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Fear of Arbitration and Hope for Transition: Why Should We Care About the Interaction Between Investment Arbitration and Transitional Justice?

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ABSTRACT

Investment arbitration has experienced an exponential growth in the past years. Recently, there has been abundant discussion on how it influences matters of public policy, with strong criticism referring to its ability to restrain state regulatory capacity, specifically through the freezing of public authorities for fear of investment claims. Among these issues, a key consideration, yet one still under-explored, is how investment arbitration interacts with *transitional justice*. Considering that building a long-term and lasting peace is the overarching obligation of states coming out of war, this field of study cannot be understated. This paper aims to study the relationship between investment arbitration and *transitional justice*. To do this, it analyzes how core principles of transitional justice relate to key features of investment arbitration. The analysis concludes that, while investment arbitration and peacebuilding are not fundamentally opposite fields, the characteristics of each system may result in contrast with the other. Further, if this tension is not addressed by public policy, investment arbitration may become an obstacle for the implementation of measures necessary to secure *transitional justice* for victims of armed conflict.

Keywords: investment arbitration, transitional justice, post-conflict, lasting peace, reparation

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1. Introduction

The relation between law and war dates to ancient times. A relevant question in this regard is how the law addresses contexts of war. The typical example of this is the concept of *bellum justum* in ancient Roman law, which determined whether a war would be "pious" or justified (Nussbaum, 1952, 679). Another, yet more recent, development of the law and war relationship is that of *jus post bellum*, which designates the situation following the end of war and follows the premise that "a theory of just war should encompass a theory of just peace" (Bass, 2004, 384). *Jus post bellum* is concerned with the process of peacebuilding and the multitude of norms, processes, and actors involved (Lawry-White, 2015, 634). It is relevant to note that it is not merely "peace" that is at issue in these cases, but a "real" peace, where mutual respect and the rule of law are key (May and Edenberg, 2013, 1).

Within this broader context, the narrative of war and peace lies at the foundations of international law. As argued by Clapham (2021), the legal discourse of international law has pursued peace as the ultimate value, which has served several agendas. Recently, there have been several shifts in paradigms governing the law and peace relationship. For instance, after the late XXth century, authors like Elster (2004) shaped the concept of *transitional justice*. While this term has been defined in different ways, that will be discussed later, one could say that, as framed generally by Webber (2012, 98), *transitional justice* refers to situations in which a society is moving from a state of injustice to justice, as well as the administration of justice across such a change of regime. The importance of *transitional justice* is such that in the past 20 years it has become one of the topics of most upward trajectory (Teitel, 2003).

Transitional justice has evolved to the point that nowadays the literature relevant to its study refers to many other disciplines such as law, criminology, sociology, history, anthropology, philosophy, and development studies

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(Lawther and Moffett, 2017). Of particular importance are fields with a direct influence on domestic regulations as, for the purpose of achieving *transitional justice*, states need to implement public policies and programs. In this regard, reviewing the relationship between international investment law and *transitional justice* is critical because recently this field has become one of most notorious issues of international law following debates about its entanglement with public powers and the regulatory capacity of states (Schill, 2011). Additionally, although academic debate on this matter started recently, these fields have been connected since many years ago.

Historical background on the development international arbitration, as addressed in detail by Schwebel (2016), shows that since the late XVIIIth century arbitration became a mechanism for the effective solution of disputes. Actually, arbitration was very close to the resolution of disputes in contexts of armed conflict. This was the case of the 1794 Jay Treaty, which constitutes one of the first serious precedents of international arbitration and addressed the potential escalation of hostilities between the United States and Great Britain. The same applies to another ancient precedent of arbitration, the 1872 Alabama Claims Tribunal, which addressed a series of claims brought by the United States against Great Britain as a consequence of the American Civil War.

Then, since several years ago, international arbitration appeared in international relations as a valid instrument to substitute the so called "gunboat diplomacy" (*Ibidem*), which describes the practice of backing diplomatic efforts with the threat of military power and was the rule of foreign affairs during most part of the XIXth century and went on through the early XX century (Mandel, 1986). By this token, the arbitration of international disputes, whether between states or between states and organizations or investors, not only has been deeply related to matters of war and peace but has served as an effective means of peacefully resolving international conflicts.

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Turning to the current status of investment protections, authors have discussed both its positive and negative effects to post-conflict reconstruction. Looking at the historical context of international arbitration as well as the above-mentioned cases it is clear that investment arbitration and armed conflict are not perfect strangers, but old acquaintances. It is noteworthy that, as argued by Paris (2007), since roughly the end of the 1990s peacebuilding operations have included economic, social, and civil reconstruction, all of which are fields relevant to the mechanics of investment arbitration.

This brings even closer both systems, showing that, while they may have several clashing values, their connection cannot be overlooked. Adding to this, they have features in common. For example, Le Moli (2021, 8) shows that they are both embedded in a logic of the *extraordinary*, as both represent forms of *ad hoc* justice, which means that none of them is the ordinary forum of dispute settlement. Now, this section tracked the missing links between investment arbitration and post-conflict. The next one will address their tensions.

