Independent States (adopted 22 January 1993, entered into force 22 January 1994) 58 UNTS 1819, arts 3 and 12.

13 Foreign Policy Concept of the Russian Federation (23 April 1993).

In September 1995, a Russian presidential decree maintained that effective cooperation with the CIS is a factor that 'opposes the centrifugal tendencies in Russia itself'. Additionally, the main task of foreign policy was stated to be ensuring that the CIS states conduct friendly policy towards Russia, the leading force in the formation of interstate political and economic relations in the post-Soviet space. Finally, it communicated that while the integration in the CIS was not mandatory, it will be 'an important factor determining the scale of economic, political and military support from Russia'.[14] This decree remains in force.

Since Vladimir Putin's accession, Russian rhetoric has changed from referring to a sphere of influence to that of *interest*. In August 1999, Prime Minister Putin stated that Russia 'has always had and still has legitimate zones of interest abroad in both the former Soviet lands and elsewhere'. In 2003, he referred to the CIS area as 'the sphere of our strategic interest'.[15]

To conclude, by the late 1990s Russia thought it had an understanding with NATO against eastern enlargement. In addition, Russia hoped to retain some influence in the former Warsaw Pact states and a significant influence over the CIS space, which it continued to consider as its sphere of interest. The problem that was already visible at this stage was the incompatibility of the Russian notion of its sphere of interest and the sovereignty of the states within this self-proclaimed sphere.

C. NATO Enlargement, 1999-2004

In 1999, the relations between Russia and the West began to worsen. In March, NATO used force against Serbia, due to the Serb policies in Kosovo. Russia was unable to stop the intervention, because NATO acted without UN Security Council approval. In April, Hungary, Poland and the Czech Republic became NATO members. NATO tried again to mitigate Russia's threat perceptions by a 2002 declaration 'NATO-Russia Relations: A New Quality' in which they reaffirmed that indivisibility of security.[16] Additionally, Russia was granted more prominence by its admittance to the G7, the International Monetary Fund and the World Trade Organization. Nevertheless, Russia remained sceptical and the 1992 Collective Security Treaty was transformed into the Collective Security Treaty Organization (CSTO) in October 2002.[17]

The 2003 invasion of Iraq - again without UN Security Council's approval - derailed the relationship between Russia and the West further. It was interpreted in Moscow as marginalizing the Security Council, a permanent membership of which is central to Russia's self-image as a Great Power and which it had been so determined to retain after the dissolution of the USSR.

In 2004, the Eastern enlargements of NATO (by six states) and the EU (by ten states) took place, which for the first time welcomed former SSRs of the USSR (Estonia, Latvia and

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[14] 'Russia's Strategic Course in its Relations with the States-Participants of the Commonwealth of Independent States' (14 September 1995) Presidential Decree, arts 1, 4 and 7; Translation by the Author. In addition, art 12 prohibited participation in any alliances directed against Russia.

[15] Ijaz Ayman, 'Russia's Resurgence: Global-Regional Threat and Opportunities' [2016] 1((1-2)30) Journal of Current Affairs 30-33.

[16] North Atlantic Treaty Organization, 'NATO-Russia Relations: A New Quality' (28 May 2002).

[17] Charter of the Collective Security Treaty Organization (adopted on 7 October 2002, entered into force on 7 October, 2002). The Charter was signed by Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia and Tajikistan.

Lithuania) as members. The problem that could not be overcome was that while NATO was willing to give Russia a place at the table to co-decide issues together, it was unwilling to give it a veto on enlargement. This would have been a confirmation of Russia's sphere of influence and a re-division of Europe along the Cold War lines.

In sum, Russia saw the 1999-2004 enlargements of the Western organizations as being directed against it, and the unilateral use of force decreased trust in the Western assurances of the opposite.

D. The First Wave of Color Revolutions, 2003-2006

Russian officials have used the term 'color revolution' since 2003.[18] Just as with the NATO enlargement, the perception of color revolutions differs fundamentally between the West and Russia. For the former, they are legitimate democratic movements, an expression of the free will of peoples who should be free to choose their political and security alignments. Even a change of regime through extra-parliamentary means remains within the internal affairs of a state. International law does not prohibit revolutions; it only prohibits external states from organising or supporting such revolutions.

Russia focuses on the external actors. In this narrative, the color revolutions are driven by external influence, thereby violating the target state's sovereignty. It has been able to convince the Russian public that the West instigates color revolutions, which only brings economic and political chaos.

In 2003-2006, four color revolutions took place in the post-Soviet space, with three bringing down a pro-Russian government. In November 2003, a 'Rose Revolution' in Georgia brought pro-Western Mikheil Saakashvili into power. In 2004, Ukraine's 'Orange Revolution' caused the pro-Russian Viktor Yanukovych to lose his presidency to pro-Western Viktor Yuschenko. In early 2005, President Putin commented that these permanent revolutions will 'plunge all the post-Soviet space into a series of never-ending conflicts, which will have extremely serious consequences'. In February 2005, he continued: 'My greatest concern is not that dramatic events are taking place there, but that they are going outside the framework of the existing legislation and constitution'.[19]

In April 2005, a 'Tulip Revolution' took down Kyrgyzstan's President Askar Akayev, replaced by opposition's Kurmanbek Bakiyev. A revolution in Kyrgyzstan had been expected, and afterwards Russian scholars and politicians condemned it as a part of a systematic set of color revolutions.[20] This seemed to be confirmed by President George W. Bush's proclamation of the formation of a special 'Active Response Corps' to advance democracy and freedom throughout the world. Bush called the democratic change in the former SSRs as

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[18] According to Defense Minister Sergei Shoigu's speech on 29 May 2014 at the Moscow Conference on International Security, the scheme of color revolutions had been used in Serbia, Libya, Syria, Ukraine and Venezuela.

[19] Vladimir Putin, 'This Year Was Not an Easy One' (2005) 51(1) International Affairs 3.

[20] The title 'Tulip Revolution' was already coined by Akayev in 2004; Vladimir Radyuhin, 'Moscow and Multipolarity' (30 December 2004) *The Hindu* 6. The revolution was widely categorised as a part of the colour revolution pattern, by, for example, Gleb Pavlovsky, Andrannik Migrainian, Stefanie Ortmann in Stefanie Ortmann, 'Diffusion as Discourse of Danger: Russian Self-Representations and the Framing of the Tulip Revolution' (2008) 27 Central Asian Survey 363, 369-373); and by the former Foreign Minister Igor Ivanov in Yulia Nikitina, 'The "Color Revolutions" and "Arab Spring" in Russian Official Discourse' (2014) 14 (1) Partnership for Peace Consortium of Defense Academies and Security Studies Institutes 87, 95.

'only the beginning. We are seeing the rise of a new generation whose hearts burn for freedom - and they will have it'. The Secretary of the Russian Security Council Nikolai Patrushev responded in the Duma: 'Our opponents are steadily and persistently trying to weaken Russian influence in the CIS and the international arena as a whole. The latest events in Georgia, Ukraine and Kyrgyzstan unambiguously confirm this'.[21]

Belarus' President Lukashenka feared he was next in line, commenting in February 2005 that the West thinks Belarus is ready for a color revolution. However, while there were significant protests after the 2006 elections, Lukashenka - aided by Moscow - was able to hold on to power in Minsk.[22] A similar situation has developed since the August 2020 presidential elections that are widely believed to have been fraudulent.

E. Kosovo and Georgia, 2008

The Russia-West relations continued on an ever-worsening path. In the 2007 Munich Security Conference, Putin aired many of his grievances of the Western policies in the post-Soviet space.[23] 2008 began with the highly controversial Kosovo independence, followed in April by a summit where NATO pledged that Georgia and Ukraine would become members in the future.[24] Putin took the occasion to warn Bush in the auspices of the Russia-NATO Council that Ukraine's entry into NATO might prompt Russia to encourage predominantly Russian-inhabited regions to secede.[25]

Then came the August 2008 Georgian war. Afterwards, President Dmitry Medvedev reaffirmed the Russian sphere of interest in the region, and Foreign Minister Sergey Lavrov called the war a 'long-desired moment of truth' for Russia's relations with the West.[26] Most importantly, in October 2008 Lavrov compared the Rose and Orange revolutions to the 1917 October Revolution and stated that this could be seen as creating a completely new state with which Russia would not have any binding agreements.[27] This was the first official reference to the destruction of statehood formula.

Furthermore, the EU became a revisionist actor from the Russian perspective with the launch of the Eastern Partnership (EaP) Program in 2009, which promised Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine political and economic integration without guarantees for membership. Russia felt betrayed, as it was not consulted beforehand. Lavrov called the EaP an 'EU attempt to expand its "sphere of influence"', and 'to weaken

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[21] BBC News, 'US Pledges to Aid New Democracies' (*BBC News,* 19 May 2005) <http://news.bbc.co.uk/2/hi/americas/4561145.stm> accessed 7 December 2020; the second quote in Taras Kuzio, 'Soviet Conspiracy Theories and Political Culture in Ukraine: Understanding Viktor Yanukovych and the Party of Regions' (2011) 44(3) Communist and Post-Communist Studies 221, 223.

[22] 'Lukashenko says no to' (*United Civil Partym,* 24 February 2005) <https://web.archive.org/web/20050430223422/http://www.ucpb.org/eng/show1prel.shtml?no=1241>, accessed 7 December 2020; Thomas Ambrosio, 'The Political Success of Russia-Belarus Relations: Insulating Minsk from a Color Revolution' (2006) 14(3) Demokraizatsiya 407.

[23] Speech at the Munich Conference on Security Policy (10 February 2007).

[24] North Atlantic Treaty Organization Bucharest Summit Declaration [1985] OJ 2 342/19, para 23.

[25] Mark Kramer, 'Russian Policy Toward the Commonwealth of Independent States: Recent Trends and Future Prospects' (2008) 55(6) Problems of Post-Communism 3, 9.

[26] Valerie Pacer, *Russian Foreign Policy under Dmitry Medvedev, 2008-2012* (Routledge 2016) 20.

[27] 'A Conversation with Sergey Lavrov' (*The Council on Foreign Relations*, 24 September 2008) < https://www.cfr.org/event/conversation-sergey-lavrov> accessed 7 December 2020.

Russian influence in the post-Soviet space and offer a different development model to the former Soviet Republics'. [28]

F. 'Reset', 2009

2009 was a time for new beginnings in the Russia-West relations. In March, Russia did not strongly oppose Albania and Croatia joining NATO. The OSCE started the Corfu Process, with an aim of agreeing a high-level framework for a Euro-Atlantic and Eurasian security community. In November, Russia presented a Draft for 'European Security Treaty'. It stated that 'no nation or international organization operating in the Euro-Atlantic region is entitled to strengthen its own security at the cost of other nations or organizations', and that '[a] party to the Treaty shall not undertake, participate in or support any actions or activities affecting significantly security of any other Party'. The first part was already enshrined into the OSCE framework, whereas the second was interpreted to give Russia a veto right to any future NATO enlargement. The Draft was not seriously addressed.

As a counter-proposal, Germany launched the 'Meseberg Initiative', but the parties ran into the same problems - Germany tried to bring Russia into table and cooperate with European security issues, but Russia demanded the right to veto any decisions.[29] Similarly, Russia remained committed to and sought a bigger role for the OSCE where every state has a veto power.

Meanwhile, the post-Soviet space experienced yet another political upheaval, this time in Kyrgyzstan. As the Bakiyev government had failed to address the underlying reasons for the 2005 revolution that had brought it to power, it was brought down by another revolution in 2010. Despite Bakiyev's pleas for help, the CSTO did not intervene. Lukashenko was furious, asking '[w]hat sort of organization is this one, if there is bloodshed in one of our member states and an anti-constitutional coup d'état takes place, and this body keeps silent?'[30] Notwithstanding this, Russia did not mind the overthrow of the Bakiyev government and the CSTO remained passive.

In conclusion, the 2000s had made Russia suspicious of the Western designs for the states in its sphere of interest. The European security framework remained elusive, and Russia maintained its strict objection against any changes of the geopolitical position of the former SSRs. Furthermore, it believed that such changes could not take place on their own, but were always externally directed. Thus, seemingly internal matters of sovereign states become under this line of reasoning hostile events that require reaction from Russia.

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[28] Valentina Pop, 'EU Expanding its "Sphere of Influence", Russia Says' (*Eurobserver,* 21 March 2009) <https://euobserver.com/foreign/27827> accessed 7 December 2020; Mungo Melvin, *Sevastopol's Wars: Crimea from Potemkin to Putin* (Osprey Publishing 2017) 611.

[29] Philip Remler, 'Negotiations Gone Bad: Russia, Germany, and Crossed Communications' (*Carnegie Europe*, 21 August 2013) https://carnegieeurope.eu/2013/08/21/negotiation-gone-bad-russia-germany-and-crossed-communications-pub-52712 accessed 7 December 2020.

[30] David Trilling, 'Kyrgyzstan Events Helping to Define CSTO Security Alliance' (*Eurasianet,* 26 April 2010) <https://eurasianet.org/kyrgyzstan-events-helping-to-define-csto-security-alliance> accessed 7 December 2020.

II. The Arab Spring, the 'Snow Revolution' and the EaP, 2011-2013

A series of anti-government demonstrations later known as the 'Arab spring' began in Tunisia in December 2010 and spread quickly in Northern Africa and the Middle East, with varying results. In Libya and Syria, the revolutions developed into civil wars. In March 2011, the UN Security Council established a no-fly zone over most of Libya and authorised the use of 'all necessary means' short of occupation to protect civilians. Russia and China abstained from voting. However, 13 NATO states exceeded the resolution's mandate and sided militarily with the rebels, with some leaders openly stating that President Muammar Gaddafi needed to be replaced.[31] By October, Gaddafi was brought down, with two long-term consequences: Russia had since then blocked attempts for the UN to intervene in Syria, and categorised the Arab spring as a part of the color revolution pattern.[32]

In December 2011, the greatest demonstration in Russia since the early 1990s, known as the 'Snow Revolution', seemingly confirmed the Kremlin's fears of a color revolution targeting Moscow.[33] On 15 December 2011, Putin claimed on live television that some of the protesters were paid to participate and that the color revolutions were 'tried and tested schemes for destabilizing society', and in 2012 he wrote '[w]e continue to see new areas of instability and deliberately managed chaos'.[34]

While the Kremlin was able to ride out the protests, the timing was awkward as Russia was trying to launch integration projects in the post-Soviet space. In October 2011, eight CIS states signed a free trade agreement, and the following month Russia, Belarus and Kazakhstan announced a plan to establish the Eurasian Economic Union (EEU) by 2015.[35] The perceived instability was jeopardizing these projects and thus Russia began introducing means to counter the threat caused by the color revolutions. It was discussed in depth in the CSTO conferences in 2011, 2013 and 2014, with calls for a collective response to this threat. In September 2011, the CSTO General Secretary Borduzha presented a plan, according to which an intervention could be authorised by the Council of Heads of State with majority voting.[36] In 2013, Chief of the General Staff Gerasimov referred to the color revolutions as a form of warfare and that 'a perfectly thriving state can, in a matter of months and even days, be

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[31] Andrew Quinn, 'Clinton says Gaddafi must go' (*Reuters*, 28 February 2011) https://www.reuters.com/article/us-libya-usa-clinton-idUSTRE71Q1JA20110228 > accessed 7 December 2020.

[32] In March 2011, Lavrov called the Arab spring 'an expected surprise' that is mainly caused by internal problems, unlike the color revolutions, in Vladimir Solovyov, 'Aktual'nyj razgovor' (*3 Kanal Television Company*, 13 March 2011).

[33] Julie Ioffe, 'Snow Revolution' (*The New Yorker,* 10 December 2011) <https://www.newyorker.com/news/news-desk/snow-revolution> accessed 7 December 2020; Scholars also reflected Kremlin's fears, e.g. Ponamareva ('Russia is the final destination of "color revolutions" since the strategic goal of the West is to immerse Russia in a democratic chaos and to bring it to its final fragmentation'); Varvary Ponamareva, 'Sekreti "cetnih revolyuciy"' (2012) 5(6) Svobodnaya Mysl 38, 39.

[34] Vladimir Putin, 'Being Strong: National Security Guarantees for Russia' (*Rossiiskaya Gazeta,* 20 February 2012) <http://archive.premier.gov.ru/eng/events/news/18185/> accessed 7 December 2020.

[35] Madalina S Vicari, 'The Eurasian Economic Union- Approaching the Economic Integration in the Post-Soviet Space by EU-Emulated Elements' Papers in Political Economy < https://journals.openedition.org/interventionseconomiques/2823> accessed 7 December 2020.

[36] Vladimir Socor, 'Russia Proposes to Codify Intervention Right Via CSTO' (2011) 8(168) Eurasia Daily Monitor.

transformed into an arena of fierce armed conflict, become a victim of foreign intervention'.[37] This meant it was necessary to seek ways to respond militarily.

Russia internal legislation was changed to deal harsher punishments for unauthorised demonstrations. Moreover, the so-called Foreign Agents Law demanded a special registration for any non-profit organization that engages in political activities and receives even a part of its funding from abroad.[38]

According to its EaP policy, the EU had started negotiating Deep and Comprehensive Free Trade Area (DCFTA) agreements with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine. Comparably, the 2013 Foreign Policy Concept of Russia listed Ukraine as the 'priority partner within the CIS' and pledged to 'contribute to its participation in extended integration processes'.[39] The problem was that DCFTA renders the participating state incompatible with any form of association with the EEU. Therefore, when the EU offered a DCFTA to Ukraine in late 2013, Russia felt that its legitimate sphere of interest in the CIS was not recognised and objected strongly.

However, the EU saw this as a bilateral issue between it and Ukraine. In November 2013, European Commission President Barroso commented that the EU will not accept a veto by Russia in relation to its ties with the former SSRs, the era of 'limited sovereignty was over in Europe' and that Russian interference was 'contrary to all principles of international law'. In December, the European Commissioner for Enlargement and European Neighborhood Policy Štefan Füle commented that the EU was willing to make sure the EU-Ukraine agreement will not harm Russia's economic interest, but 'it will not hold tripartite negotiations on the matter'.

Thus, by the time of the EaP summit in Vilnius in December 2013, Russia and the EU were in a state of ever-increasing confrontation over the political affiliation of the EaP states. In Ukraine, the confrontation became especially severe due to the incompatible and seemingly mutually exclusive views on the political affiliation of Ukraine.

III. The Destruction of Ukrainian Statehood, 2014

After the government had suspended the preparations to sign an Association Agreement with the EU, protests started in Ukraine in late 2013. On 6 February 2014, the European Parliament produced a resolution calling for 'the EU and Russia to find ways of making the respective regional integration processes more compatible' and 'opposes Russia's intention to continue to consider the Eastern Partnership region as its sphere of influence'.[40]

The Ukrainian protests gathered momentum, with the Russian attempts to offer profitable trade deals and a 'peace deal' agreed by President Viktor Yanukovych and the

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[37] Originally in Valery Gerasimov, 'The Value of Science in Foresight' (*Military-Industrial Kurier*, 27 February 2013), Quoted in Mark Galeotti, 'The "Gerasimov Doctrine" and Russian Non-Linear War' (*In Moscow's Shadows*, 6 July 2014) <https://inmoscowsshadows.wordpress.com/2014/07/06/the-gerasimov-doctrine-and-russian-non-linear-war/> accessed 7 December 2020.

[38] International Center for Not-For-Profit Law (ICNL) Law on Foreign Agents (adopted 20 July 2012), art 1.2b 121 FZ regarding 'Amendments to Legislative Acts of the Russian Federation regarding the Regulation of the Activities of Non-profit Organisations Performing the Functions of a Foreign Agent'.

[39] Concept of the Foreign Policy of the Russian Federation (adopted on 18 February 2013, entered into force on 18 February 2013) para 48.

[40] European Parliament resolution of 6 February 2014 on the EU-Russia summit [2014] (2014/2533(RSP).

opposition leaders failing to quell them. After Yanukovych decided to flee to Russia, on 22 February 2014, the Ukrainian Parliament voted 328-0 to remove him from the post of the president, and appointed a caretaker President and government until elections could be held.[41] On 27 February 2014, soldiers later identified as Russian took over public buildings in the Ukrainian Autonomous Republic of Crimea. A new, self-appointed pro-Russian Prime Minister took over the Crimean parliament under murky circumstances. On 16 March 2014, this new government organised a highly criticised referendum on the future status of Crimea without the possibility to vote for the status quo.[42] The results were allegedly overwhelmingly for joining Russia, which proceeded to incorporate Crimea and Sevastopol to the Russian Federation as two new federal subjects. Russia used its veto in the UN Security Council, but the General Assembly condemned the annexation as contrary to international law in a vote by 100-11 (58 abstentions).[43]

The destruction of statehood formula that Lavrov had already mentioned in October 2008 was revived. On 4 March 2014, Putin described Ukraine's overthrow of Yanukovych as 'an anti-constitutional takeover […]. Only constitutional means should be used on the post-Soviet space, where political structures are still very fragile, and economies are still weak'. He denied the legitimacy of the new Ukrainian Parliament and President, debating whether the situation was an armed seizure of power or a revolution. In his opinion, if Ukraine had experienced a revolution 'it is hard not to agree with some of our experts who say that a new state is now emerging in this territory. This is just like what happened when the Russian Empire collapsed after the 1917 revolution and a new state emerged. And this would be a new state with which we have signed no binding agreements'.[44] However, the discontinuity of the USSR in respect to the Russian Empire was never recognised in the state practice.[45]

When Ukraine called for consultations regarding the security guarantees it was provided in the 1994 Budapest Memorandum, Russian Foreign Ministry claimed that Russia had not signed the Budapest Memorandum with the then acting *government* of Ukraine, and was therefore no longer bound by it. As summarised by Pifer, '[u]nder that logic, each and every time a government changes in any state in the world, Russia would have to reconfirm

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[41] Interfaxukraine, 'Rada removes Yanukovych from office, schedules new elections May 25' (*InterfaxUkraine News*, 22 February 2014) <https://en.interfax.com.ua/news/general/192030.html> accessed 7 December 2020.