Against this backdrop, there has been a fair amount of academic work on the relationship between *jus post bellum* and investment arbitration. The different research on this issue could be divided in three waves. The *first wave* are economic and development studies, which have focused on whether foreign investment is beneficial for the growth of post-conflict nations (Appel and Loyle, 2012). Accordingly, the relevant literature of this approach gathers and compares data about the flows of foreign investments in countries coming out of armed conflict before and after the implementation of *transitional justice* initiatives.

For example, Phiri (2012) shows that in Mozambique, after the 1977-1992 civil war, foreign direct investment increased drastically. Likewise, Joshi and Quinn (2018, 6-8), illustrate a similar situation in Guatemala since the end of the 1960-1996 civil war. These changes may be explained by factors such as an increased sense of political stability or trust in domestic institutions (Neumayer and Spess, 2005). Additionally, relevant activities such as

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extractive industries may be located in regions particularly affected by conflict (Nichols, 2014), which means that peace processes provide security to carry out these operations.

The *second wave* are studies focuses on very specific matters relevant to the practice of international arbitration. For instance, there is extensive work on the protection of investments in times of armed conflict (Zrilič, 2019), odious debt and *jus post bellum* (Gallen, 2011), and potential claims and defenses of investors and states in contexts of war or post-conflict (Schreuer, 2019). Notably, while this literature has implied the tension between investment arbitration and *transitional justice*, it has not offered a detailed comparison of the key features of both systems and the frictions between them.

The *third wave* are studies on the impact of international investment law in peacebuilding, mostly focused on policy implications and regulatory concerns. Risvas (2019, 209-210) holds international investment protection may play a positive role in post-conflict as it could contribute to the reconstruction of the social and economic tissue of a country. For instance, foreign investors can use investment arbitration to protect their interests when they consider that they have been affected by armed conflict (Zrilič, 2019). BITs tend to have provisions known as "war clauses" to protect the interests of investors in contexts of conflict:

> An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party *due to war or to other armed conflict, State of emergency, revolution, insurrection, civil disturbance, or any other similar event* (…) in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any

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> third State, whichever is most favourable to the investor (…) (Article 5, Austria-Lybia BIT, emphasis added).

This has been the case in previous investment arbitrations where investors that were affected by armed conflict brought action against the state. In *LESI SpA v Algeria* (2008), investors claimed that due to the guerrilla warfare in certain parts of the national territory, civil unrest and violence had affected a public tender for the construction of a dam. Specifically, they argued that Algeria had breached indirect expropriation, fair and equitable treatment (FET), and full protection and security (FPS) standards in the Algeria-Italy BIT.[1] Similarly, following the Arab Spring, foreign investors in *Lundin v Tunisia* (2015), who considered that their investments had been affected by civil unrest, presented investment claims.

On the contrary, the research of De Brabandere (2015, 602) poses interesting questions on whether BITs will constraint the capacity of states to adopt regulatory measures, creating a concern on the prevalence of nationals versus foreign investors. Likewise, Lawry-White (2015) has discussed the role that investment arbitration could play in the establishment of a just and sustainable peace during post-conflict. These approaches are complemented by novel research from authors that have explored these questions focusing on case studies. For instance, Le Moli (2021) reviews the implications of investment arbitration in African countries like South Africa and Zimbabwe. The same is the case for Velásquez (2016) and Van Ho (2016) for Colombian post-conflict after the 2016 Peace Agreement.

These difficulties about the interaction between investment arbitration and *transitional justice* are the subject of this article. Particularly, it aims to show that, while investment arbitration and *jus post bellum* are deeply interwoven, the application of investment law by domestic authorities could freeze *transitional justice* and pose an obstacle to some of the core principles of this concept that are key for victims of armed conflict. Yet, it is noteworthy that

[1] All claims were dismissed at the merits stage.

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this paper does not commit to the ambitious task of offering solutions to bridge the gap between both fields, which shall be considered further in academia and policymaking.

Put differently, the purpose of this paper is discussing the features of the international investments protection system, specifically those of investment arbitration, that conflict with key principles of *transitional justice*. Considering these aspects, the article will focus on the tension that arises between the two systems and assess the effects of each one on the other. At the outset, it will explain the concept of *transitional justice* and some of its core principles and purposes to show later how, if not addressed properly, the investment arbitration regime may pose relevant obstacles to the fulfillment of these objectives.

The goal of this paper is not to say that international investment arbitration and *transitional justice* are antagonists or that their tensions cannot be resolved, but to show their potential clash of interests and discuss the details underlying such friction. It also seeks to provide insights from a theoretical and a practical perspective, promoting debate in the academia but also regulatory concern. This may help raise awareness about the importance of identifying and addressing these issues among the stakeholders involved in post-conflict to secure the simultaneous protection of foreign investments and *transitional justice*.

This paper is structured into five additional sections. Section 2 defines the concept of *transitional justice* in relevant literature and certain instruments of the United Nations (UN),[2] as well as three of its core pillars: (i) justice, (ii) non-recurrence, and (iii) reparation. Section 3 looks at certain features of investment arbitration that are in contrast with *transitional justice* and its core elements. Section 4 reviews how the application of investment arbitration standards could interfere with the fulfillment of a *transitional justice*

[2] For the purposes of this paper, these instruments are used as mere references to define *transitional justice.* Therefore, their different authoritativeness as sources of law should not be put on equal footing.

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framework. Lastly, Section 5 offers certain conclusions relevant to policymaking.

2. Justice, Non-Recurrence, and Reparation: The Three Pillars for the Effective Implementation of *Transitional Justice*

As a consequence of several post-conflict events during the late XXth century, academics and international organizations came up with modern notions of *jus post bellum*, including *transitional justice* (Paige 2009, 323-325). According to Teitel (2000), *transitional justice* could be defined as the notion of *justice* associated with periods of political change. This is a baseline definition of *transitional justice*, which considers it to be any form of political change after situations of conflict. However, such notion has been developed further. For instance, the UN Secretary General Report "The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies" issued in March 2010 states that:

> For the United Nations, transitional justice is the full range of processes and mechanisms associated with a *society's attempts to come to terms with a legacy of large-scale past abuses*, in order to ensure *accountability, serve justice and achieve reconciliation*. Transitional justice processes and mechanisms are a critical component of the United Nations framework for strengthening the rule of law (emphasis added).

Not only are these concepts currently applied in political and legal theory to understand better the wide spectrum of *jus post bellum* and its recent changes, but they are also used for policymaking (Pham and Vinck, 2007). For this reason, *transitional justice* has become essential in discussions about post-conflict and regulatory powers. As argued by De Greiff (2012), while

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transitional justice refers to a wide array of measures adopted to face long periods of abuse, these initiatives must be read holistically. Hence, a proper approach to *transnational justice* calls for the consideration of the many concepts, values, and measures that are key to its accomplishment. As such a review could encompass several principles, this paper focuses on three pillars of *transnational justice* inspired in the work of the UN Human Rights Council (UN HRC): (i) justice; (ii) non-recurrence; and (iii) reparation.

In 2011, following several resolutions on human rights and *transitional justice*,[3] the UN HRC passed Resolution 18/7 appointing a Special Rapporteur "on the promotion of *truth, justice, reparation, and guarantees of non-recurrence*" (emphasis added). Report A/HRC/36/50, which gathered the findings of the Special Rapporteur after a review of *transitional justice* initiatives worldwide, was released in 2017. According to the Report, some of the obligations of the state in post-conflict transition are "(i) to investigate, prosecute and punish those accused of serious rights violations; (ii) to reveal to victims and society at large all known facts and circumstances of past abuses; (iii) to provide victims with restitution, compensation and rehabilitation; and (iv) to ensure repetition of such violations is prevented."

2.1 Justice: Institutional Trust and Legitimacy Through Redistribution

Justice is probably one of the most complex yet most common concepts in discussions about philosophy, law, and politics. Sandel (2009) shows that, while *justice* may encompass matters of maximizing welfare, respecting freedom, or promoting virtue, a question about *justice* is generally related to "what is the right thing to do?" In *transitional* justice, this is a question that

[3] *See* Commission on Human Rights resolutions 2005/70 of 20 April 2005 on human rights and transitional justice, 2005/81 of 21 April 2005, on impunity, and 2005/66 of 20 April 2005, on the right to the truth, as well as Human Rights Council resolutions 12/11 of 1 October 2009, on human rights and transitional justice, 9/11 of 18 September 2008 and 12/12 of 1 October 2009, on the right to the truth, and 10/26 of 27 March 2009 and 15/5 of 29 September 2010, on forensic genetics and human rights, as well as Council decisions 2/105 of 27 November 2006, on the right to the truth. and 4/102 of 23March 2007, on transitional justice.

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interacts with the relevant stakeholders. As pointed out by Elster (2004, 80), "in deciding how to deal with wrongdoers and victims from the earlier regime, the leaders of the incoming regime are often influenced by their ideas about what is required by justice." In this vein, Teitel (2003, 77) shows that recent developments in the *transitional justice* agenda has increased the space of civil society in the formation of post-conflict frameworks.

An important effect of the sense of *justice* of a population is their trust in the institutions and therefore the legitimacy of a state as a whole. As Offe (1999, 70-71) describes, trusting institutions means recognizing as valid its values and deriving that they make sufficient sense to a sufficient number of people to motivate compliance with a set of rules. Here, the role of domestic institutions is crucial, particularly the judiciary and other authorities involved in the design of a *transitional justice* framework. For instance, De Greiff (2006) argues thar a persuasive effort to establish a solid transition out of post-conflict might be seen by victims as an effort of the state to "come clean" and form a truly new political project. However, this cannot be achieved if there is not a sense of *justice* accepted by the community.

Van der Merwe and Schkolne (2017, 224) highlight that, in countries transitioning from dictatorship to democracy or from war to peace, the legitimacy of the state will tend to be compromised and civil society can play a major role in changing that. Notably, local communities can have a reaction to the sense of *justice* promoted by the government leading transition, awakening emotions around fairness or impunity. Civil society organizations may offer official support to post-conflict programs and help them achieve adequate human rights standards and the recognition of victims (Burt, 2009). However, they can also mobilize to pressure authorities into changing substantive parts of the *transitional justice* framework as laws or post-conflict measures if they feel that they are deficient (Díaz, 2008).