[42] Putin admitted the identity of the soldiers in 'Crimea: The Road to Motherland' (*Крым. Путь на Родину*, 15 March 2015) <https://smotrim.ru/brand/59195> accessed 7 December 2020. The referendum has been condemned by, for example, Council for Europe's European Commission for Democracy through Law: (*Opinion on Whether the Decision Taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to Organise a Referendum on Becoming a Constituent Territory of the Russian Federation or Restoring Crimea´s 1992 Constitution is Compatible with Constitutional Principles* (21 March 2014)); Anne 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); Keir Giles, 'Crimea's Referendum Choices Are No Choice at All' (*Chatham House*, 20 March 2014).

[43] *The Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea in the Russian Federation and on Forming New Constituent Entities within the Russian Federation* (18 March 2014); and UNGA Res 68/262 (1 April 2014) UN Doc A/RES/68/262.

[44] President of Russia, 'Vladimir Putin answered journalists' questions on the situation in Ukraine' (*Kremlin.ru,* 4 March 2014) <http://en.kremlin.ru/events/president/news/20366#sel=19:6:W,19:6:W> accessed 7 December 2020.

[45] Peter Hilpold, 'Ukraine, Crimea and New International Law: Balancing International Law with Arguments Drawn for History' (2015) 14(2) Chinese Journal of International Law 237, 257.

all of its agreements with the new government. International agreements are between states, not between governments'.[46]

The academic community in Russia was also harnessed to promote the destruction of statehood formula. One example of this is a collective 'Statement Concerning the Situation in Ukraine and Legitimacy of Conducting the All-Crimean Referendum on the Status of Crimea on March 16, 2014', put forward by the Association of Lawyers of the Russian Federation (ALRF) on 18 March 2014. In their statement, the ALRF produced the following: 'We propose to proceed from a general principle of law, Ex injuria non oritur jus meaning "law does not arise from injustice" […]. Removal from office of Ukrainian President proclaimed by the new, self-appointed leaders of Ukraine does not fit in any legal framework'.[47] In his analysis, Merezhko concludes that revolutions are a matter of national, not international, law and do not lead to disappearance to an existing state. Any questions over legitimacy of the new government are under the exclusive jurisdiction of the Ukrainian legal system, not the Russian government or the ALRF. Finally, despite claiming that a new state had emerged, Russia never severed diplomatic relations with Ukraine.

On 18 March 2014, after having signed the law to incorporate Crimea into the Russian Federation, Putin articulated the Russian legal position further in a speech to State Duma deputies and Federation Council members. Referring to the West, Putin said that '[t]hey must have really lacked political instinct and common sense not to foresee all the consequences of their actions. Russia found itself in a position it could not retreat from'. On the Ukrainian government, Putin commented that 'there is no legitimate executive authority in Ukraine now, nobody to talk to' and that 'we understand that these actions were aimed against Ukraine and Russia and against Eurasian integration'.[48]

In June, Putin stated that '[t]he very concept of national sovereignty is becoming eroded. Undesirable regimes […] are being destabilized. For that purpose the so-called color revolutions are set in motion […] they are simply coups, provoked and financed from outside'. In August 2014, Lavrov described the color revolutions as being 'fostered by external forces. Most colour revolutions would not have happened without this external influence'.[49]

In the 2014 Moscow Conference on International Security, Putin described how socio-economic and political problems were used to replace nationally oriented governments by regimes that are controlled from abroad, and Lavrov lamented how '[a]ttempts to impose

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[46] Steven Pifer, 'Mr. Lavrov, Russia, and the Budapest Memorandum' (*Brooking Institute*, 28 January 2016); 'Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons' (*United Nations Treaties*, 5 December 1994) < https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52241/Part/I-52241-0800000280401fbb.pdf> accessed 7 December 2020.

[47] Statement of the Association of Lawyers of Russian Federation Concerning the Situation in Ukraine and Legitimacy of Conducting the All-Crimean Referendum on the Status of Crimea on 16.3.2014 (18 March 2014). Quoted in Oleksandr Merezhko, 'Crimea's Annexation by Russia - Contradictions of the New Russian Doctrine of International Law' (2015) 75(1) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 167, 186.

[48] Address by President of the Russian Federation (18 March 2014), found in 'Putin signs treaty to annex Crimea as Ukraine authorizes use of force' (*The Gaurdian,* 18 March 2014) < https://www.theguardian.com/world/2014/mar/18/ukraine-crisis-putin-plan-crimea-annex-speech-russia-live> accessed 7 December 2020.

[49] Putin quote from meeting of the Russian Security Council, 22 June 2014; Lavrov quote in *Address at the Youth Education Forum* (*Seliger,* 27 August 2014).

homemade recipes for internal changes on other nations, without taking into account their own traditions and national characteristics', have a destructive impact.[50]

In conclusion, Russia saw the Ukraine revolution confirming its long held views that color revolutions only target states whose national institutions remain fragile. Thus, Russia became determined to protect itself and its sphere of interest from this phenomenon.

IV. Closing Ranks of the CIS and the CSTO, 2014-2017

In 2014-2017, the CIS and the CSTO updated their policy documents to counter the color revolutions. Russia also updated its Military Doctrine (December 2014), Concept for Military Cooperation between the CIS Member Countries Through to 2020 (October 2015), National Security Strategy (December 2015), the CSTO Collective Security Strategy for the Period up to 2025 (October 2016), Foreign Policy Concept (December, 2016), and Doctrine of Information Security (December 2016).

In August 2014, Putin explained Russian actions by the logic that while Russia respects Ukraine's sovereign rights to choose its military and economic affiliations, this should not be detrimental to other participants. 'Ukraine is deeply integrated into the CIS economic space […]. In 2011, a free trade zone agreement was signed within CIS framework, Ukraine took very active stance here'.[51] However, this narrative is incompatible with the destruction of statehood theory - if Ukraine had ceased to exist, it would not have any obligations towards Russia. Nevertheless, under Presidents Poroshenko and Zelensky, Ukraine has boycotted the CIS meetings and announced in April 2018 a complete withdrawal from the organization. Its gradual withdrawal from the CIS agreements continues, with the latest taking place in January 2020.

In September 2014, Lavrov held a speech at the UN General Assembly, calling for harmonization of integration projects so that 'not only NATO and CSTO members but all the countries of the region including Ukraine, Moldova and Georgia can enjoy equal and indivisible security'. After re-advocating the European Security Treaty, he proposed that the General Assembly adopt a declaration on non-interference into domestic affairs of sovereign states and on 'non-recognition of coup d'état as a method of the change of power'.[52] This would have amounted to *de facto* legalizing the destruction of statehood formula - outside states could decide on the state's behalf whether its change of power had been legal. The proposal has not been seriously debated since.

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[50] Putin quote in a speech on 23 May 2014 (translation by the author); Lavrov quote in <*https://sputniknews.com/world/20140523190067813-Color-Revolutions-Cause-Apparent-Damage-to-International/*> accessed 7 December 2020.

[51] 'Speech at the meeting of the Customs Union Heads of State with President of Ukraine and EU representatives' (*Kremlin,* 26 August 2014)< http://en.kremlin.ru/events/president/transcripts/46494 >accessed 7 December 2020.

[52] MFA Russia, 'Address by Russian Foreign Minister Sergey Lavrov to the 69th session of the UN General Assembly, New York, 27 September 2014' (*MFA Russia,* 27 September 2014) <http://www.mid.ru/en/posledniye_dobavlnenniye/-/asset_publisher/MCZ7HQuMdqBY/content/id/668972>, accessed 7 December 2020.

The 2014 Military Doctrine named as a threat 'regimes, which policies threaten the interests of the Russian Federation in the states contiguous with the Russian Federation, including by overthrowing legitimate state administration bodies'.[53]

In February 2015, the Russian Security Council's Patrushev concluded that the 'U.S. administration expects [its recent] anti-Russian measures to decrease quality of life for the population, give rise to mass protests and push Russian citizens to overthrow the current government using the scenario of the "color revolutions"'. Additionally, the Russian Defense Ministry ordered a major research into color revolutions, with the stated goal of preventing the situations Russia had faced in 1991 and 1993.[54]

While the EEU was finally launched on 1 January 2015, only Armenia, Belarus, Kazakhstan joined in the outset, followed by Kyrgyzstan in August. As Russia had hoped for more participation, its 2015 National Security Strategy blamed the West for aiming to counter Russian-led integration processes, warned that the 'practice of overthrowing legitimate political regimes and provoking intrastate instability and conflicts is becoming increasingly widespread', and listed as one of the main threats external attempts to incite color revolutions.[55]

In October 2015, the CIS updated its Concept for Military Cooperation. The member states pledged to consider 'each other's interests in the implementation of military cooperation'.[56] To understand Russian expansive interpretation over 'each other's interests', one should note Putin's statement on 26 August 2014 of Ukraine's CIS obligations and Article 54 of the 2016 Foreign Policy Concept.

In January 2016, Russia announced its intention to restructure the CSTO, which was accomplished in October of the same year with the 'CSTO Collective Security Strategy for the Period up to 2025' that revised the 2002 CSTO Charter. It listed the color revolutions and attempts to change the constitutional order in the member states as threats, and pledged to 'prevent the support of unconstitutional and unlawful actions in any country leading to the destruction of statehood'.[57] This was the first official codification of the destruction of statehood concept. While the strategy reaffirmed the possibility to take decisions in a limited format, it did not accept Russian proposals to change the voting procedure from consensus to majority voting.

After these changes, Russia has a wide array of means to intervene in the near abroad. It could act under a government's invitation, a defense agreement, or the new CSTO strategy if it were to categorise the situation as an attempt to 'destroy the statehood'. Furthermore,

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[53] Military Doctrine of the Russian Federation (adopted on 25 December 2014, entered into force on 25 December 2014) art 12(m).

[54] 'US is trying to dismember Russia, says Putin adviser' (*Wall Street Journal)* <https://www.wsj.com/articles/u-s-is-trying-to-dismember-russia-says-putin-adviser-1423667319>; 'Putin vows to prevent 'color revolutions' for Russia and its Eurasian allies' *(Russia Today,* 12 April 2017) <https://www.sott.net/article/347907-Putin-vows-to-prevent-color-revolutions-for-Russia-and-its-Eurasian-allies>, accessed on 7 December 2020.

[55] Russian National Security Strategy (adopted on 31 December 2015, entered into force on 12 January, 2016) arts 17, 18 and 43.

[56] Concept for Military Cooperation between the CIS Member Countries Through to 2020 (16 October 2015) II. Basic Principles, Goals and Objectives of Military Cooperation.

[57] CSTO Collective Security Strategy for the Period up to 2025 (adopted on14 October 2016, entered into force on 14 October 2016) arts 3, 3.1 and 6.1. Translation by the author.

Russia gained leverage over the CIS with increased possibilities to interpret their actions to be against its interests.

In 2016, a revised Foreign Policy Concept was published. It announced that '[w]hile respecting the right of its partners within CIS to establish relations with other international actors, Russia expects CIS member states to fully implement their obligations within the integration structures that include Russia, as well as further promote integration and mutually beneficial cooperation in CIS space'.[58]

To summarize, with these measures Russia has created several different legal or treaty-based frameworks with which it can justify interference into what are otherwise internal affairs of sovereign states within its self-proclaimed sphere of interest.

V. Later Developments

In June 2017, a group of Russian legal scholars published a collective opinion on the Crimean Referendum. According to it, the Ukrainian Constitution had lost its effect, and the Crimean referendum was legitimate because of the 'unconstitutional coup d'état carried out with foreign participation'. Furthermore, the 'new government committed a felony and its actions had no legal power for the Russian Federation' and the Venice Commission's condemning Opinion on the Crimean Referendum 'seems to be unconvincing because the constitutional norms on the functioning of the Ukrainian government that functioned before the coup d'état were ruined'.[59] This is another demonstration how Russia sees itself having a right to judge on what are constitutional or unconstitutional acts in a foreign state.

In April 2018, another pro-Russian leader was overthrown in Armenia. As the West did not play any demonstrable role, Russia avoided a tough response. Although the new Prime Minister Nikol Pashinyan pledged continuity in the Armenian-Russian relationship, Armenia could still pose a problem as an example of a non-violent regime change. In July 2018, Lavrov commented that 'the events happening there inevitably worry us, including from the point of view of normal operations of the CIS of which Armenia is a member state'. In other words, Russia tries to make itself a direct subject of what is clearly an internal matter through Armenia's CIS commitments.

Finally, on 30 May 2018 a Russian Federation Council's Commission on Protecting State Sovereignty and Preventing Foreign Interference concluded that the West actively participated in destabilizing Arab states prior to the Arab Spring and had tried the same in Russia in 2011-2012.[60]'

VI. Conclusions

Russia remains committed to countering color revolutions and allocates significant resources for this task. It has listed the color revolutions as main threats in the 2011 Draft Convention on International Information Security and in the 2015 National Security Strategy, and has

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[58] Foreign Policy Concept of the Russian Federation (adopted on 30 November 2016, entered into force on 30 November 2016) arts 52, 54 and 55. These statements, while already present in the 2013 Concept, should be read in a different light after 2014.

[59] 'Concerning Legitimacy of the Crimean Referendum, 2014' (*Government of Crimea*, 21 June 2017) < https://rk.gov.ru/file/dok_en.pdf> accessed 7 December 2020.

[60] Special Report on the Results of the Presidential Elections in the Russian Federation (2018) from the Point of View to Russian Electoral Sovereignty (30 May 2018) 8; Translation by the author.

changed the CSTO Treaty so it can more easily intervene in the case of a revolution. Finally, the Russian military has listed color revolutions as a form of warfare and has been working on ways to counter them.[61]

While the CIS commitments are vaguer, Russia has since 1995 made a main task of its foreign policy to ensure that the member states abide by friendly policies towards Russia, and has since 2013 changed its Foreign Policy Concept so that it may categorise any revolutionary development to be its concern through the target state's CIS commitments.

Russia is signaling that it is taking this threat very seriously. Eventually, it does not matter whether the Kremlin believes its own rhetoric of the color revolutions being a political tool of the West or if it is just using this as an excuse to intervene in its self-proclaimed sphere of interest. The result remains the same: Russia is currently unable to accept any kind of unconstitutional change of power in the post-Soviet space, as proven yet again with its rhetoric towards the upheaval in Minsk after the August 2020 elections.

In conclusion, the concepts of the destruction of statehood and the color revolutions are indistinguishable from the concept of 'near abroad'. As Russian concerns are in reality about the target state's Western alignment, its reaction can be predicted by evaluating the chances of the target state to change its political affiliation. For example, despite labelling them as color revolutions, Moscow did not intervene in Kyrgyzstan in 2005 and 2010, since there was no risk for Kyrgyzstan defecting to the Western camp. Indeed, in 2020, Kyrgyzstan is a member state of the CIS, the CSTO and the EEU. Under the Russian narrative, the main competition is over influence in Georgia, Moldova and Ukraine, followed by Armenia, Azerbaijan and Belarus. Russia has a stronger 'claim' to these states due to their CIS and CSTO commitments, and historical and cultural ties.

The new developments in the Russian international law doctrine since 2014 are worrying. Russia has developed legal tools to counter color revolutions before they bring about a reversal of the target state's geopolitical direction. If the revolution nevertheless succeeds, this is categorised as the 'destruction of statehood' that extinguishes the target state. However, international law does not accept the concept of 'un-recognizing' a state because of its change of a regime and the 'precedent' for this - the USSR in 1917 - is not recognised in state practice. The notion that a foreign state could establish the legitimacy of another state's government is a clear interference into its internal affairs. It is this interpretation of state sovereignty where the main political difference between Russia and the West lies. The West maintains that any possible coups or revolutions are within the internal affairs of that state alone, whereas Russia asserts that the coups or revolutions would not have taken place without the West's illegal interference into the target state's internal affairs. This fundamental disagreement drives the relationship between Russia and the West into confrontation, without any consequential dialogue on the issue taking place.

Therewith, what was first envisioned as the indivisible European security order has transformed into two competing schools of thought on state sovereignty. While Russia has been unable to convince the West or the wider international community to accept its new interpretations on sovereignty, it has been able to consolidate a mutual understanding of them in the CSTO and the CIS. Thus, while some post-Soviet state leaders have gained assurances that they cannot be removed from power via unconstitutional means, they might be slowly

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[61] 'Russia's Defense Ministry Takes "Color Revolutions" in Their Sights' (*Covert Geopolitics*, 24 June 2015) <https://sputniknews.com/russia/201506241023776766/> accessed 7 December 2020.

relinquishing their sovereignty in exchange. For example, it certainly cannot be excluded that if the current regime in Belarus would have to flee the country, Russia would not choose to categorise this as a color revolution and intervene militarily, even without a formal request. This endangers the independence of the post-Soviet states and is a worrying sign of the Russian policy towards the near abroad since 2014.

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The Victims' Court?
An Analysis of the Participation of Victims of Sexual Violence in International Criminal Proceedings

Veena Suresh*
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INTERNATIONAL CRIMINAL LAW; THE INTERNATIONAL CRIMINAL COURT; SEXUAL VIOLENCE

Abstract

The inclusion of a victim participation scheme within the framework of the ICC is revolutionary under the domain of International Criminal Law. The scheme grants unprecedented rights for victims to participate in proceedings outside of witness capacity, as provided for at the *ad hoc* tribunals. This article aims to critically evaluate the ICC's victim participation scheme for victims of sexual violence. It will do so by investigating the participation scheme to establish whether it embodies inherent limits, and, if so, to assess the impact of these limitations on victims of sexual violence.

While the inclusion of a participation scheme for victims is commendable, this paper finds that there is still a long way to go before victims of sexual violence have access to a form of participation that is meaningful, in that it encompasses the participation envisaged in the provisions of the Rome Statute and considers victims' needs and expectations. This article argues that several institutional and procedural changes are required before victims of sexual violence are adequately served by the participation scheme. Lessons learnt from practice include the need for a harmonised participation procedure, providing victims of sexual violence with an influence on the charges brought against an accused, assigning collective legal representation based on crimes suffered, and encouraging resource allocation into investigating sexual crimes and non-judicial programmes that will benefit victims of sexual violence that are unable to access participatory and reparatory rights.

I. Introduction

Sexual violence has historically played a major role in wartime – so much so, that customary international law specifically prohibits rape and other forms of sexual violence in situations of armed conflict.[1] Within the international sphere, the prosecution of sexual violence – perpetrated in peacetime and/or wartime – relies on international humanitarian law, international criminal law, and its categorisation as a war crime, genocidal act, or crime against humanity.[2] This is a fairly recent development as sexual violence, and other international crimes, remained undefined until decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).

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* Double LLM Graduate in International Human Rights Law and Global Criminal Law, University of Groningen (veenasuri@gmail.com). The author would like to thank Prof. Dr. Caroline Fournet for her comments and feedback.

1 Kirsten Campbell, 'The Gender of Transitional Justice: Sexual Violence and the International Criminal Tribunal for the Former Yugoslavia' (2007) 1 The International Journal of Transitional Justice 411, 413.

2 ibid 414–415.

Sexual violence has been recognised as an instrument of genocide, as a crime against humanity, and as torture,[3] a recognition which indicates its grave nature.[4] Despite the prevalence of sexual violence, it was not until recently that victims of these crimes, and other international crimes more broadly, were taken seriously in criminal proceedings. In many instances, the only provisions in place to allow their voices to be heard was through a grant of witness status, where they would be called to Court to testify against their alleged attackers. This led to discussions in which victims were characterised as the forgotten party in the criminal justice system.[5] It has been well acknowledged that this process often results in secondary victimisation, and the treatment of victims of sexual violence in particular has been criticised by many.[6]

In response, the Rome Statute adopted an approach envisaging a dual scheme for victims at the International Criminal Court (ICC), enshrining both participatory rights and access to reparations. It is the former - specifically, the ICC's victim participation scheme for victims of sexual violence - that will form the focus of this article. Thus, this article aims to investigate the ICC's victim participation scheme to establish whether it embodies inherent limits, and, if so, to assess if and how these limitations have impacted victims of sexual violence.