In this vein, a key question in the examination of post-conflict transition is about the sense of *justice* that is relevant to the civil society. While this may change on a case-by-case basis, many authors interested in *transitional justice*

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agree that an important part of an effective post-conflict framework is preventing the inequality of resources and the continued dominance of the traditional elites (Pseworzki, 1986, 45-47). Following Galtung (1969), a state should not only accomplish individual reparation, but a more egalitarian distribution of resources and power within a society to prevent the repetition of conflict and lock down an effective and lasting peace. Against this backdrop, another concept that is key for peacebuilding, which has also gained more importance recently, is *distributive justice*.

As opposed to corrective justice, that is concerned with the measures adopted in the event of the infringement of rules about the allocation of rights and resources, *distributive justice* deals with the design of such rules (Benson, 1991, 535-538). In words of Cohen (2016, 664), "distributive justice tells us how and why people in some group may have certain benefits and responsibilities regarding various divisible goods." Therefore, *distributive justice*, inasmuch as it is concerned with the distribution of resources that is precisely the core of many social conflicts, is essential for transition because it entails not only compensating victims for harm suffered during conflict but addressing the social dimension of their suffering and the real causes of war (Saffon and Uprimny, 2010).

To a great extent, *distributive justice* deals with matters of *reparation*. As will be addressed in a subsequent section of this paper, *reparation* is an objective of *transitional justice* that cannot be limited to specific types of measures (De Greiff, 2012). For instance, it is noteworthy that the judicialization of those responsible for atrocities and the implementation of acts of social justice and symbolic reparation are key to an effective transition (Flournoy and Pan, 2002, 114). But *distributive justice* emphasizes in particular the importance of recognizing inequalities in the distribution of wealth and resources. For this reason, this paper focuses on measures concerned with *de facto* redistribution such as processes of land reform.

Against this backdrop, a special case for the question of *distributive justice* is that of the redistribution of property and property rights. As stated by

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Barnes (2009, 61) property rights "are never purely abstract rights or economic rights; they are legal rights and are thereby infused with the values of the community that sustain the legal system." For example, as argued by authors like Teubal (2012) and Adam (2010), commonly marginalized communities in civil conflict, such as peasants and indigenous groups, tend to have a special relation with the land that transcend to values of cultural or religious importance. In this sense, as conflict over the land tends to suppose the dispossession of these groups, effective reparation and transition must take special consideration of these issues (Torres, 2008).

As demonstrated by Bothe (2021), property rights, and the integrity of the legal system supposedly protecting these rights, are often challenged during conflict. Then, redressing harm to property rights is part of peacebuilding and re-establishing the rule of law in this regard is key to securing a durable peace (Lawry-White, 2015, 634). To this end, common transitional measures include the implementation of land reforms and other types of property redistribution aimed at giving back to dispossessed communities (McCallin, 2013). However, as noted by Mani (2005), it is important to bear in mind that *distributive justice* should not only be implemented in the form of a restorative measure but seek the transformation of the conditions of exclusion that led to the origin of conflict.

2.1. Non-Recurrence: Recognition and the Idea of a Lasting Peace

Lykes and van der Merwe (2017) confirm that ensuring non-repetition or securing *non-recurrence* is an agreed-upon objective of *transitional justice.* Notably, the existence and importance of these guarantees in public international law is supported by customary law and treaty language (Sandoval, 2014, 182). Nonetheless, more detailed literature on the field also suggests that the concept of *non-recurrence* is still under-explored in academia and policymaking (Mayer-Rieckh, 417). Arguably, in contexts of armed conflict, where *transitional justice* represents the change from war to

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peace, one could say that an important part of implementing *non-recurrence* is maintaining the peace.

As *transitional justice*, "peace" has many meanings. At the outset, Galtung (1969) shows that peace can be defined and understood as the "absence of violence" or, in practical terms, as the end of hostilities. Nonetheless, authors as Stahn (2006, 925-926), explain that nowadays peace means something different, more connected with breaking the cycle of violence itself than with a cease of fire. All in all, as stated by Muvingi (2009), failure to adequately address structural problems of a social system, such as inequalities or systemic violence, undermines the chances of a state to accomplish an effective transition. For this reason, peace is not a concept read in isolation from other elements of *transitional justice* anymore.

This has led authors to develop further layers into the notion of "peace". By way of example, today most of the research on *transitional justice* assumes the idea of peace as a long-term objective. To this end, the idea of a peace that remains in the long term has been defined in many ways, for example, "sustainable peace" (Keating and Knight, 2004) and "durable peace" (Aggestam and Björkdahl, 2012), all of which refer to the same baseline concept. To set a distinction from previous work, this article refers to this idea as a *lasting peace*. Additionally, although there are several aspects that are relevant to guarantee that peace will last in the long term, this article focuses on the issue of peace through *recognition*.

As argued by Honneth (1996), in different ways, all systems of social conflict and thus *transitional justice* itself seek to provide victims recognition for abuses. Such recognition can take several forms but a relevant one is that introduced by Hampton (1981) and contemplates recognizing, via legal instruments such as decisions issued by criminal justice tribunals, that perpetrators' unlawful behavior is not superior to that of victims and that they will be punished for it. Then, as De Greiff (2012, 44) notes, recognition to victims of armed conflict involves acknowledging not only that they suffered a setback to their interests but that they were actually *harmed*, a thicker and

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normative notion referring to the idea of wrongdoing and placing victims in the position of right-bearers.