In light of this overarching theme, Part I will seek to outline the ICC's victim participation scheme through an analysis of the provisions governing the Rome Statute's participation scheme, to illustrate how the scheme fits within the move towards recognising restorative justice. Part II will elucidate the role of victims of sexual violence, both in the absence of a formal victim participation scheme at the ad hoc tribunals, and as provided for in the framework of the ICC, focusing on requests to amend an indictment to include sexual crimes. The aim of Part II is to explore how victims of sexual violence have participated in proceedings, comparing their participation as witnesses at the tribunals with the victim participation afforded by the ICC's scheme. This will illustrate the modalities of participation in both settings. Part II will also undertake an analysis of fair trial rights to highlight the limitations of the scheme for victims of sexual violence. Part III will contain a critical analysis of the challenges arising out of the Rome Statute's participatory system in relation to victims of sexual crimes, and will seek to explore both the practical limitations of the scheme and how these limits constitute a barrier to a meaningful participation scheme for victims of sexual violence. The conclusion shall aim to propose recommendations on how the participation scheme can be improved to better benefit victims of sexual violence.

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3 Kelly D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles' (2003) 21 Berkeley Journal of International Law 288, 288.

4 Doris E Buss, 'Rethinking 'Rape as a Weapon of War'' (2009) 17 Feminist Legal Studies 145, 147.

5 Jo-Anne Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process' (2009) 20 Criminal Law Forum 395, 395.

6 See for example Susana SaCouto, 'Victim Participation at the International Criminal Court and the Extraordinary Chambers in the Courts of Cambodia: A Feminist Project' (2012) 18 Michigan Journal of Gender and Law 297; Mariana Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2009) 16 ILSA Journal of International and Comparative Law 497.

II. Victim Participation and the Role of International Criminal Justice

A. The ICC's Victim Participation Scheme

Provisions governing the ICC's victim participation scheme are contained in the Rome Statute and ICC Rules of Procedure and Evidence (RPE).[7] A victims' right to participate in proceedings is determined in two stages: a confirmation of victim status pursuant to Rule 85 of the RPE, followed by the provision of participatory rights, according to Article 68(3) of the Rome Statute. It is the Pre-Trial Chamber (PTC) hearing the case of the underlying acts relevant to the victim's claim that grants or denies victim status. In determining who is a victim for the purposes of participation in proceedings, the PTC makes a case-by-case assessment based on the Rome Statute provisions and the ICC's RPE.[8]

i. Who is a victim?

Victims are defined by Rule 85 of the ICC Rules as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court […]".[9] Individuals claiming victim status must first file a written application with the Victim Participation and Reparations Section (VPRS) at the Registry while the relevant case is heard before the PTC. This application is sent on to the PTC overseeing the case, which decides whether to grant or deny victim status using a flexible analysis.[10] Considering the succinctness of Rule 85 and Article 68 of the Rome Statute, the Court is given little guidance on their application, resulting in the acceptance of most victim applications so long as they conform with four basic criteria.[11]

Firstly, the PTC must assess whether the applicant is a natural person, which requires verification of identity. This verification is approached pragmatically, and the Court has held that the absence of identification documentation is insufficient to dismiss an application.[12] Secondly, the PTC must determine if the facts contained in the application for participation fall within the Court's jurisdiction based on whether the alleged crime is included in the Rome Statute, was committed after 1 July 2002, and whether it occurred in the territory or was committed by a national of a State Party to the Rome Statute.[13] Thirdly, the PTC must decide if the victim has suffered harm of a material,

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7 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 68; International Criminal Court, Rules of Procedure and Evidence, ICC-PIOS-LT-03-004/19_Eng (ICC RPE), r 85.

8 Christodoulos Kaoutzanis, 'Two Birds with One Stone: How the Use of the Class Action Device for Victim Participation in the International Criminal Court Can Improve Both the Fight Against Impunity and Victim Participation' (2011) 17 UC Davis Journal of International Law and Policy 111, 122.

9 International Criminal Court, Rules of Procedure and Evidence, ICC-PIOS-LT-03-004/19_Eng (ICC RPE), r 86.

10 Kaoutzanis (n 8) 119.

11 ICC, *Situation in Uganda (Prosecutor v. Kony, Otti, Odhiambo and Ongwen),* Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06, ICC-02/04 (14 March 2008) para 8.

12 ibid para 193.

13 Kaoutzanis (n 8) 121.

physical, or psychological nature. This too has been subject to broad interpretation.[14] Finally, causality is considered: whether there is a reasonable basis to believe that the harm caused was a result of the alleged crime as being presented by the Prosecutor.[15] Considering the difficulty of proving this requirement, the Court has held that causality was satisfied if "the special and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least appear compatible rather than clearly inconsistent".[16] While assessing causality is logical in determining the validity of an individual's application, in practice, victims of sexual violence remain disadvantaged, as charges of sexual violence are particularly vulnerable and can be easily dismissed, if brought at all by the Prosecutor.[17] The victim's application is assessed against these criteria flexibly – if any of the four are not met, the PTC usually requests additional information, and only rarely denies the application.[18]

ii. Who can participate?

Perhaps the most critical provision within the Rome Statute regarding victim participation at the ICC is Article 68 (3), which reads:

> "Where the *personal interests* of the victims are affected, the Court shall permit their *views and concerns* to be presented and considered at stages of the *proceedings* determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence" (emphasis added).[19]

This provision has been described as "frustratingly vague" by scholars.[20] The terms "views and concerns", "personal interests", and "proceedings" remain undefined in the Statute. The obscurity of Article 68 allows flexibility in its interpretation, ultimately leaving decisions on victim participation up to the Court. While Article 68 provides the Court with wide discretionary powers on participation, its lack of direction and ambiguity has created conflict amongst parties as to how and when victims should be allowed to participate.[21] Representatives of victims have pushed for a broad interpretation of Article 68, often opposed by the Prosecution and Defence.[22] The Court has largely sided with victims and their representatives by utilising a broad interpretation of the provision to allow the participation of victims in most proceedings.[23]

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14 ibid.

15 ibid 122.

16 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Fourth Decision on Victim Participation, ICC-01/05-01/08 (12 December 2008) para 75.

17 The vulnerability of sexual charges and the link between charges brought and victim status are analysed in the following sections.

18 Kaoutzanis (n 8) 122.

19 Rome Statute, art 68(3).

20 Charles P Trumbull IV, 'The Victims of Victim Participation in International Criminal Proceedings' (2008) Michigan Journal of International Law 777, 793; Michael J Kelly, 'The Status of Victims Under the Rome Statue of the International Criminal Court' in Thorsten Bonacker, Christoph Safferling (eds) *Victims of International Crimes: An Interdisciplinary Discourse* (Asser Press Springer 2013) 53.

21 Kelly (n 20) 53.

22 Trumbull (n 20) 794.

23 Kelly (n 20) 53.

iii. What does participation entail?

The content of the right to participate has been interpreted by the Court, as the Statute and Rules of Procedure and Evidence say very little on its practical operation. Victims generally have access to the public record of the case, and the Chambers have noted that parties are permitted to notify the victim's legal representatives should certain confidential information affect victims' personal interests. Additionally, the legal representatives are entitled to identify confidential information relevant to a victims' personal interests and request authorisation from the Chambers to access it.[24]

Rule 91(3) of the Rules of Procedure and Evidence recognises the right to question witnesses. Victims that remain anonymous for security reasons are prevented from exercising this right to protect the rights of the accused, but those who have disclosed their identities may request permission from the Chamber to do so by presenting witness statements on how the accused's actions affect the victims' personal interests.[25] It is also often required that the legal representatives file questions they wish to pose before questioning begins. This means that timely access to the case records is important so that the representatives are aware of when they must request to intervene.[26] Victims have also been granted rights to challenge and submit evidence.[27]

B. The Move Towards Restorative Justice and Why It Matters

In their 2013 report on the revised strategy in relation to victims, the ICC Assembly of the States Parties claimed "the Court was created with both a punitive and restorative function, with the Rome Statute granting victims a right to directly participate in proceedings".[28] While the punishment of perpetrators creates conditions for justice in a retributive sense, restorative justice focuses on involving all those with a stake in an offence by addressing harms, needs, and obligations to put things right as far as possible.[29] Restorative justice focuses on the idea that justice is a process, and not just a judgment, and thus, must allow redress for victims' suffering.[30] As such, active victim participation is central to restorative justice as it provides victims with the opportunities to have their voices heard.[31] Through incorporating these provisions in the Rome Statute, the drafters instilled upon the Court the challenge of balancing justice's restorative and retributive functions.

The *Lubanga* case, as the first case to come to judgment at the ICC and the first to take into account this issue, exemplified the provisions included in the Rome Statute on victim participation. In their opening statements, victim participants stated the purpose of

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[24] ICC, *Situation in the Democratic Republic of the Congo* (*Prosecutor v. Lubanga Dyilo*), Decision on Victims' Participation, ICC-01/04-01/06-1119 (18 January 2008) paras 105–107.

[25] Pena (n 6) 505.

[26] *Lubanga,* Decision on Victims' Participation (n 24) para 107.

[27] ibid paras 108–111.

[28] Assembly of States Parties, International Criminal Court, 'Report of the Court on the Implementation in 2013 of the Revised Strategy in Relation to Victims', ICC-ASP/12/41 (11 October 2013) para 28.

[29] Donald H J Hermann, 'Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice' (2017) 16 Seattle Journal for Social Justice 71, 72.

[30] Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation' (2013) 7 The International Journal of Transitional Justice 518, 522.

[31] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5 Restorative Justice: An International Criminal Journal 198, 200; Claire Garbett, 'The Truth and the Trial: Victim Participation, Restorative Justice, and the International Criminal Court' (2013) 16 Contemporary Justice Review 193, 194.

their participation as an opportunity to "elucidate the truth on what happened and all the truth",[32] where they noted that sharing their experiences contributed to "shedding light on what actually happened, and to fill the gap that could take place between procedural establishment of facts and the truth itself".[33] As such, the victims' interests in the search for the truth has been emphasised by the Chambers, which confirmed that Court proceedings are capable of satisfying that interest.[34] The participation scheme, thus, aligns itself with the Court's overall obligation to "establish the truth",[35] exhibiting the importance of the inclusion of victims in the process of justice.

Scholars and civil society organisations have identified numerous benefits to allowing victim participation in international criminal proceedings.[36] Above all, offering a voice to those most affected enhances the process of international criminal justice.[37] As UN Secretary General Kofi Annan emphasised at the opening of the Rome Conference, the 'overriding interests must be that of the victims and the international community as a whole'.[38] The Rome Statute's inclusion of participatory rights for victims affirms this notion and represents a global shift towards recognising restorative justice.

III. Where Do Victims of Sexual Violence Stand? The Role of Victims in the International Prosecution of Sexual Violence

A. Victims of Sexual Violence Participating in *Akayesu:* the Role of Victims in the Historic Genocidal Rape Judgment at the ICTR

Although the framework of the *ad hoc* tribunals does not include a victim participation scheme, victims have still had influence on proceedings. In the absence of a participation scheme, victims can participate in a witness capacity by testifying. For a victim to be called before a tribunal, they must be called as a witness by either party, or by the Chambers acting *proprio motu.*[39] Most victim-witnesses are called to testify for the prosecution.

Victims have had a major role in their witness capacity by influencing the inclusion of sexual violence charges on the indictment. On multiple occasions, the Office of the Prosecutor (OTP) has applied for leave to amend the indictment to include charges of sexual violence in response to victim-witness testimony. Although not isolated instances, the tribunals have been reluctant to allow amendments to include uncharged sexual

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[32] ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Transcript, ICC-01/04-01/06 (30 October 2007), 23; Garbett (2017) (n 31) 200; Garbett (2013) (n 31) 194.

[33] ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Transcript, ICC-01/04-01/06 (26 January 2009), 41; Garbett (2017) (n 31) 200; Garbett (2013) (n 31) 194.

[34] ICC, *Prosecutor v. Katanga/Ngudjolo*, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, ICC-01/04-01/07-474 (13 May 2008) paras 31–36.

[35] *Lubanga,* Decision on Victims' Participation (n 24) para 133.

[36] For more on these benefits, see e.g. Carsten Stahn, Hector Olasolo, Kate Gibson, 'Participation of Victims in Pre-Trial Proceedings of the ICC' (2006) 4 Journal of International Criminal Justice 219, 221; Pena (n 6) 500; Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26 Criminal Law Forum 255, 258.

[37] Pena and Carayon (n 16) 527.

[38] United Nations, 'UN Secretary-General declares overriding interest of international criminal court conference must be that of victims and world community as a whole', Press Release SG/SM/6597 (15 June 1998).

[39] International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence (adopted 11 February 1994, as amended 8 July 2015) IT/32/Rev.50 (ICTY RPE), r 89; International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (adopted 29 June 1995, as amended 13 May 2015) (ICTR RPE), r 89.

offences or additional facts, particularly near or during the trial, due to concerns related to the fair trial rights of the accused in combination with the need for expediency.[40]

The *Akayesu* case was acclaimed as "the most important decision rendered thus far in the history of women's jurisprudence",[41] due to its rulings on rape as genocide. While this remark was published twenty years ago, it is largely still valid today. In *Akayesu,* the Tribunal recognised rape as a crime against humanity, a war crime, and as part of an intent to perpetrate genocide against the Tutsi population of Rwanda. In this case, the Trial Chamber (TC) found that acts of sexual violence, such as rape, constitute the *actus reus* for genocide as they cause "serious bodily or mental harm to members of the group".[42] It added that rape perpetrated with the intent to destroy could constitute genocide, disencumbering it from a pre-existing category of genocidal acts. Scholars lauded this judgment as a "step in the direction of ending impunity for sexual violence on the supranational criminal level".[43]

The original indictment against Jean-Paul Akayesu, however, did not include any charges of sexual violence. At the end of the Prosecution's case in 1997, multiple witnesses testified to witnessing or experiencing sexual violence in the Taba commune, where Akayesu was mayor. Eighteen days into the trial, Witness J testified that her daughter had been gang-raped during the genocide and that she had not been previously questioned in relation to this incident.[44] Witness H further testified that she had been raped after being chased by members of the Hutu militia; after fleeing to the commune office to seek refuge, she testified to witnessing the rape of many other women and girls.[45] The judges questioned the women on their experiences of sexual violence during the genocide and ensured that their experiences would be part of the trial record.[46] Judge Pillay stayed proceedings and ordered the Prosecutor to conduct further investigation.[47]

The testimonies of Witnesses J and H, as well as reports on the prevalence of sexual violence during the genocide, led to the filing of an *amicus curiae* brief by the Coalition for Women's Human Rights in Conflict Situations, urging the Chamber to push for the inclusion of sexual violence charges. The brief cited the mention of sexual violence in the Prosecution's opening statements alongside various reports documenting rape and sexual violence in Rwanda, and asserted that the Prosecution's failure to bring charges of sexual violence raised "questions about the commitment of the Tribunal to the elimination of

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40 Patricia Wildermuth and Petra Kneuer, 'Addressing the Challenges to Prosecution of Sexual Violence Crimes before International Tribunals and Courts' in Morten Bergsmo, Alf Butenschøn Skre, Elisabeth J Wood (eds) *Understanding and Proving International Sex Crimes* (Torkel Opsahl Academic EPublisher 2012) 95.

41 Kelly Askin, 'Women's Issues in International Criminal Law: Recent Developments and the Potential Contribution of the ICC' in Dinah Shelton (ed) *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Ardsley NY: Transnational Publishers, 2000) 47.

42 ICTR Statute, art 2.

43 Anne-Marie de Brouwer, *Suprantional Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and ICTR* (Intersentia 2005) 427.

44 Rosemary Grey and Louise Chappell, 'Gender-just judging' in international criminal courts: new direction for research' in Susan H Rimmer and Kate Ogg (eds) *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing 2019) 223.

45 ibid.

46 ibid.

47 Rhonda Copelon, 'Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law' (2000) 46 McGill Law Journal 217, 225.

gender-based violence as well as the protection and advancement of the human rights of women".[48]

The Prosecution then requested leave to amend the indictment, pursuant to the procedure enshrined in Rule 50 RPE, by adding charges of sexual violence, a request that was allowed by the TC.[49] The contributions made by witnesses such as J, H and many others had a profound impact on the prosecution of sexual violence; the amended indictment included charges of sexual violence and put in place the groundwork necessary for the TC to come to its landmark judgment on genocidal rape. This did not remain an isolated instance. A similar situation arose in the *Musema* case, where the Prosecutor requested leave to amend the indictment to include a rape charge, citing the precedent set in *Akayesu*, which was allowed by the Chamber.[50]

The Rule 50 procedure allowing for amendment of indictments acts as an important safeguard to allow for the addition of sexual violence charges once proceedings have commenced. This procedure is imperative to avoid impunity for perpetrators of sexual crimes as evidence of sexual violence often arises in the course of proceedings.[51] It is equally important with regards to the role of victims in proceedings, as it is victim-witness testimony that has often motivated the Chambers and Prosecutor to request an amendment of an indictment to include additional charges.

On the flip side, amending an indictment to include additional charges has the potential to prejudice the rights of the accused, such as the right to be tried without undue delay, protected by Rule 50 which provides "the Prosecutor may amend an indictment, without leave, at any time before its confirmation, but thereafter only with leave of the Judge who confirmed it or, if at trial, with leave of the Trial Chamber".[52] In accordance with this rule, the TC granted leave to amend the charges against Akayesu to include sexual violence, reminding the Prosecutor to transmit the amended indictment and supporting evidence to the accused and his counsel, and postponing the resumption date of the trial.[53]

B. Victims of Sexual Violence Participating at the ICC

The *Lubanga* case, as the first case to come to judgment at the ICC, was also the first to illustrate the capacity and realities of the ICC's victim participation scheme. Thomas Lubanga Dyilo was found guilty of the war crime of enlisting and conscripting child soldiers and using them to participate in hostilities. Although Prosecutor Ocampo never brought charges of sexual violence against Lubanga, despite records and knowledge of sexual violence committed against the child soldiers,[54] the efforts of victims to re-characterise the facts in an attempt to amend the indictment cannot go unmentioned.

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48 Amicus Brief Respecting Amendment of the Indictment and Supplementation of the Evidence to Ensure the Prosecution of Rape and Other Sexual Violence within the Competence of the Tribunal, Coalition for Women's Human Rights in Conflict Situations (1997) <http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/Akayesu/amicusbrief_en.php>39.

49 ICTR, *Prosecutor v. Jean-Paul Akayesu*, Amended Indictment, ICTR-96-4-I (17 June 1997); Grey and Chappell (n 93) 223.

50 ICTR, *Prosecutor v. Musema,* Decision on Prosecutor's Request for Leave to Amend the Indictment, 1CTR-96-13 T (18 November 1998) paras 4, 13–18.

51 This will be further discussed and analysed below.

52 RPE ICTR, r 50.

53 ICTR, *Prosecutor v. Jean-Paul Akayesu,* Leave to Amend Indictment, ICTR-96-4-T (17 June 1997).

54 Avocats Sans Frontières and others, 'DR Congo: ICC Charges Raise Concern' (31 July 2006) <www.hrw.org/news/2006/07/31/dr-congo-icc-charges-raise-concern> accessed 6 April 2020.

Victim participants engaged in a widespread effort to include charges of sexual violence to the indictment.[55]

i. Victim participants in Lubanga: when victims can participate and the limits of Rule 85

Prior to this concerted effort, the Chamber first had to decide which victims could participate. As per Rule 85 RPE, the individual must be considered a victim to participate, followed by a determination on whether their participation is appropriate, in accordance with Article 68 (3) of the Rome Statute. Rule 85 reads that victims are "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court".[56] When applying Article 68(3), the Court must assess "(i) whether the individuals seeking participation are victims in the case (ii) whether they have personal interests which are affected by the issues on appeal, (iii) whether their participation is appropriate and lastly (iv) that the manner of participation is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[57]

While the TC initially decided that Rule 85 did not restrict the participation of victims to crimes confirmed in the charges,[58] the AC overturned this decision to the detriment of the victims of sexual violence. It affirmed the TC's view that Rule 85 did not, in itself, restrict participation to the crimes charged, but found that Rule 85 must be read in context and in accordance with its object and purpose.[59] As Rule 85 is a general rule applicable at all stages of proceedings, the AC reversed the TC's decision that participation was not restricted by the charges confirmed by the PTC, and confirmed that "harm alleged by the victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused."[60]

Consequently, the Chamber's restrictive reading of Rule 85 confined participation to victims linked to those charges where only victims of the crimes charged were granted participatory rights. Thus, the Prosecutor's exclusion of charges of sexual violence effectively excluded victims of sexual violence from participating in the trial, or receiving reparations. Although a disappointing decision for victims of sexual violence, this decision mitigates the risk of fair trial violations resulting from the inclusion of testimony related to uncharged crimes, as discussed above.

ii. Victims' request to recharacterise the facts to include charges of sexual violence

Lubanga was charged with conscription, enlistment, or active use of children under the age of fifteen in international and non-international armed conflicts. During the pre-trial confirmation of charges the Women's Initiatives for Gender Justice sought to attain *amicus*

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55 Pietro Sullo, 'Lubanga Case' (April 2014) in Rüdiger Wolfrum (ed) *Max Planck Encyclopaedia of Public International Law* (online ed) 25.

56 ICC RPE, r 85.

57 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Participation of Victims on Appeal, ICC-01/01/01/-6-1453 (6 August 2008).

58 *Lubanga*, Decision on Victims' Participation (n 31).

59 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals of the Prosecutor and the Defence against Trial Chamber's Decision on Victims' Participation of 18 January 2008, ICC-01/04-01/06-1432 (11 July 2008) para 54.

60 ibid para 65.

status to push the Chamber to request an expansion of charges to include sexual violence.[61] This application was unsuccessful and the charges were confirmed by the PTC – the decision to omit charges of sexual violence was highly controversial, considering the widespread availability of information recording egregious sexual violence in the Democratic Republic of Congo.[62]

In reaction to the Prosecutor's failure to bring charges of sexual violence against Lubanga, twenty-seven victim participants requested a variation of the legal characterisation of the facts in the case, aiming to add the additional crimes of sexual slavery and inhuman and cruel treatment to the charges pursuant to Regulation 55 of the Regulations of the Court. Regulation 55 provides that a "Chamber may change the legal characterisation of facts to accord with the crimes […] or to accord with the form of participation of the accused […] without exceeding the facts and circumstances described in the charges and any amendments to the charges".[63]

In accordance with this procedure, a majority at the TC issued a decision contemplating the possibility of amending the legal characterisation of the facts contained in the indictment, as well as those not contained but established through evidence and which were in "procedural unity" with facts pleaded. The decision cited reasons submitted by the victims' representatives: that facts and circumstances included in the charges as well as the evidence presented at trial established the material elements of sexual slavery, as well as the crimes charged.[64]

This decision was appealed by the Prosecution and Defence, both disputing the TC's finding that new facts and circumstances could be introduced.[65] In its appeal, the Prosecution argued that continuing the procedure under Regulation 55 would require consideration of additional material, and could mean the remainder of the trial was conducted on the basis of an incorrect legal framework.[66] The victims noted that they did not request a change with respect to facts not pleaded, as the new legal characterisation was consistent with the facts already pleaded in the indictment.[67]

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61 Louise Chappell, 'Conflicting Institutions and the Search for Gender Justice at the International Criminal Court' (2014) 67 Political Research Quarterly 183, 186.

62 Sienna Merope, 'Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC' (2011) 22 Criminal Law Forum 311, 312.

63 International Criminal Court, Regulations of the Court, ICC-BD/01-01-04 (Regulations of the Court), reg 55.

64 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision Giving Notice to the Parties and Participants that the Legal Characterization of the Charges may be Subject to Change in Accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06-2049 (14 July 2009) paras 33–34.

65 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Prosecution's Document in Support of Appeal against the ''Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'' and urgent request for suspensive effect) ICC-01/04-01/06 (14 September 2009) paras 3–6; ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Defence Appeal against the Decision of 14 July 2009 entitled Decision giving notice to the parties and participants that the legal characterization of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court, ICC-01/04-01/06 (10 September 2009) paras 16, 23–24.

66 *Lubanga*, Prosecution's Document in Support of Appeal (n 65) para 20.

67 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Observations from the Legal Representatives of the Victims in response to the documents filed by the Prosecution and the Defence in support of their appeals against the Decision of Trial Chamber I of 14 July 2009, ICC-01/04-01/06 (23 October 2009) paras 25 – 26*;* ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with

The AC held that a notice of possibility of variation in the legal characterisation of facts pleaded in the indictment was fully consistent with the Rome Statute. However, after a trial has commenced, an amendment of the indictment on the Prosecution's motion is only possible in terms of the withdrawal of charges; other modifications upon the TC's own motion were not precluded.[68] It found that under Regulation 55, legal recharacterisations must not exceed the facts and circumstances in the charging document and that notice on the possibility of recharacterisations must be provided to the parties.[69] The AC remitted the decision on the possibility recharacterisation to the TC,[70] which held that nothing within the facts and circumstances of the charges against Lubanga supported including sexual slavery or cruel and inhuman treatment, excluding sexual crimes in the case against Lubanga.[71] In a powerful dissent to the judgment, Judge Odio-Benito stated:

> "By failing to deliberately include within the legal concept of "use to participate actively in the hostilities" the sexual violence and other ill-treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of the crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group".[72]

Failure to include charges of sexual violence in this case was heavily criticised.[73] The Chamber's ruling on recharacterisation limits victims' capacity to affect the outcome of proceedings. Indictment amendment procedures that were provided for at the *ad hoc* tribunals via Rule 50 RPE allowed victims an indirect influence upon the charges on an indictment as tribunal judges could amend charges during the trial, often in response to victim-witness testimony.[74] This has not been possible within the framework of the ICC, due to restrictive interpretations adopted by the Chamber in relation to Regulation 55.[75] This discrepancy highlights the need for an amendment procedure within the ICC framework that provides the possibility to amend charges once evidence of sexual violence has been exposed during proceedings, as is often the case.[76] It also emphasises the need for a participatory regime that gives victims a greater say in the pursuit of justice. The recharacterisation decision demonstrates that the participation scheme is certainly limited to the extent that victims lack the ability to compel, or even influence, the Prosecutor to pursue sexual crimes,[77] cutting victims of sexual violence out of proceedings if a Prosecutor

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Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06 OA 15 OA 16 (8 December 2009) para 57.

68 *Lubanga,* Judgment on the Appeals of Mr Lubanga Dyilo and the Prosecutor on Recharaterization of the Facts (n 67) para 77.

69 ibid paras 93–100.

70 ibid para 109.

71 ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Decision on the Legal Representatives' Joint Submissions concerning the AC's Decision on 8 December 2009 on Regulation 55 of the Regulations of the Court, ICC-01/04-01/06 (8 January 2010) paras 34 – 38.

72 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06 (14 March 2012) para 16.

73 Avocats Sans Frontières and others (n 54).

74 Chappell (n 61) 188.

75 ibid.

76 Solange Mouthaan, 'The Prosecution of Gender-based Crimes at the ICC: Challenges and Opportunities' (2011) 11 International Criminal Law Review 775, 793.

77 SaCouto (n 6) 339.

does not bring charges of sexual violence early enough. This is particularly problematic considering that evidence on sexual violence arose repeatedly during trial, but did not even have the impact of aggravating the sentence eventually imposed on Lubanga.[78]

Although no conviction for sexual violence was rendered, evidence of sexual violence was put on the record at trial, and acknowledged in the *Lubanga* judgment.[79] The Chamber did not rule on sexual violence and the absence of charges meant victims could not receive reparations. While the *Lubanga* case provided the Chambers with the possibility to clarify the ICC's victim participation regime, it also exposed its issues. The Prosecution's failure to bring charges of sexual violence in this case and the absence of a procedure to allow amendment when evidence later arises implies that sexual crimes are such a low priority that the presentation of relevant testimony does not even suffice to allow the possibility of amendment. Another loss for victims comes in the form of the decision that victim participants must have a link to the charges brought by the Prosecutor, meaning that the Prosecutor's failure and the absence of an amendment procedure completely excludes victims of sexual violence from attaining formal participatory rights or reparations. This is even worse considering that experiences of sexual violence often arise during testimony and questioning – 15 of the 25 Prosecution witnesses mentioned sexual violence against girl child soldiers – resulting in its presence on the trial record without any possibility of justice in the form of a related conviction.[80]

C. Balancing the Accused's Fair Trial Rights with the Rights of Victims

Victim participation must be exercised "in a manner that is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".[81] It is evident in the decisions on victim participation and recharacterising the charges that the fair trial rights of the accused are considered highly important by the Chambers. These safeguards are important to protect fair trial rights, as the provisions governing the right to participation are vague and must be interpreted by the Chambers in a balancing act between victims' rights and defendants' rights.

While the addition of a victim participation scheme within the ICC framework has been a landmark development in terms of victims' rights, in the absence of sexual violence charges, the scheme as interpreted by the Chambers in *Lubanga* has excluded victims of sexual violence from receiving reparations or the right to have their voices heard. Hesitancy to bring charges of sexual violence has been a recurring theme in international criminal justice for many reasons, such as lack of time and resources to investigate sexual crimes, and the *Lubanga* jurisprudence reveals that there is a long way to go before victims of sexual crimes can achieve participatory rights as sexual violence charges often remain, at least initially, uncharged. The Chamber's interpretation of Rule 85 as restricting participation to victims linked to the charges brought has reduced the participation scheme to little more than what was provided for within the *ad hoc* framework; the Chamber's decision on Regulation 55 as restricting the ability to recharacterise the facts to include sexual crimes has been detrimental to the participatory and reparatory rights of victims of sexual violence by removing their access to the aforementioned while simultaneously requiring them to

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78 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Separate and Dissenting Opinion of Judge Odio Benito, ICC-01/04-01/06 (14 March 2012) para 22.

79 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Trial Judgment, ICC-01/04-01/06-2842 (14 March 2012) paras 890 – 896.

80 Jennifer Tridgell, 'Prosecutor v Ntaganda: The End of Impunity for Sexual Violence against Child Soldiers' (2017) 23 Australian International Law Journal 153, 154.

81 Rome Statute, art 68(3).

still testify in relation. It is interesting that the Rule 50 procedure governing amendment of indictments at the *ad hoc* tribunals was, contradictorily, less restrictive and more open to the inclusion of sexual violence charges, at least early on during proceedings.

In evaluating the jurisprudence of the Chambers pertaining to the rights of the defence, the failure to recharacterise the facts to include sexual crimes in *Lubanga* comes down to the restrictive interpretation adopted by the Chambers. Such restrictive interpretations as adopted in, both, decisions on recharacterising the facts and on narrowing participation to victims linked with the charges brought emphasises that the Chamber values the fair trial rights of the accused. It is then curious that evidence of sexual violence was nevertheless included and acknowledged in testimony and the judgments. Allowing this testimony on the trial record has the potential to provide some recourse in the form of acknowledgement for victims of uncharged sexual crimes. However, disallowing amendments to the indictments seems to have constituted somewhat of a 'lose-lose' situation for both defence rights and victims' rights, in that the trial judgment acknowledged uncharged crimes, allowing the possibility for it to influence the judges' verdict, and victim participation on said uncharged crimes lacked all possibility to result in a conviction, undermining the purpose of the ICC's participatory scheme: the elucidation of the truth.[82]

IV. Challenges Faced and Lessons Learnt: Making Victim Participation Meaningful

There are many barriers to the meaningful participation of victims of sexual violence in international criminal proceedings. At the outset, a definition of meaningful victim participation is required. Meaningful participation can be defined, first and foremost, as the participation intended in the Rome Statute: the actual expression of views and concerns by victims in proceedings.[83] Thus, theoretical and hypothetical participatory rights do not suffice; the right to participate in proceedings must be concrete and effective, as highlighted by the Chambers.[84] It is, thus, unfortunate that the ICC's victim participation scheme, as interpreted by the Judges, often falls short of a concrete and effective right to participation, as will be discussed in this section. Secondly, when defining meaningful victim participation, it is necessary to consider the expectations and needs of the victims themselves, which will be addressed later. If the ICC is to achieve meaningful victim participation that serves the communities and individuals most affected by the international crimes and gross human rights violations brought to trial, various changes are required.

A. Practical Application of Procedural Rules Related to Charges and Indictments

i. Failure and hesitancy to bring charges of sexual violence results in impunity

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82 ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Transcript, ICC-01/04-01/06 (30 October 2007) 23.

83 Christine H Chung, 'Victims' Participation at the Internatinal Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 Northwestern Journal of International Human Rights 459, 509.

84 ICC, *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5, VPRS 6, ICC-01/04-01/101-tENn-Corr (17 January 2006) para 71.

Article 54(1)(b) of the Rome Statute requires the Prosecutor to ensure "effective investigation and prosecution of crimes within the jurisdiction of the Court" and, in doing so, to "take into account the nature of the crimes, in particular where it involves sexual violence, gender violence or violence against children".[85] Despite this provision and an increased focus on sexual crimes,[86] the ICC's record on the investigation of sexual crimes and bringing charges of sexual violence has been mixed.[87] Failure to sufficiently investigate allegations of sexual violence resulting in a hesitancy to charge sexual crimes constitutes the first, and possibly greatest, barrier to participation of, or justice for, victims of sexual violence.

Sexual crimes are notoriously difficult to investigate, due to the private nature of sexual violence, the associated trauma victims experience, societal stigma, and a lack of physical evidence.[88] These issues are augmented by the period within which investigations take place, often months or years after the offences have been committed, and the time constraints associated with trial. [89] Some commentators note that the historical perception of sexual violence as a consequence of war has contributed to its perception as an opportunistic offence alongside "core" crimes, resulting in perpetrators remaining unpunished.[90] In this regard, sexual violence is often implicitly encouraged rather than committed on the basis of explicit orders, which can make it challenging for prosecutors to link high-level perpetrators with such crimes, making thorough investigations into such crimes even more important.[91]

The psychological and social consequences experienced by victims of international crimes cannot be understated. For victims of sexual violence, the stigma and shame associated with sexual crimes can make it even harder to come forward. It can also be very dangerous for victims to speak openly about what they have endured. As victims are often ostracised by their families and communities, bringing charges that reflect and validate their experiences can help them cope with this stigma.[92] Ignoring these accounts by failing to bring the relevant charges could worsen this experience and removes the possibility of closure via justice.

As victim participation is dependent on the charges brought due to the requirement of a link between the harm they suffered and the crimes charged, Prosecutor Ocampo's failure to bring charges of sexual violence in the initial *Lubanga* indictment created the ripple effect of excluding victims of sexual violence from access to participation and

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85 Rome Statute, art 54(1)(b).

86 See art 36(8)(b) on States Parties having to take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children; See also art 44(2) on the Registrar and Prosecutor considering importance of legal expertise on violence against women in hiring staff; See also arts 43(6) and 68(1) on the VWU including staff with expertise in trauma related to sexual crimes and protective measures taking into account the nature of the crime, in particular, when it involves sexual or gender violence, respectively.

87 Susana SaCouto and Katherine Cleary, 'Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court' (2009) 17 Journal of Gender, Social Policy and the Law 339, 344.

88 Merope (n 62) 319.

89 ibid.

90 Patricia V Sellers, 'Individual(s') Liability for Collective Sexual Violence' in Karen Knop (ed) *Gender and Human Rights* (Oxford University Press, 2004), 190; SaCouto, Cleary (n 87) 349; K'Shaani O Smith, 'Prosecutor v Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo' (2011) 54 Howard Law Journal 467, 479.

91 SaCouto and Cleary (n 87) 349.

92 K'Shaani O Smith, 'Prosecutor v Lubanga: How the International Criminal Court Failed the Women and Girls of the Congo' (2011) 54 Howard Law Journal 467, 489.

reparations. The Prosecution cited the need for expediency when explaining the decision to pursue child soldier charges, perceived as easier to substantiate than charges of sexual violence.[93] This revelation suggests that in light of investigative difficulties and time constraints, a 'streamlined' investigative strategy side-lining sexual crimes was here deemed appropriate.[94] That sexual violence charges can be set aside for the sake of expediency further solidifies the inexcusable notion that sexual violence is an inevitable consequence of conflict that is not worth investigating or substantiating at trial, and contributes to the creation of an implicit hierarchy within international crimes.

It is, thus, clear that prosecutorial failure constitutes a challenge to victims of sexual violence. The *Mbarushimana* case is an exemplification of Prosecutor's failures pertaining to evidence. While the arrest warrant against Callixte Mbarushimana contained a wide range of sexual and gender-based crimes, including rape, torture, other inhumane acts, inhuman treatment and persecution of the basis of gender,[95] not a single charge was confirmed, and he was released in 2011. In the confirmation of charges decision, the PTC criticised the Prosecution's presentation of the case, highlighting that "the charges and the statements of facts in the DCC [Document Containing the Charges] have been articulated in such vague terms that the Chamber had serious difficulties in determining, or could not determine at all, the factual ambit of a number of the charges".[96] The PTC repeatedly stated that the Prosecutor did not provide enough, if any, evidence to establish substantial grounds to believe that the event in question had occurred.[97] The Prosecutor must learn from such failures by ensuring that sufficient time and resources are invested to remedy the vulnerability of charges of sexual crimes.

In 2014, signifying the culmination of two years of the ICC's second prosecutor Fatou Bensouda's effort to strengthen the OTP's focus on sexual crimes, the OTP released the Policy Paper on Sexual and Gender-Based Crimes, recognising "the challenges of, and obstacles to, the effective investigation and prosecution of sexual and gender-based crime" and committing to "integrating a gender perspective and analysis into all of its work, being innovative in the investigation and prosecution of these crimes, providing adequate training for staff, adopting a victim-responsive approach in its work, and paying special attention to staff interaction with victims and witnesses, and their families and communities".[98] This paper turns out to be important to the context, considering the vulnerability of charges of sexual crimes and the difficulties in securing convictions: although fifty-seven charges of gender-based and sexual crimes in twenty cases were brought up until 2014, only twenty were confirmed, and within this period, not a single conviction for such crimes was secured.[99]

Two years later, in 2016, the Court finally issued its first indictment on rape as a war crime and crime against humanity in *Bemba*, representing the change in prosecutorial

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93 Chappell (n 61) 187.

94 Rita Shackel, 'International Criminal Court Prosecutions of Sexual and Gender-Based Violence: Challenges and Successes' in Rita Shackel and Lucy Fiske (eds) *Rethinking Transitional Gender Justice: Transformative Approaches in Post-Conflict Settings* (Palgrave Macmillan 2019) 202.

95 *Prosecutor v Mbarushimana*, Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10 (11 October 2010).

96 *Prosecutor v Mbarushimana,* Decision on the Confirmation of Charges, para 110.

97 ibid paras 131, 134, 169, 206, 211.

98 Office of the Prosecutor, 'Policy Paper on Sexual and Gender-Based Crimes' (ICC, June 2014), 5.

99 Valerie Oosterveld, 'The ICC Policy Paper on Sexual and Gender-Based Crimes: A Crucial Step for International Criminal Law (2018) 24 William and Mary Journal of Race, Gender, and Social Justice 443, 445–446.

strategy and focus implemented by Prosecutor Bensouda at the OTP.[100] Notwithstanding this, this case and every other charge of sexual violence laid since has subsequently resulted in acquittal, except in the recent *Ntaganda* judgment, pending appeal.[101] Although acquittals do not necessarily indicate a failure on the part of the Court, a single conviction in relation to the number of sexual charges brought is alarming. To avoid impunity for sexual crimes, stronger safeguards must be installed to ensure that prosecutorial strategy and discretion falls in line with the overarching aims of the Rome Statute, of which the most important is to put an end to impunity. It is evident, in light of the number of acquittals and the frequency at which sexual crimes have remained uncharged due to lack of evidence, that the OTP, and the Court more broadly, must invest increased time and resources into the investigation of sexual violence. Concerted effort is required from all actors of the Court to allow victims of sexual violence to attain justice.[102]

ii. Unclear amendment procedure for indictments and inability of victims to affect charge sheet

Difficulties in investigating sexual crimes combined with a prosecutorial strategy that has openly prioritised prosecuting crimes other than those of a sexual character has resulted in evidence of sexual violence only emerging at trial during questioning related to other crimes, as occurred in the *Lubanga* trial at the ICC, but also *Akayesu* and *Lukić* at the tribunals.[103] From these instances, it is clear that, in light of these failures of prosecutorial strategy, an amendment procedure allowing the introduction of sexual violence charges after the commencement of proceedings may be necessary to avoid impunity for these crimes.

A blanket provision allowing the introduction of additional charges into proceedings that have already commenced certainly has the potential to prejudice the rights of the accused. However, practice from *Akayesu* demonstrates that in the presence of a procedure that considers fair trial rights, such as the Rule 50 procedure governing indictment amendments at the tribunals, the addition of charges can be possible in certain circumstances and within a permitted time limit at the discretion of the TC.[104] On appeal, the claim that Akayesu was prejudiced by the late indictment amendment was rejected by the AC on the grounds that the new counts fell within the spatial and temporal scope referred to in the initial indictment and more accurately reflected Akayesu's criminal responsibility. The AC also referred to the four-month adjournment period, the possibility to recall witnesses following the amendment, and the fact that no objections were raised by the Defence with regards to the new charges when Akayesu was re-arraigned to demonstrate that there had been no prejudice against the accused.[105] Thus, fair trial safeguards such as granting adjournments and allowing the Defence to recall witnesses mitigated the risk of prejudicing the accused's rights without having to deny the

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[100] Maryann E Gallagher, Deepa Prakash and Zoe Li, 'Engendering justice: women and the prosecution of sexual violence in international criminal courts' (2020) 22 International Feminist Journal of Politics 227, 229.