The decisions adopted within a legal system can affect recognition. A similar situation takes place in regard to policymaking and peacebuilding processes, which nowadays focus more on community-based transformation than on institutional *transitional justice* initiatives (McEvoy and McGregor, 2008). Recently, there is increasing interest in the notion of construing *transitional justice* by taking the victims and the civil society as the starting point for effective peacebuilding, this is, considering the interests and opinions of traditionally marginalized communities, such as peasants, indigenous groups, minorities, etc. (Turner, 2008, 140). This strategy could be defined as the bottom-up approach to post-conflict and reflects on alternatives to achieve longer-term sustainability in peace by shifting away from traditional or institutional approaches to *transitional justice* and allowing the participation of the "voices from below" (Lundy and McGovern, 2008).

This is also complemented by a holistic approach to *transitional justice*. Such notion is key in the work of authors such as Gready and Robins (2014, 340-344) and suggests that policies aiming to facilitate a *lasting peace* should consider all the relevant stakeholders and give them a voice in the design and application of post-conflict measures. This is inspired in taking seriously the complexity of armed conflict as a phenomenon incorporating the interests of several parties that interact with each other (Smith, 2004, 115). Then, the bottom line of this feature of *transitional justice* is that adopting a transformative rather than a restorative approach to peacebuilding and including marginalized communities is necessary to secure a *lasting peace* through the involvement of a plurality of agents.

2.3 Reparation: The Right to an Effective Remedy

There are several forms to address the goal of effective reparation in transitional contexts, including measures of an economic and symbolic nature

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(Flournoy and Pan, 2002). The same is reflected in international instruments as well as in the practice of international tribunals. The UN Human Rights Office of the High Commissioner (OCHR) issued in 2006 a document on the rule of law tools for post-conflict states, which includes reference to mechanisms available to promote peacebuilding. Within these tools, there are measures such as the prosecution of crimes, the establishment of truth commissions, and the implementation of reparation programs. As identified by Dixon (2017), the practice of states reflects the application of a combination of instruments, avoiding reparation by exclusive means and securing a holistic redress of atrocities. Nonetheless, it would be too ambitious to review all of these alternatives in this paper, which does not intend to commit to such an endeavor.

Conversely, this article narrows the scope of review of remedies to those related to property rights, as is the case of ownership restitution and monetary compensation. It does so due to the particular importance of property rights for *distributive justice* and conflicts related to land dispossession. In such contexts, Leckie (2003) explains that that the default remedy according to the practice of international tribunals and the text relevant instruments is restitution. This mechanism is defined and developed in the 2005 UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles). This instrument establishes in Section II(2)(2.1) that "All refugees and displaced persons have the right to have restored to them any housing, land, and/or property of which they were arbitrarily or unlawfully deprived (…)" . By the same token, according to Section II(2)(2.2) states should prioritize restitution over other remedies for victims of forced displacement.

These remedies have also been developed in the practice of international courts. Notably, the Inter-American Court of Human Rights (IACtHR) considers that *reparation* calls for full restitution (*restitutio in integrum*) whenever possible and, under different circumstances, for "a set of measures such that, in addition to ensuring the enjoyment of the rights that were

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violated, the consequences of such breaches may be remediated, and compensation provided for the damage thereby caused" (*La Cantuta v Peru* 2006, para. 201). Anthowiak (2011, 279) has called this stance of the IACtHR a "victims-centered" approach as opposed to the "cost-centered" perspective that could prevail in monetary compensation.

In *Mayagna Awas Tingi Community v. Nicaragua* (2001), the *Awas Tingni* indigenous community from Nicaragua filed a claim against the state for the grant of a logging concession on territories possessed by them (para. 103). The communities did not have a deed or any formal title that accredited their ownership of the lands of their ancestors (*Ibidem*). Yet, the IACtHR interpreted that Article 21 of the American Convention on Human Rights (ACHR), which incorporates the right to private property, "protects private property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property" (para. 148).

According to the IACtHR, it was necessary to recognize that among indigenous communities there are traditions of communal property and relations with the land are not merely a matter of possession (para. 149). On these grounds, the IACtHR ordered the state to implement statutory action for delimiting and protecting the indigenous territories (para. 173). This ruling, which has been followed in other cases that illustrate the importance of restitution in matters related to property rights and the land of local communities,[4] shows the importance of adopting remedies that are broad and adequate to grant an effective *reparation* to the communities affected by state measures.

This broad sense of *reparation* has been arranged around terms such as that of an *effective remedy*, which will be the focus of this section. The right to obtain *effective remedy* is incorporated on rules referring to concepts such as judicial relief (Gray, 1990). For instance, Article 8 of the Universal

[4] *See Yakye Axa Indigenous Community v. Paraguay* (2005); *Sawhoyamaxa Indigenous Community v. Paraguay* (2006); *Xákmok Kásek Indigenous Community v. Paraguay* (2010).