[101] *Prosecutor v. Bosco Ntaganda*, Judgment, Case No. ICC-01/04-02/06 (8 July 2019); Susana SaCouto, Leila N Sadat, Patricia V Sellers, 'Collective Criminality and Sexual Violence: Fixing a Failed Approach' (2020) 33 Leiden Journal of International Law 207, 210.

[102] Carla Ferstman, 'Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility?' (2012) 16 The International Journal of Human Rights 796, 807.

[103] Merope (n 62) 318.

[104] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber, Trial Transcript, 17 June 1997.

[105] Prosecutor v. Akayesu, AC, Judgment, 1 June 2001 paras 119–123.

amendment. In the *Akayesu* judgement, the TC stated that the amendment had been allowed as the "investigation and presentation of evidence related to sexual violence [was] in the interests of justice".[106]

Pursuant to Article 61 (7) (c) (ii) of the Rome Statute, the PTC may also invite the prosecutor to amend charges where "the evidence submitted appears to establish a different crime within the jurisdiction of the Court", as occurred in *Akayesu* when Judge Pillay stayed proceedings to allow the OTP to investigate further and amend the indictment. It is unfortunate that the Judges in *Lubanga* did not utilise this opportunity provided for by the Rome Statute to encourage the OTP to bring charges of sexual violence, to close the accountability gap. Such an invitation in the *Lubanga* case would have been welcome, as Prosecutor Ocampo spoke extensively on sexual violence experienced by female child soldiers at the opening of the trial, and 15 of the Prosecution's 25 witnesses testified on sexual crimes.[107] In his opening statements, Prosecutor Ocampo claimed that "in this International Criminal Court, the girl soldiers will not be invisible",[108] a statement that might have rung true had he not failed to investigate and charge sexual crimes.

Other than this, Regulation 55 governing the legal recharacterisation of facts is the only recourse available within the ICC framework to introduce charges of sexual violence upon emergence of evidence of these crimes at trial. As such, it contains safeguards to protect the rights of the accused; sufficient notice must be given to the defence and the TC holds discretionary powers to assess the possibility of recharacterisation against expediency and other fair trial protections. Although the AC ruled that Regulation 55 is not inconsistent with the Rome Statute, it also failed to address the broader question of whether facts can be recharacterised to a crime not originally charged, missing out on a valuable opportunity to determine the scope of the regulation.

While much of the evidence presented in the *Lubanga* trial is not accessible to the public, publicly available information on the sexual exploitation of female child soldiers suggests that acts of sexual violence could fall within the facts and circumstances included in the charging document.[109] For instance, the Decision on the Confirmation of Charges in *Lubanga* states in relation to 'active participation in hostilities' that new recruits were trained in a systematic and organised fashion in that they were subjected to rigorous and strict discipline.[110] The case could then be made that evidence of the use of rape as a form of discipline or punishment, as reported widely by NGOs, could fall within these facts.[111] The Chamber's restrictive interpretation of Regulation 55 in *Lubanga*, thus, undermined the effective prosecution of crimes of sexual violence, and ignored the presence of safeguards built into the Regulation to protect the rights of the accused.

Given the unique nature of sexual crimes in terms of the social ramifications faced by the victims and evidence of sexual violence repeatedly arising at trial, interpreting Regulation 55 in narrow terms here resulted in the Chamber ignoring the experiences of sexual violence victims by disallowing the possibility of a conviction for these crimes. The safeguards within Regulation 55 to protect the rights of the accused in combination with

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[106] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998 para 417.

[107] Women's Initiatives for Gender Justice, Gender Report Card on the International Criminal Court 2009 <http://www.iccwomen.org/news/docs/GRC09_web-2-10.pdf>, 71–85.

[108] *Prosecutor v Lubanga*, Transcript, ICC-01/04-01/06 (26 January 2009) para 13.

[109] Merope (n 62) 339–340.

[110] *Prosecutor v. Lubanga*, Decision on the Confirmation of Charges, ICC-01/04-01/06 (29 January 2007) para 265; Merope (n 62) 340.

[111] Merope (n 62) 340.

the argument that Regulation 55 is "expressly defined in wide terms to allow the Trial Chamber flexibility in the classification of the conduct of the accused",[112] suggests that a broad interpretation of Regulation 55 would indeed be consistent with the Rome Statute, and better suited to fulfil its purpose. This is especially pertinent as the AC noted itself that the purpose of the regulation was "closing accountability gaps" resultant when "legal qualifications in the pre-trial phase … turn out to be incorrect, in particular based on evidence presented at trial", which would be "contrary to the aim of the Statute to put an end to impunity".[113]

As the decisions on the possibility to recharacterise the facts are to be made on a case-by-case basis by the relevant Chamber, Regulation 55 is an important recourse to ensure justice for victims of sexual violence; despite prosecutorial indifference towards sexual crimes in the *Lubanga* case, evidence on sexual slavery arose in those proceedings. The victims' attempt to request a re-characterisation to include sexual slavery indicated their dissatisfaction with the charges brought by the Prosecutor, and the Chamber's decision undermined the purposes and presence of a participation scheme. The decision to disallow re-characterisation, despite the presentation of evidence on sexual crimes and its mention in the opening statements of the Prosecutor, raises the question of how meaningful the participatory scheme can be for victims of sexual violence, as victims are unable to have an impact on the charges brought, arguably the most imperative factor in their access to justice.

B. Practical Application of Procedural Rules Related to Victims and Participation

i. Lack of clarity in ICC's participation provisions: an inconsistent approach resulting in unequal victimhood

Another issue pertaining to participation at the ICC is the lack of clarity in the provisions enshrining the victim participation scheme. As victim participation is not automatic and relies on the discretion of the TC, the lack of clarity present in the provisions of the Court's Statute and RPE has resulted in an inconsistent and varied approach in determining the degree and modalities of participation for each victim.[114] This is best evidenced in a comparison between the systematic and piecemeal approaches adopted in the *Katanga* and *Lubanga* cases respectively.[115]

According to the Single Judge in *Katanga*, all individuals that meet the criteria of Rule 85 and who are granted victim status will always have a personal interest in participating in proceedings; thus, the determination of whether a victim's personal interests were affected was carried out on a collective basis.[116] The Single Judge justified this finding by highlighting the link between guilt or innocence and the right to truth,[117] emphasising that the interests of victims extend to securing punishment for those found

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[112] Carsten Stahn, 'Modification of the Legal Characterization of the Facts in the ICC System: A Portrayal of Regulation 55' (2005) 16 Criminal Law Forum 1, 24.

[113] *Prosecutor v. Lubanga* (n 110) para 77.

[114] Solange Mouthaan, 'Victim Participation at the ICC for Victims of Gender-Based Crimes: A Conflict of Interest' (2013) 21 Cardozo Journal of International and Comparative Law 619, 628.

[115] Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings* (Internsentia 2011) 258–260.

[116] *The Prosecutor v. Katanga/Ngudjolo*, No. ICC-01/04-01/07-474 (13 May 2008) para 43.

[117] ibid paras 35–36.

criminally responsible,[118] and by extension, determined that victims have a personal interest in the outcome of the pre-trial stage, as this stage is responsible for deciding whether there is sufficient evidence providing substantial grounds to believe that the suspect is responsible for the crimes charged.[119] In viewing the pre-trial stage as the broad context, the Judge determined the manner and scope for all victims in all proceedings during the pre-trial stage, building on the pre-trial case law in *Lubanga* and followed in *Bemba.*[120] This approach ensures that the parties and victims' representatives are informed of the modalities of participation in advance, and can, therefore, better prepare for hearings.[121]

In the *Lubanga* case, however, the TC departed from the PTC and favoured a different approach, finding that Article 68(3) requires a determination of the specific personal interests of individual victims in relation to specific issues.[122] This procedure requires that victims' legal representatives show how participation in specific trial proceedings affects the personal interests of specific victims, rather than the trial generally.[123] The approach adopted by the TC in *Lubanga* was endorsed by the AC,[124] on the basis that determining the appropriateness of participation on an individual basis sits best with the rights of the accused and the right to a fair trial. The TC in *Katanga* found that the recognition of victim status would automatically imply the recognition of the personal interest of the victim at the trial stage of the case, but held that it could require extra information in situations where the link between the requested intervention and the victim's personal interests were not clear.[125] Thus, in the trial stage of the *Katanga* proceedings, a de facto piecemeal approach was adopted, where victims were indeed required to file discrete applications on how their personal interests were affected before being permitted to participate in a certain part of the trial.[126]

From these instances, it seems that the TCs are hesitant to provide participatory rights without having the opportunity to assess whether participation is appropriate in a particular instance, an approach that is arguably consistent with Article 68(3) and the right to a fair trial. While this may be the case, requiring the filing of a discrete written application for every instance of participation is onerous,[127] and can result in delays in proceedings, as discussed in the next section.

The stark difference in each approach highlights the differences in understanding between Judges at the ICC on what victim participation entails and the modalities of participation. The lack of clarity on a uniform system governing the right to participation has resulted in victims being treated differently in different cases, and in different stages of proceedings. This inequality undermines the underlying purpose of victim participation as a "contribution to the truth-seeking justice process of the ICC".[128]

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[118] ibid para 38.
[119] ibid para 43; McGonigle Leyh (n 115) 258–259.
[120] McGonigle Leyh (n 115) 259.
[121] ibid.
[122] *The Prosecutor v. Lubanga*, No. ICC-01/04-01/06-1119 (18 January 2008) para 97.
[123] McGonigle Leyh (n 115) 260.
[124] *The Prosecutor v. Lubanga*, No. ICC-01/04-01/06-1432 (11 July 2008).
[125] *The Prosecutor v. Katanga/Ngudjolo*, ICC-01/04-01/07-1788-tENG (22 January 2010) paras 61–62.
[126] McGonigle Leyh (n 115) 260–261.
[127] ibid 261.
[128] Mouthaan (n 114) 628.

Inequalities amongst victims arising from the ICC's participatory scheme are compounded by the connection between participation, reparations and the crimes charged; in this regard, victims of sexual violence are inherently disadvantaged due to the abovementioned failure to charge sexual crimes, combined with their inability to affect the charges brought. Thus, victims of uncharged crimes and those victimised outside of the locations that are subject to the charges are totally excluded, contributing to victim inequality, which may in turn negatively impact reconciliation.[129] As victims of sexual crimes are so often ostracised in their own communities, the limitations of the participation scheme resulting in their removal from the judicial process can contribute to further stigmatisation.

To combat the inequalities arising from varied interpretations adopted by the Judges of the Court, a harmonised victim participation scheme is necessary. For example, by laying out the modalities of participation and leaving only the determination of exceptional rights up to Judges, such inequalities, as well as the burden on the Court, would be mitigated.[130] Consistency is also equally important to manage victim expectations, so that upon application to participate, victims are duly informed of the modalities of this participation and understand its limitations.

ii. Inadequate application process and common legal representation: dilution of the participatory process

The broad definition of a victim adopted by the Chambers opens the door to innumerable applications for victim status. The Court's approach towards processing individual applications and allocating legal representation can constitute a barrier, not only to the participation of victims, but also to the right to expediency.[131] While 127 victims were given permission to participate in *Lubanga,* this number steeply rose to 5,229 victim participants in *Bemba.*[132] At the Assembly of States Parties on the Court's strategy towards victim participation, representatives of the Court noted an insufficiency of resources to effectively deal with the influx of applications submitted.[133]

In part, this is due to the long and cumbersome application process in which the VPRS receives a lengthy standard application form along with supporting evidence that must be translated into one of the working languages of the Court. Following the translation, in most cases, redactions must be made and approved by the Chamber to protect the identity of the victim, and then sent to the parties for submissions to be filed within a prescribed time limit. The Chamber must then decide, on a case-by-case basis, whether the applicant meets the Rule 85 criteria and whether their interests are affected by the proceedings.[134]

This approach requires that an individualised process is followed for each application. It places a particularly heavy strain on the VPRS, responsible not only for the processing of thousands of individual applications, but also for obtaining information

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[129] Christine van den Wyngaert, 'Victims Before International Criminal Court: Some Views and Concerns of an ICC Trial Judge' (2011) 44 Case Western Reserve Journal of International Law 475, 492.

[130] Luke Moffet, 'Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and the Hague' (2015) 13 Journal of International Criminal Justice 281, 292.

[131] Susana SaCouto and Katherine Cleary Thompson, 'Regulation 55 and the Rights of the Accused at the International Criminal Court' (2014) 21 Human Rights Brief 17, 18.

[132] ibid; Van den Wyngaert (n 129) 482; *The Prosecutor v. Bemba Gombo,* Judgment, ICC-01/05-01/08-3343 (21 March 2016) para 18.

[133] SaCouto and Cleary Thompson (n 131) 20.

[134] Van den Wyngaert (n 129) 481–482.

omitted from incomplete applications and redacting sensitive information before sending the applications forward to the parties.[135] The Defence has repeatedly complained that "the burden of responding to applications to participate, and the 'potentially detrimental' allegations raised therein, was impairing the Defence's preparation for the hearing",[136] and that the time spent examining and making submissions on victim applications was "to the complete detriment of its capacity to investigate and prepare its own defence for the trial".[137] On the impact on the Chambers, Judge Van den Wyngaert wrote that "before the start of the hearings on the merits in the Katanga case, for several months, more than one third of the Chamber's support staff was working on victims' applications".[138]

This process places not only a heavy burden on the organs of the Court, but results in victims themselves having to wait for a long time in between the submission of their applications and achieving recognition under Rule 85, as well as learning whether they have gained participatory rights; even in early cases with fewer applicants, victims waited up to 2 years to hear back.[139] In *Bemba,* ongoing delays resulted in the admission of applicants at a very late stage in the proceedings by which time a significant part of the trial had unfolded.[140] The resulting frustration of victims has been noted by victims' representatives, who have stated that most victims find the application procedure complicated and require assistance in completing the standardised forms.[141]

This frustration is compounded by the collective representation allocated for those who have obtained victim status. The organisation REDRESS in a 2012 report reviewing the practice of participation noted a 'mismatch' between victim participation and the information required from them:

> Because of the individualised processing requirements, victims are requested to provide an array of personal information, including information to prove their identity, information on their experience of crimes under the jurisdiction of the Court and how they suffered harm, even though they will invariably be heard through a legal representative which represents their interests collectively with the interests of other victims also being represented. Thus, there is an apparent mismatch between the typical way in which victims will ultimately participate and the information they are required to produce in order to enable them to participate.[142]

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[135] SaCouto and Cleary Thompson (n 131) 18.

[136] Christine H Chung, 'Victims' Participation at the Internatinal Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6 Northwestern Journal of International Human Rights 459, 491.

[137] SaCouto and Cleary Thompson (n 131) 18; *Prosecutor v Bemba,* Defence Response to the Third Transmission of Victims' Applications for Participation in the Proceedings, ICC-01/05-01/08-945 (11 October 2010) para 3; *Prosecutor v Bemba,* Defence Observations on the Seventh Transmission to the parties and legal representatives of redacted versions of applications for participation in the proceedings, ICC -01/05-01/08-1053 (26 November 2010) para 5.

[138] Van den Wyngaert (n 129) 493.

[139] Mariana Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead' (2009) 16 ILSA Journal of International and Comparative Law 497, 512.

[140] Mariana Pena and Gaelle Carayon, 'Is the ICC Making the Most of Victim Participation' (2013) 7 The International Journal of Transitional Justice 518, 528.

[141] ibid 527.

[142] REDRESS, 'The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future' (REDRESS October 2012) 16.

Victims' access to participation relies on legal representation, as no absolute statutory right of victims to participate in person exists.[143] Rule 90 on the representation of victims allows choice of counsel, however, under Rule 90(3) the Court may allocate a common legal representative (CLR). As such, the appointment of CLRs to represent victims has become the standard approach adopted by the ICC;[144] it has been viewed as, both, an "unavoidable necessity" to ensure effectiveness, and controversial on the basis that it negates the emphasis on choice included within Rule 90.[145] Furthermore, CLRs must represent massive numbers of victims before the Court, on the basis of arbitrary groupings, such as geographical location.[146] For example, in *Lubanga*, victims were placed into two groups on this basis with a common legal representative for each group, and the OPCV represented the group with dual status as victim and witness.[147] Victim participation, defined in the Rome Statute as the presentation of views and concerns of victims, is, thus, difficult to achieve within the framework of such collective representation for victims, since victims often live considerable distances apart. While representatives must take instructions from their clients, it is challenging for these to be relayed to the Court due the sheer number of those represented.[148] It is then questionable how meaningful these participatory rights are, considering that victims are very rarely actually able to have their views and concerns presented before the Court.

The focus on geography, rather than on harm suffered, has also led to criticism that collective representation may "not serve the victims' interests in relation to the high number of victims of sexual violence expected to participate".[149] As such, the question of whether victims of sexual violence are adequately represented within the framework of collective representation is especially pertinent. The position of victims of sexual violence could be weakened by appointment of CLRs, due to the sensitive nature of sexual crimes. Appointing a single representative to represent large numbers of victims problematically assumes that all those applying to participate share uniform interests. Furthermore, considering the hesitancy of victims of sexual violence to speak to their CLR about these crimes in particular, besides other harms suffered, collective representation could lead to a prioritisation of other crimes over those of a sexual nature.[150] Thus, arbitrary divisions of victims and grouping many victims together for the purposes of representation disregards the specificity that accompanies victimhood arising from sexual violence.

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[143] *Prosecutor v Banda,* Decision on the participation of victims in the trial proceedings, ICC-02/05-03/09-545 (20 March 2014) para 20; *Ruto and Sang,* Decision on victims' representation and participation, ICC-01/09-01/11-460 (3 October 2012) para 21.

[144] *Prosecutor v Banda and Jerbo,* Order instructing the Registry to start consultations on the organisation of common legal representation, ICC-02/05-03/09-138 (21 April 2011) para 4; Anni Pues, 'AVictim's Right to a Fair Trial at the International Criminal Court? Reflections on Article 68(3)' (2015) 13 Journal of International Criminal Justice 951, 961.

[145] Emily Haslam, Rod Edmunds, 'Whose Number is it Anyway? Common Legal Representation, Consultations and the 'Statistical Victim'' (2017) 15 Journal of International Criminal Justice 931, 936–937.

[146] Van den Wyngaert (n 129) 489.

[147] Jean de Dieu Sikulibo, *Sexual Violence and Effective Redress for Victims in Post-Conflict Situations: Emerging Research and Opportunities* (IGI Global 2019) 175.

[148] Van den Wyngaert (n 129) 489.

[149] Women's Initiatives for Gender Justice, 'Statement by the Women's Initiatives for Gender Justice on the Opening of the ICC Trial of Jean-Pierre Bemba Gombo' (22 November 2010) <http://www.iccwomen.org/documents/Bemba_Opening_Statement.pdf.pdf>.

[150] Jean de Dieu Sikulibo, 'International Criminal Justice and the New Promise of Therapeutic Jurisprudence: Chelllenges in Conflict-Related Sexual Violence Cases' in Debarati Halder, K Jaishankar (eds) *Therapeutic Jurisprudence and Overcoming Violence Against Women* (IGI Global, 2017), 231.

In light of the large number of applications received, the Court has tended to enact measures to preserve the expediency of proceedings, such as the imposition of strict deadlines for victim applications and the abovementioned collectivisation of the participatory process.[151] Participation applications in the Kenya situation adopted a two-tier approach, wherein participation through a CLR required a simple registration procedure in which eligibility was reviewed by the representative themselves for the purposes of the presentation of views and concerns without personally appearing before the Court.[152] Only victims requesting to personally share their views and concerns before the Court were requested to utilise the application procedure established under Rule 89.[153] This bifurcated approach significantly cuts down the burden placed on the organs of the Court in the individualised application process, as the parties, Registry and Chambers need only review the applications of victims wishing to express their views and concerns personally before the Court. While its adoption has been criticised on the point of collectivisation and removal of the individualised nature of participation, past decisions show that few participants come before the Court in person, with the bulk of victim participation taking place through the CLR. While this is a point of criticism in itself, in light of expediency requirements, utilising the two-tier approach can improve victims' experiences as it manages expectations by making clear how the victim will ultimately participate, removing the mismatch identified in the aforementioned REDRESS report that leads to victims' disappointment.[154]

C. Victim Expectations and the Limits of the ICC's Participation Scheme in the Trial Process: Filling in the Gaps

While certain limits of the participation scheme may be rectified to produce a more meaningful process for victim participants, removing all barriers to participation is impossible to reconcile with the necessities of a trial process, including the fair trial rights of the accused. The rendering of a verdict within the ICC process can, in itself, create friction – inevitably, a trial resulting in an acquittal can cause immense disappointment for victims.