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Declaration of Human Rights (UDHR) establishes that "everyone has the right to an *effective remedy* by the competent national tribunals" (emphasis added). Likewise, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) and Article 13 of the European Convention on Human Rights (ECHR) also recognize the right to get an *effective remedy* from a national authority. The Committee on Economic and Social Rights (CESR) recognized in General Comment 3 to the International Covenant on Economic, Social and Cultural Rights (ICESCR) the importance of judicial remedy for securing the effectiveness of the rights of nationals.

A key question on the concept of *effective remedy* is defining how it should be defined in the context of armed conflict. The European Court of Human Rights (ECtHR) has released many rulings that are relevant in this regard and from which this article highlights the one in *Isayeva v Russia* (2005), in which the ECtHR decided on the killing or serious injury of civilians exiting Grozny during conflict in Chechnya in January 2000 as a consequence of the aerial bombardment of a refugee convoy (paras. 13-34). Among other claims, the victims argued that their right to life and the life of their relatives had been violated (para. 155) and that domestic "authorities had failed to conduct an independent, effective and thorough investigation into the attack" (para. 201).

The ECtHR found that there had been a violation of Articles 2 and 13 of the ECHR which protect the rights to life and to an *effective remedy*. Particularly, two reasonings of this case are relevant to this article. Firstly, the ECtHR considered that Article 13 of the ECHR implies that an *effective* remedy, aside from the payment of compensation, requires a thorough and effective investigation of the facts that caused harm to the victims, including access to the investigation procedure (para. 237). Secondly, that the role of *independence* of domestic authorities in providing *effective remedy* is very relevant as an investigation of the events that led to the harm of the victims required authorities in charge to be independent from those implicated in the events and even from other state agencies (para. 210).

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Another ECtHR case that provides relevant context is that of *Velikovi v Bulgaria* (2007). Here, claimants objected measures adopted by the government as part of the implementation of the Restitution Law, which allowed the nullification of titles of property acquired during the communist regime for granting these properties to people that had been expropriated without compensation in the 1940s (para. 159). The ECtHR found that there had been a deprivation of property as a consequence of the application of these initiatives (para. 160). However, it considered that such actions could be justified if they pursued the "public interest", stating that this was the case of a restoration of property that had been expropriated during a totalitarian regime (para. 170). Then, the ECtHR provided the following:

> Persons who have taken advantage of their privileged position or have otherwise acted unlawfully to acquire a property in a totalitarian regime (…) cannot expect to keep their gain in a society governed democratically through the rule of law. The underlying public policy interest in such cases is to restore justice and respect for the rule of law (para. 172).

This ruling is fundamental because it introduces an additional criterion to assess the concept of *effective remedy*. Briefly, it suggests that, when considering whether to grant restitution of property rights to victims of armed conflict, measures of *transitional justice* that conflict with the right of third parties to private property would be justified if these rights are tainted by unlawful actions. This could be referred to as an application of the principle of *good faith*. Added to the issue of *independence* of domestic authorities discussed by the ECtHR in *Isayeva* and to the principle to seek adequate remedies to redress victims outlined in the case law of the IACtHR, it could be inferred that the idea of *reparation* through an *effective remedy* entails considering the broader context of a post-conflict situation.

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3. Features of International Investment Arbitration that are in Contrast with *Transitional Justice* and its Main Objectives

There are several ways to introduce the tension between investment arbitration and *transitional justice*. This paper will address the issue by looking at four features that arise in the interaction between these systems: (i) the *asymmetry of rights* in arbitral practice; (ii) the *dilemma of state legitimacy* when a government faces compliance with conflicting international and national obligations; (iii) the *victim-perpetrator cynicism* caused by the double role of investors as victims of state measures and perpetrators of conflict; and (iv) the *regulatory chill* caused on public authorities by the threat of investment claims.

3.1 Asymmetry of Rights in Arbitral Practice

At the outset and following De Brabandere (2015, 590-591), investment arbitration is a double-edged sword when it comes to post-conflict matters:

> Indeed, on the one hand, post-conflict economic reconstruction and development requires and relies on FDI. On the other, rights granted to foreign investors before and during the post-conflict phase may result in a backlash for States recovering from conflict because rights granted to foreign investors have – besides the general tensions caused by such instruments – specific consequences in post-conflict situations due to the economic, security-related, social, and demographic specificities of those situations.

This relates to the *asymmetry of rights* in arbitral practice, to which Schreuer (2019, 6) refers by explaining the existence of conflicting rhetoric on the issue of *jus post bellum* in investment arbitration. One side argues for the wide discretionary power of the state in situations of emergency or post-conflict, granting privilege to an effective peace transition. The other side holds that investors should not lose their protections in these contexts and that

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foreign direct investment (FDI) is also in the public interest. The literature shows that there is consensus on the idea that BITs recognize a certain degree of regulatory capacity to states (Schneiderman, 2008). For example, Article 24(3) of the Energy Charter Treaty (ECT) excludes most investors' protections where a state considers a measure necessary for "protection of its essential security interests including (…) in time of war, armed conflict or other emergency in international relations; (…) or for the maintenance of public order."

As held by Lawry-White (2015, 651), this language could mean a limitation to the protection of foreign investors in times of emergency, which could arguably be extended to contexts of post-conflict. Further, investment tribunals have recognized that there is no good reason for the investment protection system to operate in isolation from the rest of public international law. The arbitrators in *AAPL* even acknowledged that a BIT "is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability" (21). This would mean that, following the common rules of international law, situations of emergency such as armed conflict would grant states a degree of flexibility regarding their international obligations (Kamber, 2017). Yet, as pointed out by authors such as Van Harten (2013) and Korzun (2017) the reality of arbitral practice is that BIT provisions and rules of international law securing regulatory capacity are applied narrowly by investment tribunals.

On the contrary, BITs tend to have broad language that protects the rights and interests of foreign investors to a great extent (Bodea and Ye, 2018, 1-2). To avoid dwelling on the different standards of protection in BITs that illustrate this point, a simple example is that of the FET standard. Although the concept of FET is highly ambiguous (Kalicki and Medeiros, 2007, 25), of particular importance is its understanding as a guarantee of legitimate expectations, upheld by tribunals like the one in *Tecmed v Mexico* (2003, 167), which stated that an investor "may know beforehand any and all rules and regulations that will govern its investments." This approach may highly

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restrict the capacity of states to introduce legal reforms addressing non-economic values (Ortino 2008), which would include measures for victims' reparation, for example, instruments of *distributive justice* that could be interpreted as hinderance to the stability of investors' rights.

Schreuer (2019, 10-19) compiles extensively the defenses that a state could argue to justify measures adopted in times of war or post-conflict. These may include (i) the impossibility of performance of treaty obligations under Articles 61 and 62 of the Vienna Convention on the Law of Treaties (VCLT); (ii) self-judging clauses in BITs that limit claims against measures adopted for security interests; (iii) and the circumstances precluding wrongfulness in the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), mostly state of necessity and *force majeure.* Nonetheless, in investment arbitrations these allegations entail a very high burden of proof and are unlikely to succeed (Martinez 2010, 336-337). Further, even if this trend would start changing, Franck (2005) shows that the absence of precedent in the system, paired with the lack of consistency in previous decisions, would suppose states taking their chances with every new dispute and arbitral tribunal.

3.2 Dilemma of State Legitimacy

Another feature to consider is the *dilemma of state legitimacy*, which deals with a concept that is critical to the effectiveness of post-conflict environments (Dagher, 2018). Relying on Morris (2004, 18), one notion of legitimacy refers to the belief of a community that its state is rightful and acts within the law. Notably, while political theory recognizes the importance of state legitimacy as an overarching value, it is of particular interest in *jus post bellum* because one of the main causes of internal conflict is usually a lack of trust in state governance or an absence of a state's political legitimacy (Beetham, 2012, 126). This is the case, for example, in situations of unrest where there are belligerent groups that ground their ideology on the idea that the state failed to their values and interests (Goldstone, 2008, 290-291). By

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this token, legitimacy is one of the most important objectives of a state in a situation of *transitional justice* for reasons as the avoidance of replicating the initial causes of conflict and failing to secure effective guarantees of *non-recurrence*.

Against this backdrop, the literature on international arbitration and domestic policy has pointed out that the first shapes the concept of good governance and the rule of law (Kingsbury and Schill, 2009, 12). Then, sovereign decisions on investment matters that could potentially affect the rights of communities of special importance to *transitional justice* are particularly sensitive. This includes both measures adopted by domestic authorities as well as decisions of international investment tribunals. As exemplified by Bonnitcha (2014), the quantum of damages approved by a tribunal, if paid by the host state, can contribute to form the perception of an inequitable distribution of limited resources, thus increasing the sense of social injustice that commonly fuels conflict. Lawry-White (2015, 660-661) puts this in plain terms by asking what happens if states refrain from imposing compensations to millions of victims but are obliged to pay millionaire sums of investors.

In this regard, the investment protection system has been heavily criticized by authors reviewing its tension with public objectives (Tienhaara, 2009). While this paper disagrees with the idea that the investment protection system is essentially and inevitably inclined in favor of the investor, it notes that the opposition to it by the public opinion – including local communities and other stakeholders – is a reality. This is exemplified by the denunciation of the ICSID Convention by Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012. Remarkably, in Ecuador's denunciation, President Rafael Correa stated that the withdrawal from the instrument was necessary for the "liberation" of Latin American countries because it represented "colonialism" and "slavery." Another example of this are the declarations of recently appointed President

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of Peru, Pedro Castillo, who supports the withdrawal from the Convention as he considers that it is partial to multinational companies.[5]

All of the above refers to "domestic legitimacy", the one owed by a state to its own nationals and grounded on concepts such as the democratic governance (Buchanan, 2002). Nonetheless, the politics of foreign affairs have also shaped an "international legitimacy", which refers to the duties of a state to respect its international commitments and the political cost of failing to do so (Hurd, 1999). The latter includes a state's obligation to comply with investment awards, which despite suffering certain problems of non-compliance or delayed payment by rogue states has been proved successful in most instances (Gaillard and Penushliski, 2020). The *dilemma of state legitimacy* is then a feature that arises when a state faces national and international duties that oppose to each other, and it must decide to affirm one and negatively affect the other. Given its costs for any of the stakeholders, this is another feature of the interaction of investment arbitration and *transitional justice* that denotes their tension.