Notwithstanding, it is important that the ICC takes the purposes of its participatory scheme into consideration in its decision-making processes. Victim participation has repeatedly been recognised as important for its truth-telling function; at the closing of the *Lubanga* trial, the OPCV representative aptly stated:

> "the essential concern of the victims participating in this trial, over and beyond the conviction of the accused, is therefore to contribute to the establishment of the truth, seeking for the truth and establishing the truth".[155]

However, the Court has not outlined its broader perceptions of how the scheme contributes towards restorative justice: is the use of victim participation a reconciliatory measure or a means to provide healing for victims? Without elaborating the underlying goals of the participatory scheme and the types of justice that the Court cannot provide to victims, it is

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[151] Pues (n 144) 960.

[152] ibid; SaCouto and Cleary Thompson (n 131) 20.

[153] ibid.

[154] SaCouto and Cleary Thompson (n 131) 20–21.

[155] *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Transcript, ICC-01/04-01/06 (25 August 2011) 62.

challenging to manage victims' expectations towards their role in the ICC's justice process.[156]

To increase the meaningfulness of the participation scheme, the expectations of victims must be considered. While the Chambers have provided various modalities of victim participation, it has been suggested that these do not necessarily correspond with victims' needs.[157] Although it is impossible to determine the needs of victims as a monolith, studies suggest that victims are often content with participation to carry an expressive function, that is, the possibility to express their views and concerns and to remain informed and duly notified of the development of their case by the ICC and their legal representatives.[158] Paolina Massida argues that the majority of victims expect their story to be told by someone, other than the prosecutor, who will represent their interests in the proceedings.[159] Thus, whilst the participatory scheme as it stands is a step forward for victims' rights in one respect, its other consequences, namely, victim inequalities and impunity arising from the failure to lay charges of sexual violence, combined with limited avenues to affect charges brought and the exclusion of victims of uncharged crimes, are a step backwards in the same breath.

The limits imposed on victim participation in the trial process imply that victims are still unable to narrate their stories in a way that meets their needs. Several alternatives exist to complement the limited trial process. The problems associated with the issuance of a verdict could be avoided through the use of truth and reconciliation commissions (TRCs), which do not focus on criminal prosecution, but rather work towards establishing a record of human rights violations.[160] While historically these commissions have not had the best record on sexual violence, the commission set up in Sierra Leone was lauded for offering a "complex account of the social, legal, political and cultural forces that conspired to render women more vulnerable to a range of outrages and degradations".[161] This demonstrates that TRCs could be considered an option to help fill in the gaps present in the Court's participation scheme – nonetheless, these commissions are often perceived as far less authoritative and condemnatory than the Court process and are vulnerable to political pressure and corruption, indicating that through solely these means, once again, a meaningful participatory process, in which victims' experiences are validated and listened to, can be challenging to achieve.[162]

The ICC's creation of non-judicial programmes is a worthy alternative to be considered and invested in. The Trust Fund for Victims (TFV) is responsible for reparations, but is additionally mandated to provide "physical or psychological rehabilitation or material support for the benefit of victims and their families".[163] The TFV can, therefore, assist victims in countries under the Court's jurisdiction, even if they are

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[156] Claire Garbett, 'The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice' (2017) 5 Restorative Justice: An International Criminal Journal 198., 209.

[157] Mouthaan (n 114) 630; Jo-Anne Wemmers, 'Victim Policy Transfer: Learning from Each Other' (2005) 11 European Journal of Criminal Policy and Research 121; War Crimes Research Office, 'Victim Participation at the Case Stage of Proceedings (2009).

[158] Jo-Anne Wemmers, 'Victims' Rights and the International Criminal Court: Perceptions Within the Court Regarding the Victims' Right to Participation' (2010) 23 Leiden Journal of International Law 629, 643; Mouthaan (n 114) 631.

[159] Mouthaan (n 114) 631.

[160] SaCouto (n 6) 353.

[161] Katherine M Franke, 'Gendered Subjects of Transitional Justice' (2006) 15 Columbia Journal of Gender and Law 813, 827.

[162] SaCouto (n 6) 354.

[163] TFV Regulation 56.

not connected to the specific crimes or suspects under investigation, covering a wider range of beneficiaries than the participation and reparations schemes. Thus, access to assistance is independent of the Court process and does not rely on a conviction.

In designing such programmes, the TFV actively consults with the victim population,[164] and as such, these non-judicial programmes have the potential to be successful in bridging the gaps between victims' needs and the assistance they require from the Court. For instance, following the *Bemba* acquittal in 2018, the TFV decided to accelerate the launch of an assistance programme in the Central African Republic for both victim participants in the *Bemba* case, as well as victims of sexual and gender-based violence, more broadly.[165] This example highlights that the TFV is aware of the importance of the creation of non-judicial programmes in response to victims' needs. However, the ICC's TFV remains underfunded and underdeveloped, with much of this external assistance funded through voluntary contributions. Encouraging resource allocation and stakeholder investment into these extra-judicial programmes could be of great benefit to the victims whom the limited participatory process is currently failing.

V. Recommendations for Change: The Way Forward

While the ICC's victim participation scheme is a commendable addition, it is evident that the scheme embodies limits that have negatively impacted victims of sexual violence. Considering both the procedural obstacles and the expectations of victims as outlined in the previous chapter, this conclusion will make recommendations for change so as to allow the ICC to achieve meaningful victim participation in the proceedings before it. As described earlier, meaningful victim participation encompasses a participation scheme that allows the actual presentation of victims' views and concerns as envisaged by the Statute, while considering their expectations and needs. In light of this, various recommendations are put forth below to illustrate how the ICC's participation scheme could better serve victims of sexual violence.

1. The ICC must clarify the purpose of its participation scheme. Is the scheme a reconciliatory measure, or a means for victims to have their voices heard? Setting out the rationale and goals of the participation scheme can help to manage victims' expectations.
2. As the truth-seeking function of the participation scheme has been emphasised, it is important that the scheme allows victims an opportunity to help frame the scope of the case(s) against their alleged tormentor(s). This can be achieved by allowing victim involvement at the pre-trial stage of proceedings and by adopting an amendment procedure for indictments that contains safeguards to protect the rights of the accused. Allowing the possibility of indictment amendments is particularly important in cases where evidence of sexual violence arises during proceedings, due to the nature of sexual crimes. The Court has been receptive in understanding the difficulties faced by victims of sexual violence, insofar as delayed reporting and the

[164] Trust Fund for Victims, 'Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2010 to 30 June 2011', ICC-ASP/10/14 (1 August 2011) 5.

[165] Trust Fund for Victims, 'Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2017 to 30 June 2018', ICC-ASP/17/14 (28 July 2018) 16.

associated stigma and shame are concerned.[166] Thus, the Court could extend this understanding to instances where sexual violence evidence arises in proceedings by considering the aforementioned when deciding whether an indictment can be amended. As part of this understanding, judges could alternatively invite the Prosecution to include sex crimes charges where such evidence arises at trial.

3. All organs of the Court must invest increased financial and human resources into the investigation of sexual violence to allow meaningful participation and access to reparations for victims of sexual violence, as participation and reparations are linked to the crimes charged and convictions, respectively.
4. As collective representation is increasingly relied upon to preserve expediency, appointing representatives on the basis of the crimes victims have endured is imperative for the actual presentation of their views and concerns. In this regard, victims of sexual violence deserve to be appointed a representative that can speak to the specificities of the struggles they have faced by taking into account the societal consequences they have endured as a result of the sexual violence perpetrated against them.
5. A harmonised participation scheme must be adopted to prevent victim inequalities and the impact such inequalities could have on reconciliation within communities. Adopting a harmonised scheme would improve expediency as the Chamber would only have to assess the allowance of exceptional rights. A harmonised approach would also help to manage victims' expectations as they would be informed from the outset of the modalities of their participation.
6. The rights of victims and the rights of the accused must no longer be perceived as inherently contradictory. Nonetheless, the trial process is intrinsically limited by certain judicial safeguards. Therefore, the Court must encourage resource allocation and stakeholder investment into extra-judicial programmes to benefit the victims whom the limited participatory process is currently failing.

The ICC's victim participation scheme is certainly a step forward for victims of sexual violence, and for victims of international crimes more broadly. However, for the scheme to benefit those it seeks to help, it must be reworked with the focus of acknowledging victims' experiences and listening to their voices – a function of justice that must not be ignored. If the underlying purpose of the victim participation scheme is to, indeed, contribute to restorative justice, meaningful participation is required, and the Court must be creative in addressing these challenges.

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[166] *The Prosecutor v. Bosco Ntaganda,* Judgment, ICC-01/04-02/06 (8 July 2019) para 88.

The Energy Charter Treaty, Frivolous Claims and the Looming Threat of Investor-state Dispute Settlement: Any Hope from the EU's Modernisation Proposal?

Oskari Vaaranmaa*
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INTERNATIONAL INVESTMENT LAW; FRIVOLOUS CLAIMS; ENERGY CHARTER TREATY

Abstract

The system of investor-state dispute settlement ('ISDS') is being increasingly perceived as a hindrance to States' efforts to regulate against climate change. A potential scenario for this concern is that, as more robust environmental regulation is made, investors who have been adversely impacted in the fossil fuel sector, will threaten to sue States under international investment agreements ('IIAs'). This is not just a hypothetical concern. Recently, German energy company Uniper has threatened to take legal action against Netherlands for its coal phase out plan. Against this backdrop, contracting parties to the Energy Charter Treaty ('ECT'), the world's most widely invoked IIA, are attempting to modernise the ECT to, *inter alia*, better accommodate States' right to regulate. Amongst the proposed amendments is the inclusion of a provision on frivolous claims, under which claims that are found to be legally untenable can be summarily dismissed. This paper will put forward the argument that, based on existing jurisprudence on frivolous claims and the European Union's ('EU') proposal, the provision will likely be too weak to effectively address the types of cases that ECT contracting parties are concerned about. In other words, as far as the prevailing line of jurisprudence is concerned, the vast majority of the anticipated cases will be too legally and factually complicated to be addressed on a summary basis. That is unless Tribunals interpreting the modernised ECT make a conscious effort to broaden the provision's applicability to more complex cases.

I. Introduction

Following the collapse of the Soviet Union, Western European States were eager to tap into the vast energy resources of Eastern Europe.[1] Equally, in the words of Hobér, the latter States were 'rich in energy but in great need of investment'.[2] The product of these

* The author is a recent LLM graduate from the University of Groningen. He wrote his thesis on the topic of frivolous claims in the ICSID system (Research question: To what extent has a *jurisprudence constante* emerged on the phrase 'manifestly without legal merit' under ICSID Arbitration Rule 41(5)?). The following paper is based on an adaptation of this thesis. This article was selected for publication and finalised before the author's selection to the traineeship programme of the European Commission. Thus, the content of the article is based exclusively on publicly available material, and the views, opinions, assumptions and analyses expressed therein belong solely and unequivocally to the author. Email: oskari.vaaranmaa@gmail.com

1 Andrei Konoplyanik and Thomas Wälde, 'The Energy Charter Treaty and its Role in International Energy' (2006) 24 Journal of Energy & Natural Resources Law 523, 524-530 and 556-557.

2 Kaj Hobér, 'Investment Arbitration and the Energy Charter Treaty' (2010) 1 Journal of International Dispute Settlement 153, 154.

two wants was the ECT, which is now the most widely invoked instrument in investor-state arbitration, representing a fifth of over 1000 cases.[3]

Under Part III of the ECT, each contracting party pledges to protect investments made by investors from every other contracting party.[4] Thus, the ECT seeks to ensure that if foreign investments are frustrated by, for instance, discrimination or expropriation, the investor is able to take legal action against the host State (i.e. the State in which the investment is made) through investment arbitration.[5] Although the investor and State must seek to amicably settle the dispute, there is no subsequent need to resort to the domestic courts of the host State, as international arbitration is immediately available through article 26(4).[6]

However, more recently, the ease at which legal proceedings can be initiated against States has become problematic to ECT contracting parties. One of the general anxieties is that as States attempt to implement environmental legislation, they risk facing ISDS procedures started by energy investors. More specifically, since such regulation may result in economic damages to the investment, the investor may have grounds to allege various breaches of Part III of the ECT. Consequently, the fear of facing a long, costly arbitration leads to so-called 'regulatory chill'. Kyla Tienhaara, who has written extensively on this topic, describes the concept in the following succinct manner: 'governments will fail to regulate in the public interest in a timely and effective manner because of concerns about [ISDS].'[7] It goes without saying that, in the context of climate change, States should be as free as possible to take steps against its devastating effects.

The fear of litigious investors is not unjustified. Recently, German energy company Uniper has threatened to sue the Dutch government under the ECT for the ordered closure of its Maasvlakte power plant.[8] This order comes as a part of the Netherland's effort to phase out coal power by 2030.[9]

From NGOs to legal professionals alike, Uniper's legal claims have come under heavy criticism.[10] However, what is even more worrying is that there is strong reason to suspect that this situation will not remain the last of its kind. Indeed, research by Tienhaara and Cotula indicates that 'the ECT protects at least 51 coal plants that are at risk of stranding in a Paris-compliant scenario'.[11] The scenario being referred to here is one in which States succeed in limiting the increase in average global temperature to

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3 UNCTAD, 'World Investment Report 2020' (UNCTAD 2020) 111 <https://unctad.org/webflyer/world-investment-report-2020> accessed 9 November 2020.

4 Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (ECT) part III.

5 ibid art 26.

6 ibid arts 26(1), 26(4); See also IISD, *Exhaustion of Local Remedies in International Investment Law* (IISD 2017) 16.

7 Kyla Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' (2017) 7 Transnational Environmental Law 1, 4.

8 Pekka Niemelä and others, 'Risky Business: Uniper's Potential Investor-State Dispute Against The Dutch Coal Ban' (*EJIL:Talk!*, 18 March 2020) <https://www.ejiltalk.org/risky-business-unipers-potential-investor-state-dispute-against-the-dutch-coal-ban/> accessed 9 November 2020.

9 ibid.

10 Greenpeace, 'Greenpeace to Finland's energy giant Fortum: "Walk the talk on climate"' (*Greenpeace*, 24 October 2019) <https://www.greenpeace.org/finland/tiedotteet/2532/greenpeace-to-finlands-energy-giant-fortum-walk-the-talk-on-climate/> accessed 7 December 2020; Amandine van den Berghe and Veder M Jolie, 'Legal opinion on Uniper's legally misconceived ISDS threat to Dutch coal phase-out' (Client Earth, 27 November 2019) 1 <https://www.clientearth.org/media/dkji32cj/clientearth-letter-and-analysis-regarding-the-uniper-isds-threat-ce-en.pdf> accessed 8 December 2020.

11 Kyla Tienhaara and Lorenzo Cotula, *Raising the Cost of Climate Action: Investor-State Dispute Settlement and Compensation for Stranded Fossil Fuel Assets* (International Institute for Environment and Development 2020) 32.

'well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels', as provided in article 2(a) of the Paris Agreement of the United Nations Framework Convention on Climate Change.[12] This raises an interesting question with regard to ECT modernisation: Is there any hope for States to prevent, or significantly reduce, the potential influx of energy-related investment arbitrations?

The short answer to this question is yes. However, whether these cases can be deemed 'frivolous' and dismissed through a summary procedure is a more complicated line of inquiry. This query accordingly is the core subject matter of this paper.

Tsai-Fang Chen defines frivolous claims as 'claims that have no real possibility of prevailing' and 'lack legal merit'.[13] Intent may be present, but is not necessary. It may also be quite difficult to discern.

With regard to ECT modernisation, contracting parties have proposed to include an article to directly address such claims. One of the more influential and well-elaborated proposals comes from the European Union ('EU').[14] In light of its proposal, this paper seeks to investigate whether, in the future, claims made by litigious fossil fuel companies (such as Uniper), could be deemed frivolous, and subsequently dismissed. Throughout the rest of the paper, such hypothetical legal claims will be referred to as 'Uniper-like'. All that this phrase entails is possible cases wherein a litigious investor initiates ISDS proceedings against a State for damages that were alleged to be caused by the latter's efforts to take action against climate change.

In this paper, it will be argued that based on the current state of jurisprudence on frivolous claims, the EU's proposed article will likely be too weak to address such claims. In spite of the absence of *stare decisis* in investment arbitration, prior jurisprudence will provide useful guidance for this query, since the proposed article is closely based upon Arbitration Rule 41(5) of the International Centre for Settlement of Investment Disputes ('ICSID'), as well as articles 10.20.4-10.20.5 of the Dominican Republic-Central American Free Trade Agreement ('DR-CAFTA').[15] Indeed, arbitral tribunals interpreting these provisions appear to have narrowed the applicability of such provisions to a very narrow range of legally untenable cases. The obverse of this is that more complicated legal cases, similar in content and context to Uniper, will likely be too legally and factually complex to be addressed through a summary procedure. Instead, they will require full hearings.

To arrive at this conclusion, this paper will be structured as follows. Firstly, in Part II, for the sake of context, a summary of the ECT modernisation process will be provided. Then, in Part III, Uniper's legal claims will be explored. In Part IV, the EU's proposed amendments will be outlined. After this, Part V will provide a run-through of

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[12] Paris Agreement under the United Nations Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) (2015) 55 ILM 743 (Paris Agreement), art 2 (a).

[13] Tsai-Fang Chen, 'Deterring Frivolous Challenges in Investor-State Dispute Settlement' (2015) 8 Contemporary Asia Arbitration Journal 61, 64-65.

[14] European Commission, 'EU text proposal for the modernisation of the Energy Charter Treaty (ECT)' (*European Commission*, Brussels, 27 May 2020) <https://trade.ec.europa.eu/doclib/docs/2020/may/tradoc_158754.pdf> accessed 9 November 2020.

[15] ICSID Rules of Procedure for Arbitration Proceedings (adopted 25 September 1967, entered into force 1 January 1968, as amended in 2006) (ICSID Arbitration Rules) rule 41(5) available at <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 9 November 2020; Dominican Republic-Central America Free Trade Agreement (adopted 5 August 2004, entered into force 1 January 2009) art 10.20.4 (DR-CAFTA); Polonskaya, 'Frivolous Claims' (n 63) 6.

jurisprudence on ICSID Arbitration Rule 41(5), why it will be unhelpful to address the types of claims that ECT contracting parties are worried about, and why it may be interpreted too narrowly by Tribunals. Lastly, in Part VI, some concluding remarks will be made.

II. ECT Modernisation: Concern over Frivolous Claims

The modernisation of the ECT has recently concluded its third round of negotiations.[16] Furthermore, the ECT Conference adopted a range of policy options which are to be discussed by the contracting parties.[17] As was previously mentioned, one of these proposals concerns frivolous claims.

In the 'Decision of the Energy Charter Conference,' the concern over frivolous claims surfaces on several occasions. Albania, for instance, makes the argument that '[t]he dispute settlement clause of the ECT does not provide the proper procedure/mechanism to avoid or early dismiss frivolous and unmeritorious claims.'[18] Furthermore, Georgia states that, in its experience, 'frivolous and unmeritorious investment cases initiated for various tactics to put pressure on the host contracting party is a serious problem.'[19] Indeed, this appears to be a direct reference to the 'regulatory chill'-argument. In relation to this, an extensive analysis by Moehlecke strongly suggests that less economically developed states are more prone to regulatory chill, as they tend not to possess the necessary funds to participate in lengthy, international lawsuits.[20] Thus, Georgia's concerns are very much justified. Switzerland goes on to add that '[t]he existing reference to the ICSID Rules might not suffice for the other procedures' under the ECT's arbitration clause.[21]

Now, to borrow the words of Georgia's representatives, the case of Uniper appears to be a textbook example of an ISDS threat used 'to put pressure on the host contracting party.'[22] For the sake of context, this paper will next outline some of Uniper's arguments. This also serves to elucidate the underlying legal complexity of such cases.

III. Uniper's Potential Claims: 'legally misconceived'?

Firstly, this point should be prefaced by the fact that no legal proceedings have been begun as the date of writing. Indeed, this point has been emphasised by Uniper's Finnish parent company Fortum itself.[23] Be that as it may, for the sake of argument and future reference, it is worth outlining Uniper's potential arguments.

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[16] European Commission, 'Third Negotiation Round to Modernise Energy Charter Treaty' (*European Commission*, 6 November 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2206> accessed 9 November 2020.

[17] Energy Charter Secretariat, 'Modernisation of The Treaty' (*Energy Charter Secretariat*) <https://www.energychartertreaty.org/modernisation-of-the-treaty/> accessed 9 November 2020.

[18] Energy Charter Secretariat, 'Decision on the Energy Charter Conference' (*Energy Charter Secretariat Document CCDEC 2019 08 STR*, Brussels, 6 October 2019) 30 <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2019/CCDEC201908.pdf> accessed 8 December 2020.

[19] ibid.

[20] Caroline Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty' (2019) 64 International Studies Quarterly 1, 10.

[21] ibid.

[22] Energy Charter Secretariat (n 18) 30.

[23] Fortum, 'Why Uniper?' (*Fortum*) <https://www.fortum.com/about-us/uniper/why-uniper> 9 November 2020.

This point should *also* be prefaced with a note on the *Achmea* judgment of the Court of Justice of the European Union ('CJEU').[24] The ruling concerned an arbitral award rendered on the basis of the Netherlands-Slovakia BIT.

Put very briefly, the CJEU ruled that the arbitration clause of the BIT conflicted with the Treaty on the Functioning of the European Union ('TFEU'). Indeed, according to article 344 TFEU, 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the Treaties'.[25] Since the arbitral tribunal would technically be empowered under the arbitration clause to interpret EU Law, this would conflict with article 344. Next, article 267 concerns the jurisdiction of the CJEU to give preliminary rulings on matters of EU law referred to it by a 'court or tribunal of a Member State'.[26] Put very simply, since the arbitral tribunal does not have any formal link to the judicial system of an EU Member State, it does not constitute a 'court or tribunal of a Member State.[27]

This ruling effectively sounded the death knell for intra-EU BIT's. However, whether the *Achmea* judgment has similar implications with regard to dispute settlement under the ECT is less clear. Thus, recently, Belgium asked the CJEU for 'an opinion on the compatibility of the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty with the European Treaties.'[28] This point is undoubtedly beyond the remits of this paper. However, it suffices to say that whatever CJEU chooses to pronounce on this issue is likely to have significant implications on the arguments put forward in this paper.

Now, in any event, Lawyers Van den Berghe and Jolie have written a brilliant legal opinion dissecting Uniper's potential legal claims.[29] Based on statements made by representatives of Uniper, it appears that the company is alleging breaches of the Fair and Equitable Treatment-standard ('FET'), as well as an indirect expropriation of its investment.[30] The report provides a succinct analysis of the weaknesses of Uniper's arguments, and the author encourages all interested readers to go through the document themselves. For the purposes of this paper, a short summary of Uniper's legal arguments, and the authors' counterarguments, will suffice.

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[24] Case C-284/16 *Slowakische Republik (Slovak Republic) v Achmea BV* [2018] ECLI:EU:C:2018:158.

[25] ibid para 32.

[26] ibid paras 43-46.

[27] ibid para 47.

[28] Kingdom of Belgium, Foreign Affair, Foreign Trade and Development Cooperation, 'Belgium requests an opinion on the intra-European application of the arbitration provisions of the future modernised Energy Charter Treaty' (*Diplomatie.belgium.be*, 3 December 2020) < https://diplomatie.belgium.be/en/newsroom/news/2020/belgium_requests_opinion_intra_european_application_arbitration_provisions> accessed 13 December 2020; See also Matthew Happold, 'Belgium asks European Court of Justice to opine on compatibility of Energy Charter Treaty's investor-State arbitration provisions with EU law' (*EJIL:Talk!,* 8 December 2020) <https://www.ejiltalk.org/belgium-asks-european-court-of-justice-to-opine-on-compatibility-of-energy-charter-treatys-investor-state-arbitration-provisions-with-eu-law/> accessed 9 December 2020.

[29] Van den Berghe and Jolie (n 10).

[30] ibid 2.

A. Indirect Expropriation

One of Uniper's arguments concerns indirect expropriation.[31] Under a regular expropriation, a State directly takes control of an investor's property. In contrast, under an indirect expropriation, a measure or series of measures taken by the State lead to a substantial loss in the value and profitability of an investment.[32] Intent need not be present.[33] Under ECT article 13, the notion of an indirect expropriation is expressed in the phrase 'measure or measures *having effect equivalent to nationalization or expropriation.*'[34] If an expropriation takes place, compensation must be provided for the investor.[35] Thus, Uniper's first potential argument is that, through the coal phase out plan, the Dutch government is substantially depriving its investment of value, which results is an indirect expropriation.

In response to this argument, the authors draw the essential distinction between non-compensable regulation and indirect expropriation. Indeed, under customary international law, it is well established that if a regulation is taken 'for a public purpose, carried out in a non-discriminatory manner and in accordance with due process of law', no compensation needs to be paid.[36] This is sometimes referred to as the 'police powers' doctrine, which recognises that 'state measures that are prima facie lawful exercises of the government's powers… may affect foreign interests considerably without amounting to expropriation.'[37]

However, the distinction between non-compensable regulation and expropriation is not black and white. David Khachvani rightly points out the marked dilemma here. On one hand, creating 'an unqualified exception from the duty of compensation for all legitimate regulatory measures would hardly be compatible with the language of the non-expropriation'. [38] However, equally, 'encumbering all regulatory changes with the duty of compensation would be unduly burdensome on States' sovereignty and might induce a so-called regulatory chill.'

Having said that, one could certainly argue that, in the present case, the situation is much clearer: the Netherlands, a low-lying country that faces severe risks from elevated sea levels, needs to act quickly to mitigate climate change's effects.[39] If anything, this is precisely the situation where a State should be as unencumbered as possible by ISDS threats. Consequently, to summarise the authors' arguments; the coal phase out plan is for a very valid public purpose,[40] and is non-discriminatory because the plan applies to all coal power plants.[41]

The last criterion of due process may be more difficult to discern in some instances. As put by Kotuby, '[e]very state has vastly different procedures to determine

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[31] 'Uniper and its main shareholder Fortum have argued that Uniper was being "de facto expropriated without compensation"'; See Van den Berghe and Jolie (n 10) 5.

[32] Robert Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation' (2004) 74 The British Yearbook of International Law 115, 119.

[33] ibid 120.

[34] ECT (n 4) art 13(1).

[35] ibid.

[36] David Khachvani, 'Non-Compensable Regulation versus Regulatory Expropriation: Are Climate Change Regulations Compensable?' (2020) ICSID Review Foreign Investment Law Journal 1, 2.

[37] Prabhash Ranjan, 'Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay' (2019) 9 Asian Journal of International Law 98, 103.

[38] Khachvani (n 36) 2.

[39] Van den Berghe and Jolie (n 10) 8.

[40] ibid 7-8.

[41] ibid 9.

what is "justice," and those procedures produce vastly different final judgments.'[42] However, for the purposes of this paper, the author believes that Hovell's elaboration on the *instrumentalist model* of due process suffices:

> The model imagines a system based on clear and determinate standards, in which decision makers apply those standards rather than their own personal notions of fairness, justice, or appropriateness. The resulting decisions are amenable, in turn, to review by a judicial arbiter to determine whether the decisions can be counted as correct or incorrect.[43]

Indeed, in light of this elaboration, interpreting the due process criterion does not pose any significant problems. Here, Van den Berghe and Jolie's point is worth repeating at length:

> Not only is the legislative proposal a good faith initiative to address a generally recognized fundamental issue of general interest. In addition, the issue is being handled according to the highest standards of legislative decisions-making as embodied in the legal system of the Netherlands. [44]

Now, to play the devil's advocate for a moment, one counter-argument that could be raised is that ECT's Article 13 *directly* replicates the wording of the police powers doctrine, with the exception that compensation is required even if the measure being taken for a public purpose, is non-discriminatory, and is in line with due process.[45] Thus, applying the *maxim lex specialis derogat legi generalis* could lead to the conclusion that the ECT requires that compensation be paid to investors for *all* government regulations that have the 'effect equivalent to an expropriation'.[46] Even if there was a general customary international law which provided that non-compensable regulation exists (and there is), the ECT's expropriation provision, which could be interpreted as the *lex specialis*, appears to always require compensation. The Energy Charter Secretariat recognised the complexity of the situation in its 2012 report on the 'Expropriation Regime under the Energy Charter Treaty', stating that:

> The notion that the exercise of a state's "police powers" under international law will not give rise to a right of compensation is well established. The position in the realm of investment treaty arbitration is less certain because of the broad formulation of the expropriation provision in investment treaties, including most BITs and the ECT.[47]

When faced with a similarly worded article on expropriation as the ECT, the *Philip Morris v Uruguay* Tribunal employed Article 31(3)(c) of the Vienna Convention on the

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[42] Charles T Kotuby, 'General Principles of Law, International Due Process, and The Modern Role of Private International Law' (2013) 23 Duke Journal of Comparative & International Law 411, 424.

[43] Devika Hovell, 'Due Process in the United Nations' (2016) 110 Asian Journal of International Law 1, 5-6.

[44] ibid 9-10.

[45] ECT (n 4) art 13.

[46] ibid.

[47] Energy Charter Secretariat, 'Expropriation Regime under the Energy Charter Treaty' (Energy Charter Secretariat 2012) 36.

Law of Treaties ('VCLT'), which obliges the treaty interpreter to take into account '[a]ny relevant rules of international law applicable in the relations between the parties', which is understood to include customary international law.[48] Thus, the police powers doctrine was incorporated from customary international law to decide that Uruguay's tobacco plain packaging law did not constitute an indirect expropriation of the Claimant's trademarks.[49] Furthermore, regarding the interaction between treaties and customary international law, an important statement by the ICJ is also worth keeping in mind:

> …even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of its separate applicability.[50]

Of course, the treaty and custom being discussed by the ICJ are not the same as in the present case. However, even in the context of the Uniper dispute, it offers food for thought.

All in all, the point that the author has been attempting to put forward which is that the distinction between non-compensable regulation and indirect expropriation under the ECT regime, remains a rather complicated affair.

The authors make an interesting final point on the matter. Even if, hypothetically, the Dutch government's actions would not constitute a non-compensable regulation, it would still not constitute an indirect expropriation. This is because the measure would need to result in a 'substantial deprivation' of the investment value.[51] This is also known as the 'sole effects' doctrine. As put by Mostafa, it is argued by some that there is a threshold beyond which 'a finding of expropriation is unavoidable.'[52] This threshold is surpassed when, for instance, 'the measure "removes all benefits of ownership", "renders property 'virtually valueless'", or 'become[s] equivalent to the [direct] expropriation of a property right'.[53] Thus, on this point, the authors' analysis suggests that the Maasvlakte power plant would likely not have much market value in any situation after 2030 due to 'evolving market conditions [in the energy sector] and the poor investment decision made in 2007-2008'.[54] Furthermore, it does not necessarily remove all benefits of ownership, since 'the proposed law does not require Uniper to close but allows it to convert to non-coal-fired production.'[55] Whilst this is a very interesting point, it is also a rather factually intensive question that begs for an entire paper of its own. However, what remains clear is that deciding on Uniper's expropriation claim would be no easy task for any Tribunal.

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[48] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) art 31(3)(c); Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America) (Judgment) [2003] ICJ Rep 161 [42].

[49] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v Oriental Republic of Uruguay* (Award 2016) ICSID Case No ARB/10/7 (*Philip Morris v Uruguay*) [290-301], [307].

[50] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Judgment) [1986] ICJ Rep 14 [175].

[51] Van den Berghe and Jolie (n 10) 12.

[52] Ben Mostafa, 'The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law' (2008) 15 Australian International Law Journal 267, 279.

[53] ibid 279-280.

[54] Van den Berghe and Jolie (n 10) 14.

[55] ibid 13.

B. Fair and Equitable Treatment

The second alleged breach concerns the FET standard under article 10(1) of the ECT.[56] Under the FET standard, the ECT contracting parties promise to, *inter alia*, 'encourage and create stable, equitable, favourable and transparent conditions for Investors of other contracting parties to make investments in its area' and 'observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.'[57] Central to the FET-standard is the concept of legitimate expectations. Put briefly, the latter concept concerns situations where a State has made specific commitments and representations on which the investor relies on when making the investment.[58] If the expectation created by the State is frustrated, then the investor has reasonable grounds to allege a breach of the FET-standard.

Here, the authors point out that 'no promises were made or guarantees were given to Uniper' and 'international norms do not guarantee that legislation will remain unchanged'. Lastly, the coal phase out plan is certainly not arbitrary or non-transparent, as it is in line with what any highly polluting company, including Uniper, should have been well-aware of in light of the global, regional and national measures being taken against climate change.[59] The authors cite a statement of the *Philip Morris* that is worth repeating here analogously: 'Manufacturers and distributors of harmful products such as cigarettes can have no expectation that new and more onerous regulations will not be imposed'.[60]

Thus, in summary, the authors' statement that Uniper's potential claims are 'legally misconceived' is not far from the truth. However, it is also clear that, in the words of Niemelä and others, 'its arguments are non-frivolous and have some legal merit in light of the basic principles of international investment law.'[61] To illustrate this point, the author will continue with some comments about the EU's modernisation proposal, and the content of the proposed articles on frivolous claims.

IV. The European Union's Proposal: Steps in the Right Direction

Before delving into the EU's proposal, the author would like to stress the point that, by and large, the proposals made therein are significant steps in the right direction. It should also be mentioned that many of the EU's suggestions are taken directly from its Comprehensive Economic and Trade Agreement ('CETA') with Canada.[62] This is particularly with regards to suggested clarifications on the contents of the FET, the definition of expropriation, and the express recognition of States' right to regulate.[63]

Moreover, the point here is not to argue that a provision on frivolous claims will be *ipso facto* ineffective, but instead to show that, based on the current state of jurisprudence on frivolous claims, the proposed article in the ECT is unlikely to be useful

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[56] ECT (n 4) art 10(1).
[57] ibid.
[58] Trevor Zeyl, 'Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law' (2011) 49 Alberta Law Review 203, 207.
[59] Van den Berghe and Jolie (n 10) 18-19.
[60] *Philip Morris v Uruguay* (n 39) [429-430], quoted in Van den Berghe and Jolie (n 10) 16.
[61] Niemelä and others (n 8).
[62] Comprehensive Economic and Trade Agreement (adopted 30 October 2016, provisional application 21 September 2017) (CETA) arts 8.9-8.45 <https://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> accessed 9 November 2020.
[63] Commission (n 14) 4-8.

against the types of claims that Georgia, and many other States, are concerned about. Thus, next, the author would like to draw the reader's attention to the EU's proposed articles that are likely to be helpful when States begin to make more robust environmental regulation.

A. Clarifying the Content of the FET-standard

To begin with, the proposal provides a much more comprehensive overview of what the notoriously ambiguous FET standard includes. Thus, the ECT's previous verbose article has been separated into a number of more appropriate, legally digestible parts. In the proposed Article 1(i) a number of clear breaches of the FET standard, such as denial of justice and fundamental breach of due process, are listed.[64] Then, in Article 1(ii) the concept of legitimate expectations is expressly laid out, more specifically whether the contracting party 'made a specific representation to an investor to induce a covered investment'.[65] Evidently, however, the ambiguity of what 'specific representations' entails is still very much present, and is likely to be a factually intensive process in most cases.

B. Distinguishing Non-compensable Regulation from Indirect Expropriation

Perhaps most importantly for the Uniper situation, there is an entirely new suggested Article on 'Regulatory Measures', which, similar to CETA, highlights the right of contracting parties to regulate within their territories to achieve 'legitimate policy objectives,' obviously including 'the protection of the environment'.[66] This point is restated in Annex X of the proposed article on expropriation, in which it is provided that in most circumstances, the protection of legitimate policy objectives that result in investor losses will not constitute an indirect expropriation.[67] Thus, the proposed articles would directly address Uniper-like claims for compensation. Now, having outlined the amended FET and expropriation provisions, it is most importantly worth exploring the proposed article on frivolous claims.

C. Frivolous Claims: Combining Two Different Models

To begin with, the first paragraph of the EU's proposed article on frivolous claims is largely based on ICSID Arbitration Rule 41(5), which allows a party in an ICSID proceeding to 'file an objection that a claim is manifestly without legal merit.'[68] This objection must be raised 'no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal'.[69] If the Tribunal finds that one or more of the claims are 'manifestly without legal merit' it must 'render an award to that effect' under Rule 41(6).[70] Admittedly, the procedural details of the EU's provision, such as the time limits, are slightly different. However, the key phrase 'manifestly without legal merit' remains untouched.

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64 ibid 5-6.
65 ibid.
66 ibid 4.
67 ibid 7-8.
68 ICSID Rules of Procedure for Arbitration Proceedings (adopted 25 September 1967, entered into force 1 January 1968, as amended in 2006) (ICSID Arbitration Rules) rule 41(5) available at <https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf> accessed 9 November 2020.
69 ibid.
70 ibid rule 41(6).

The second paragraph, instead of referring to a case that is 'manifestly without legal merit', speaks of a preliminary objection against 'a claim for which an award in favour of the Investor [cannot] be made.'[71] Such a provision is also found in CETA and DR-CAFTA.[72] Although jurisprudence on such claims is much more limited compared to Rule 41(5), some remarks are worth making.

As shown by Polonskaya, this formula first appeared in United States ('US') BITs following its long and tedious experience in *Methanex v US*,[73] in which the US argued that the Claimant lacked legally viable claims.[74] Without a mechanism to counter such claims, the US amended its Model BIT to allow subsequent Tribunals to dismiss legally unmeritorious claims.[75] Since then it has been repeated in a number of other treaties, such as DR-CAFTA.[76] Polonskaya points out that this is a much broader standard than Rule 41(5).[77] Overall, she summarises the approach of Tribunals faced with the same situation as a 'I know it when I see it', and that they have 'failed to articulate the applicable standard of scrutiny explicitly'.[78] This is in stark contrast to the ICSID standard, which has almost been fleshed out too explicitly, as will be shown later. Nevertheless, it appears that Tribunals faced with the second formulation for frivolous claims have been rather hesitant to interpret the provision too broadly.[79] Consider the following extracts from the *Pac Rim v El Salvador* arbitration.

Firstly, a 'tribunal must have reached a position, both as to all relevant questions of law and all relevant alleged or undisputed facts'. Furthermore, '[d]pending the particular circumstances of each case, there are many reasons why a tribunal might reasonably decide not to exercise such a power against a claimant, even where it considered that such a claim appeared likely (but not certain) to fail if assessed only at the time of the preliminary objection'.[80] Thus, the Tribunal is evidently treading very carefully about what kinds of claims it dismisses.

Furthermore, as stated previously, CETA has adopted such a provision as well, and article 8.33 provides that a claim may be preliminarily dismissed if 'as a matter of law… [the claim] is not a claim for which an award in favour of the claimant may be made'.[81] Admittedly, one benefit of the CETA/DR-CAFTA provision is that, due to its broad formulation, it offers considerably more leeway on what kinds of claims the

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71 Commission (n 14) 16-17.

72 CETA (n 62) art 8.33.

73 Ksenia Polonskaya, 'Frivolous Claims in the International Investment Regime: How CETA Expands the Range of Frivolous Claims That May Be Curtailed in an Expedient Fashion' (2017) 17 Asper Review of International Business & Trade Law 1, 6.

74 Michele Potestà and Marija Sobat, 'Frivolous Claims in International Adjudication: A Study of ICSID Rule 41(5) And of Procedures of Other Courts And Tribunals To Dismiss Claims Summarily' (2012) 3 Journal of International Dispute Settlement 137, 164.

75 Edward G Kehoe, 'Motions to Dismiss in International Treaty Arbitrations', in Arthur W Rovine (Ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2015* (Brill Nijhoff 2016) 90.

76 Dominican Republic-Central America Free Trade Agreement (adopted 5 August 2004, entered into force 1 January 2009) art 10.20.4 (DR-CAFTA); Polonskaya, 'Frivolous Claims' (n 73) 6.

77 Ksenia Polonskaya, 'Frivolous and Abuse of Process Claims in Investor-State Arbitration: Can Rules on Cost Allocation Become a Solution?' (2020) Journal of International Dispute Settlement 1, 7.

78 ibid.

79 ibid.

80 *Pac Rim Cayman LLC v Republic of El Salvador* (Decision on the Respondent's Preliminary Objections Under CAFTA Articles 10.20.4 and 10.20.5, 2010) ICSID Case No ARB/09/12 [110-112] (*Pac Rim v El Salvador*).

81 CETA (n 62) art 8.33.

Tribunal will allow. Polonskaya makes an interesting point that, combined with CETA's system for a more permanent investment court system, and its appellate mechanism:

> CETA tribunals will have an opportunity to see at an early stage whether a claim is viable. This effect has long-term benefits for both states and investors. For example, foreign investors will know and understand the parameters of viable claims, which will help guide decisions and actions in investment proceedings.[82]

In other words, when (and if) CETA Tribunals become operational, they will be able to establish a much more consistent line of jurisprudence on frivolous claims that will hopefully positively re-enforce the right of states to regulate on environmental matters. The unfortunate obverse of this, of course, is that, in the more ordinary circumstances of ISDS, with no formal system of *stare decisis* or appeal, there is no impetus for Tribunals interpreting the modernised ECT to establish a consistent line of jurisprudence, no matter how desirable this may be.

The only caveat to this is that, in the EU's proposal, there is also a push for the establishment of a multilateral investment court with an appellate mechanism.[83] The EU has added a clause in ECT Article 26 on dispute settlement which stipulates that:

> For greater certainty, if the contracting party which is party to the dispute and the contracting party of the Investor have both consented to the jurisdiction of the multilateral investment court, the dispute under subparagraph 2(c) shall be submitted for resolution to such a multilateral court to the exclusion of the other mechanisms of dispute resolution referred to in paragraphs (4)(a) to (c).[84]

This would, ideally, remedy some of the concerns about consistency. Yet, although the author commends the EU for such an effort to reform the ISDS system, the idea has its discontents. Even the comparatively easier task of modernising the ECT has significant hindrances. Most notably, Japan 'believes that it is not necessary to amend the current ECT provisions.'[85] Given the requirement of unanimity for amending of the ECT under Article 36(1)(a), modernising it may be a nearly impossible task.[86]

Be that as it may, for the moment, the paucity of cases on DR-CAFTA-type provisions means that it is difficult to draw definite conclusions about its potential effectiveness in combating Uniper-like claims. Evidently, the relative broadness of the standard, in comparison to the first paragraph, gives hope that the provision will be more useful in the curtailment of opportunistic claims arising from environmental regulation.

Having elaborated on the EU's proposal, this paper will now turn its focus on ICSID Arbitration Rule 41(5). Then, based on the analysis of existing jurisprudence on the Rule, some conclusions will be drawn about the effectiveness of the suggested provisions on frivolous claims.

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82 Polonskaya (n 73) 33.
83 Commission (n 14) 15-16.
84 ibid.
85 Climate Home News 'Japan Blocks Green Reform to Major Investment Treaty' (*Climate Home News,* 8 September 2020) <https://www.climatechangenews.com/2020/09/08/japan-blocks-green-reform-major-energy-investment-treaty> accessed 9 November 2020.
86 ECT (n 4) art 36(1)(a).

V. ICSID Arbitration Rule 41(5)

As was mentioned previously, Rule 41(5) concerns cases that are alleged to be 'manifestly without legal merit'.[87] Following the addition of the Rule in 2006, it has been used on 34 occasions, making it a relatively rare occurrence.[88] What is further unfortunate is that only 17 of these cases are public. In the context of this paper, it is especially frustrating that the Rule 41(5) objection in the *Vattenfall v Germany* ECT arbitration remains confidential. Alas, it would undoubtedly shed crucial light on what kinds of claims are permissible under the ECT. After all, the case is in some ways analogous to the Uniper situation, as it concerns Germany's nuclear phase out law and its effects on Vattenfall's nuclear power plants.

Nonetheless, Tribunals interpreting Rule 41(5) have made it clear that the range of cases which can be summarily dismissed is rather narrow. In the next sections, the author would like to explain why this is the case, and what implications this has for frivolous claims under the ECT.

A. The High Standard for Rule 41(5)

In spite of some divergences in the application of the Rule, the analysis of which is beyond the remits of this paper,[89] Tribunals interpreting Rule 41(5) have set a consistently high threshold for a claim to be 'manifestly without legal merit'. Indeed, the first Tribunal interpreting the Rule in *Trans-Global v Jordan* laid out the parameters of the phrase in such a succinct, convincing manner that its approach has been followed by virtually all subsequent Tribunals applying the Rule.

The case concerns a US-based investor, TGPJ, who, upon the discovery of oil deposits in Jordan, alleged that Jordan 'began a systematic campaign to destroy the Claimant's investment'.[90] This campaign included, *inter alia*, 'pressuring TGPJ to assign a majority of its rights' to a Lebanese Company with 'no experience in oil exploration drilling', who subsequently failed to respect various contractual obligations.[91] Regarding the standard for Rule 41(5), the Tribunal determined that the objection must be established 'clearly and obviously with relative ease and despatch'.[92] This criteria of obviousness and clarity has been endorsed expressly by the majority of subsequent Tribunals.[93] Indeed, between Tribunals and commentators alike, there is a consensus that

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87 ICSID Arbitration Rules (n 15) art 41(5).

88 ICSID, 'Decisions on Manifest Lack of Legal Merit' (*ICSID* 2020) <https://icsid.worldbank.org/cases/content/tables-of-decisions/manifest-lack-of-legal-merit> accessed 9 November 2020; See also *Lotus Holding Anonim Şirketi v. Turkmenistan* (Award, 2020) ICSID Case No ARB/17/30 (*Lotus v Turkmenistan*).

89 Oskari Vaaranmaa, 'To what extent has a jurisprudence constante emerged on the phrase "manifestly without legal merit" under ICSID Arbitration Rule 41(5)?' (LLM thesis, University of Groningen 2020).

90 *Trans-Global Petroleum, Inc v The Hashemite Kingdom of Jordan* (Tribunal's Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2008) ICSID Case No ARB/07/25 [12] (*Trans-Global v Jordan*).

91 ibid [59], [68-69].

92 ibid [88].

93 *Brandes Investment Partners, LP v The Bolivarian Republic of Venezuela* (Decision on the Respondent's Objection under Rule 41(5) of the ICSID Arbitration Rules, 2009) ICSID Case No ARB/08/3 [63] (*Brandes v Venezuela*); *Global Trading Resource Corp and Globex International, Inc v Ukraine* (Award, 2010) ICSID Case No ARB/09/11 [35] (*Global Trading v Ukraine*); *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg, and RSM Production Corporation v Grenada* (Award, 2010) ICSID Case No ARB/10/6 [6.1.1-6.1.3] (*Rachel S Grynberg v Grenada*); *PNG Sustainable Development Program Ltd v Independent State of Papua New Guinea* (Decision on Respondent's Objections under Rule 41(5), 2014) ICSID Case No

Rule 41(5) will only apply to genuinely poor legal arguments.[94] For instance, in the *Trans-Global v Jordan* case, only the last of three claims was dismissed because it was based on a fundamentally weak argument that the obligation to consult between the US and Jordan required Jordan to consult with the investor as well.[95] This argument could be dismissed simply by reference to the ordinary meaning of the terms in the BIT.

However, the bar has only been raised after the *Trans-Global* Tribunal's deliberation. This is particularly with regard to the (in)applicability of the Rule to 'resolve novel, difficult or disputed legal issues'.[96] Indeed, the general trend of jurisprudence around this issue is a converging one.

B. 'Novel, Difficult or Disputed Legal Issues': Setting the Bar Too High?

Whilst the *Trans-Global* Tribunal began by setting a rather high standard for a successful Rule 41(5) objection, subsequent Tribunals have only made it higher. This marked shift took place most clearly in the *MOL v Croatia* and *PNGSDP v Papua New Guinea* cases, and a similar approach has been either expressly endorsed, or echoed by most subsequent Tribunals.[97]

To begin with, although in general agreement with the high standard set in *Trans-Global*, the *MOL* Tribunal is 'less convinced' about the former's interpretation that 'successive rounds of written and oral submissions' may be required to settle an objection. In its view, such interpretation would 'be carrying the tribunal into hybrid territory somewhere between Rule 41(5) and Rule 41(1).'[98] In the opinion of the *MOL* Tribunal, there needs to be a distinction between cases that can be 'rejected out of hand' in contrast to those 'which [require] more elaborate argument'.[99] In other words, claims which reach an unspecified degree of legal complexity are not suitable for Rule 41(5).

A similar approach is endorsed in *PNGSDP v Papua New Guinea*. The case concerns an investor, PNGSDP, who is a stakeholder in a mining company, OTML, in Papua New Guinea.[100] In 2001, '[a former shareholder] transferred all of its ordinary shares in OTML to the Claimant,' with the condition that the 'earnings from the mine

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ARB/13/33 [88] (*PNGSDP v Papua New Guinea*); *MOL Hungarian Oil and Gas Company Plc v Republic of Croatia* (Decision on Respondent's Application Under ICSID Arbitration Rule 41(5), 2014) ICSID Case No ARB/13/32 [25], [45] (*MOL v Croatia*); *Álvarez y Marín Corporación SA and others v. Republic of Panama* (Reasoning of the Decision on Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5), 2016) ICSID Case No ARB/15/14 [44] (*Álvarez v Panama*); *Ansung Housing Co, Ltd v People's Republic of China* (Award, 2017) ICSID Case No ARB/14/25 [70] (*Ansung v China); Almasryia for Operating & Maintaining Touristic Construction Co LLC v State of Kuwait* (Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 2019) ICSID Case No ARB/18/2 [29-31] (*Almasryia v Kuwait*); *Lion Mexico Consolidated LP v United Mexican States* (Decision on the Respondent's Preliminary Objection under Article 45(6) of the ICSID Arbitration (Additional Facility) Rules, 2016) ICSID Case ARB(AF)/15/2 [63] (*Lion v Mexico*); *Elsamex, SA v Republic of Honduras* (Decision on Elsamex S.A.'s Preliminary Objections, 2014) ICSID Case No ARB/09/4 [103] (*Elsamex v Honduras*); *Eskosol S.pA in liquidazione v Italian Republic* (Decision on Respondent's Application Under Rule 41(5), 2017) ICSID Case No ARB/15/50 [39-41] (*Eskosol v Italy*).

94 Sergio Puig and Chester Brown, 'The Power of ICSID Tribunals to Dismiss Proceedings Summarily: An Analysis of Rule 41(5) of the ICSID Arbitration Rules' (2011) 10 Law and Practice of International Courts and Tribunals 227, 255.

95 *Trans-Global v Jordan* (n 90) [118].

96 *PNGSDP v Papua New Guinea* (n 93) [89].

97 See *Eskosol v Italy* (n 93) [41]; *Lion v Mexico* (n 93) [66]; *Almasryia v Kuwait* (n 93) [32]; *Lotus v Turkmenistan* (n 93) [158-160].

98 *MOL v Croatia* (n 93) [45].

99 ibid.

100 *PNGSDP v Papua New Guinea* (n 93) 17.

were used to promote sustainable development within PNG and advance the general welfare of the people of PNG'.[101] Thus, in 2011, the Claimant held 63.4% of OTML's shares.[102] However, through the 2013 Mining Act, Papua New Guinea declared that 'all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist'.[103] The Claimant, then, alleged that Papua New Guinea's actions constituted, among other violations, an unlawful expropriation.[104]

In raising the Rule 41(5) objection, Papua New Guinea asserted that it had not consented to arbitration, and that, since PNGSDP's purpose was 'sustainable development' and the 'general welfare of people,' 'there was no 'private foreign investment.'[105]

As a general remark, the Tribunal comments that the 'interpretations by prior ICSID tribunals' are 'highly relevant and material to its consideration of the Application.'[106] However, most importantly, the principal way by which the *PNGSDP* Tribunal tries to develop the interpretation of Rule 41(5) is by positing that it 'is not intended to resolve novel, difficult or disputed legal issues'.[107] Consequently, since the 'Respondent's objections concern, *inter alia*, the interpretation of both PNG's domestic legislation and the ICSID Convention [i.e. novel, difficult legal issues]… [it is not] appropriate for Resolution under Rule 41(5).'[108] The interpretation is certainly not without its problems and controversies, as will be demonstrated below.

Firstly, it could certainly be argued that the *PNGSDP* Tribunal is *severely* restricting the chances that Rule 41(5) objections will succeed. In this respect Rosenfeld is right in pointing out that such an interpretation 'limits the potential to use ICSID Arbitration Rule 41(5) as a mechanism [for states] to reassert control [over the investment regime].'[109] What Rosenfeld appears to be referring to is the *intention* of the States that created the Rule. This intention will be discussed in due course later in this paper.

The other glaring problem with the *PNGSDP* Tribunal's interpretation is what is meant by 'undisputed issues of law'. As stated by Polonskaya, 'in the context of investment arbitration, identifying "genuinely indisputable Rules of law" may be difficult, given the existing level of divergence with respect to the meaning of substantive standards of investment protection.'[110]

However, it should be mentioned that, for the moment, the anticlimactic fact is that in the vast majority of instances where a Rule 41(5) objection has succeeded, the issue in question has been rather simple.

For example, in *Rachel S Grynberg v Grenada*, the primary issue concerned *res judicata* and the re-litigation of a prior arbitration by the same Claimants.[111] Then, in *Emmis* and *Accession*, claims that were unrelated to expropriation were dismissed, since the Respondent Hungary had expressly not consented non-expropriation claims in the

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[101] ibid 19.
[102] ibid.
[103] ibid 25.
[104] ibid 29.
[105] ibid 31.
[106] ibid 8.
[107] ibid 89.
[108] ibid 93.
[109] Friedrich Rosenfeld, 'Early Dismissal of Claims in Investment Arbitration', in Andreas Kulick (ed.), *Reassertion of Control over the Investment Treaty Regime* (Cambridge University Press 2017) 92.
[110] Ksenia Polonskaya, 'Frivolous and Abuse of Process' (n 77) 5.
[111] *Rachel S Grynberg v Grenada* (n 93) 7.3.6-7.3.7.

relevant BIT.[112] In the case of *Lotus v Turkmenistan* 'all of the claims set out in the Request for Arbitration are properly to be characterized as contract claims relating to contracts entered into by Lotus Enerji' and 'the contract claims are not claims of Lotus Holding' – the Claimant in this instance.[113]

Thus, in the few cases that Rule 41(5) objections have succeeded, the issues have been undisputed, and the *PNGSDP* Tribunal's interpretation would not pose any problems. However, it is also for this reason why Howes, Stowell and Choi suggest that '[a] major contributing factor to the low observed success rate of ICSID Rule 41(5) applications, no doubt, is the reluctance of tribunals to determine complicated or novel questions of law'.[114]

Put differently, even if cases so far have been relatively easy to settle, this does not detract from the point that the strict interpretation adopted by the *PNGSDP* Tribunal effectively prevents more complicated, but still 'legally misconceived', arguments from being dismissed early. Interestingly enough, the *Pac Rim v El Salvador* Tribunal, interpreting the previously mentioned article 10.20.4-10.20.5 of the DR-CAFTA, also found that 'it should not ordinarily be necessary to address at length complex issues of law, still less legal issues dependent on complex questions of fact or mixed questions of law and fact.'[115]

Ultimately, what the preceding analysis suggests is that the Rule 41(5) objection, and in many ways the DR-CAFTA formulation, will only succeed against genuinely hopeless legal claims. Such claims are not necessarily made by litigious investors who seek to threaten the host State, but are by and large just based on faulty legal reasoning. Having explained this, an interesting question comes to mind. Namely, did the ICSID contracting parties intend for the Rule to have a more robust protective ability?

C. The intention behind Rule 41(5): protection against litigious investors?

The author believes that there is a slight tension between what the intention of the ICSID contracting parties is and how Rule has been interpreted by Tribunals. Thus, whilst a full discussion on doctrine of treaty interpretation cannot be done, the author wishes to make a point on the intention of the parties. Indeed, there is some convincing evidence for supporting a more permissive interpretation of Rule 41(5). By 'permissive' the author means that a Tribunal is willing to engage with issues that might be, under a stricter Tribunal, too complex for a Rule 41(5) objection. So, what may the intention behind Rule 41(5) have been?

As mentioned previously, through an amendment in 2006, Rule 41(5) was included following 'recurring complaint' from governments.[116] Its purpose was essentially to defend States against litigious investors. The first effort to counter frivolous claims arose from the US' experience in the *Methanex* arbitration. [117] Indeed, it led the US to

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[112] *Emmis International Holding, BV, Emmis Radio Operating, BV, MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft v The Republic of Hungary* (Decision on Respondent's Objection Under ICSID Arbitration Rule 41(5), 2013) ICSID Case No ARB/12/2, 85 (*Emmis v Hungary*).

[113] ibid 195.

[114] Ted Howes, Allison Stowell and William Choi, 'The Impact of Summary Disposition on International Arbitration: A Quantitative Analysis of ICSID'S Rule 41(5) On Its Tenth Anniversary' (2019) 13 Dispute Resolution International 7, 41.

[115] *Pac Rim v El Salvador* (n 80) 112.

[116] Antonio R Parra, 'The Development of the Regulations and Rules of the International Centre for Settlement of Investment Disputes. ICSIDRev' (2007) 22 ICSID Review Foreign Investment Law Journal 55, 65.

[117] Potestà and Sobat (n 74) 164.

amend its Model BIT to address legally unmeritorious claims.[118] Consequently, as pointed out by former ICSID Deputy Secretary-General Antonio Parra, the 2006 amendment to the ICSID Arbitration Rules was '[i]nspired by the new [US] treaty provisions'.[119] In other words, the amendment was enacted by the contracting states who were understandably eager to avoid facing Methanex-like arbitrations in the future. So, how can one view this from the angle of treaty interpretation?

As has now become evident, the author believes that a 'subjective approach' which 'seeks to investigate the actual intentions of the parties' provides appropriate guidance for the interpretation of the Rule.[120] Indeed, a more permissive approach for applying the Rule would give it the degree of effectiveness that the contracting states intended. If the barrier for claims that can pass Rule 41(5) is lowered too much, this ultimately undermines its protective potential. At the moment, the objection can only be used to address a very narrow range of weak legal claims. Conversely, if the Claimant simply suggests a small degree of legal or factual complexity in its case, the objection will effectively be bypassed. In the cases where the objection has succeeded, the legal weaknesses of the claims have been as obvious a graduate student than they have been to experienced arbitrators. It seems rather improbable that the contracting states only wanted the Rule to be effective in situations where, for instance, the Claimant fails to initiate ISDS proceedings within a clearly specified limitation period.[121] Such cases are evidently 'manifestly without legal merit', but are also far less harmful than cases where the investor is actually attempting to threaten the host State with claims that are sufficiently complex to defeat the Rule 41(5) objection, but ultimately bound to fail.

Of course, it also goes without saying that the Rule should not be utilised as a legal wall that sacrifices due process and investor rights. As is rightly noted by Arbitrator Dévaud in the *Almasryia v Kuwait* case, the standard of the Rule has an inherent degree of strictness that clearly exists to protect the investors' due process rights.[122] Chatterjee also recognises this in arguing that 'an enthusiastic Respondent must be treated cautiously'.[123] However, all that is being argued here is that this difficult balance has perhaps been upset by a tipping towards the pro-investor end of the spectrum.

Having explained the jurisprudence on Rule 41(5), it is evident that Tribunals have set the bar for a successful objection very high. However, this also has some unfortunate implications for the effectiveness of the EU's proposed article against Uniper-like situations. This will be touched upon in the final section on concluding remarks.

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[118] Kehoe (n 75) 90.

[119] Antonio R Parra, *The History of ICSID* (Oxford University Press 2012) 250.

[120] Francis G Jacobs, 'Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference' (1969) 18 International and Comparative Law Quarterly 318, 319.

[121] As was the case in *Ansung v China*.

[122] *Almasryia for Operating & Maintaining Touristic Construction Co LLC v State of* Kuwait (Dissenting Opinion on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 2019) ICSID Case No ARB/18/2, [2], [5-6] (*Dissenting Opinion of Arbitrator Dévaud*).

[123] Charles Chatterjee, 'A Critical Examination of Rule 41(5) of the ICSID Arbitration Rules, 2006' (2012) 13 The Journal of World Investment & Trade 486, 497.

VI. Concluding Remarks: Too Weak to Succeed, but Not Frivolous Enough to Be Summarily Dismissed

In summary, the general conclusion that can be drawn from the preceding analysis is that the currently proposed provisions on frivolous claims are unlikely to allow for Uniper-like cases to be summarily dismissed. That is unless Tribunals interpreting the modernised ECT make a conscious effort to broaden the provisions' applicability to more complex legal issues, and distance themselves from the past interpretations.

For example, determining whether legitimate expectations have been frustrated will remain a factually and legally complicated process. It is certainly not a novel legal issue, but it is definitely a difficult and disputed one. The same goes for the question of expropriation. Even when backed up by an express right to regulate, alleged expropriations need to be evaluated on a careful, fact-based, case-by-case basis.[124] Thus, there is certainly still a risk that cases will become drawn-out. After all, so far, Rule 41(5) objections have by and large only succeeded against hopeless legal claims. Thus, considering the present state of jurisprudence on the Rule, Uniper-like claims are likely too complicated to be addressed on a summary basis.

Admittedly, clarified FET and expropriation standards, as well as express references to the States' right to regulate will ultimately lead to more arbitration victories for States. It is entirely possible that, over time, litigious investors will be discouraged from bringing claims against States for taking action against climate change. Ultimately, however, if the prevailing interpretation that Rule 41(5) should not apply to 'novel, difficult or disputed legal issues' is adhered to, this significantly narrows down the types of claims on which the objection will succeed.[125] The same goes for the DR-CAFTA-type provision.

Evidently, one positive fact is that the absence of *stare decisis* in investment arbitration entails that future Tribunals applying the (hopefully) modernised ECT will be free to interpret the provisions in a more permissive manner, if they so wish. For example, it is not completely inconceivable that, in light of the wider context, object and purpose of the modernised ECT, it *would* be acceptable to deal with Uniper-like cases through a summary procedure. In other words, when interpreted against provisions that directly reinforce States' right to regulate; the Uniper-like cases are immediately legally weakened to a significant degree. On the other hand, however, the relative consistency of interpretation around Rule 41(5) objections suggests that the subsequent Tribunals may feel compelled to chart the same course as their predecessors.

In any event, it remains safe to say that for the moment, future Uniper-like compensation demands for alleged ECT breaches are irresponsible - both legally and societally, but not frivolous enough. Whilst the future is certainly not hopeless with regards to ISDS and climate change, some sweeping reforms are direly needed.

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[124] This is also expressly stated in Annex X(2) of the EU's modernisation proposal; See Commission (n 14) annex X(2).

[125] ibid 89.