3.3 Victim-Perpetrator Cynicism

The third feature to consider is the *victim-perpetrator cynicism*. As found by Jacoby (2014), the complexity of armed conflict makes it difficult sometimes to separate indistinctly victims and perpetrators. Happold (2008) shows that a typical case of blurred lines between victims and perpetrators is that of child soldiers, who are usually recruited taking advantage of their weakness but end up committing atrocities similar or worse to those of other common offenders. This approach to conflict and peacebuilding may create special discomfort in schemes of *transitional justice*. For example, victims that never formed part of a violent group or never carried out acts of aggression, may feel that there is no place to relativize atrocities or establish any type of comparison between

[5] The candidate proposed the denunciation of the ICSID Convention in his presidential program, as well as in several public debates when he was running for office. He was proclaimed as President in July 2021.

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victims and perpetrators. State measures that contradict this premise may trigger what Pattyn, Hiel, and Dhont (2012) call "political cynicism," which makes communities less eager to trust a government.

This feature is of special importance in investment arbitration. As demonstrated before, it is not uncommon that investors appear before the investment protection system as *victims* of conflict, claiming a failure of the state to security and other rights. Of course, this is completely normal from a legal point of view as BITs are ultimately designed to offer this type of protections (Wälde, 2004). The commonly forgotten reason behind this is that, without investments protection, foreign investors would face huge asymmetries in a dispute against a host state, having recourse to very limited alternatives such as diplomatic protection and the courts of the same state (Schreuer, 2015). However, investor's access to private justice in the cloak of "weak parties" may be shocking for victims in marginalized communities, who do not have the bargaining power of investors and may feel major inequalities in the treatment of similar or worse abuses committed against them.

Discomfort in local communities and other stakeholders may increase – paired with political cynicism– bearing in mind that investors are not only *victims* of armed conflict but could be *perpetrators*. For instance, this could be the case in industries of particular social risk such as mining, where Handelsman (2003) shows that human rights violations tend to occur in conflict zones because economic endeavors such as mining and industrial activities tend to be located in regions far away from big cities. Similarly, even authors with practical experience in the field of investment arbitration acknowledge that activities with a significant impact in aspects such as the life style of local communities or the environment tend to be highly litigious for human rights issues (Burnett and Bret, 2017).

This is not a novel approach. Authors studying the interaction of human rights and investment arbitration have shown *in extenso* that many times economic activities may entail unlawful actions against local communities

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(Steininger, 2017). A typical case here is that of *Copper Mesa v Ecuador* (2016) in which the investor used heavily armed private security corps against civil populations to defend its properties, resulting in the death or serious injury of several members of the community, actions condemned by the investment tribunal. Another interesting work in this regard is that of Van Ho (2013), who reviews cases of corporate complicity with actions related to conflict and fundamental rights violations in Colombia, for example, the forced displacement of communities.

Lougee and Wallace (2008) show that the friction between investors and victims has led to an increase in the development of corporate social responsibility (CSR) in recent years. CSR refers to guidelines and practices those enterprises may follow to limit the negative impact of their activities in a host country, which reflects prior concerns about their actions in sensitive fields like the protection of the environment and the welfare of local communities (Akindeire, 2020). This concern has spread slowly to the investment arbitration system, gaining importance in investment treaties and cases. As tracked by Monebhurrun (2017), five years ago there were around 30 clauses regarding CSR commitments in current BITs.

The actions of investors that conflict with civil society also appear reflected in the development of the clean hands doctrine. According to Fitzmaurice (2005), the clean hands doctrine mandates that "he who comes to equity for relief must come with clean hands". Put differently, investors appearing before an international tribunal shall not be tainted by actions carried out in bad faith or unlawful behavior. Crawford (2019) explains that this concept is part of an overarching principle of legality in international law, that encompasses other ideas such as good faith. Despite the foregoing, in many cases, states have alleged a breach of the clean hands doctrine given actions of the investors that were considered deceitful. In *South American Silver v Bolivia* (2018), respondent presented this argument (para. 294) because agents of the claimant used sacred clothes of indigenous communities and entered into their assembly without permission (para. 318), which

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constitutes a great offense to their traditions. This type of behavior enhances the *victim-perpetrator cynicism* discussed here.

Stakeholders tend to set a hierarchy between human rights and BIT obligations, allocating greater value to the first.[6] This is clear in *Azurix v Argentina* (2006, 254), where the government asserted that "a conflict between a BIT and human rights treaties must be resolved in favor of human rights (…)." However, De Brabandere (2013, 193-194) explains this is not feasible because rights in a BIT may also be human rights and international law proscribes resolving treaty conflict on the basis of subjective attributions of value, with the only exception of *jus cogens* that deals with exceptional breaches as slavery.[7] This approach would seem contrary to common sense and will tend to be rejected by the public opinion and non-investor victims who may think that, in the end, investors have money and power, while other victims are underrepresented. Then, this is precisely how the intricacies of the *victim-perpetrator cynicism* accounts for the tension of investment arbitration and transition.

3.4 Regulatory Chill Caused by Investment Claims

A final feature relevant to this analysis and that is also one of the most important concepts in this paper is that of the *regulatory chill*. This term compiles the notion that, under the pressure of a threat of triggering an investment claim, public authorities will be more flexible in the application of public policies (Bonnitcha, 2011). Other authors have even been of the opinion that, in certain circumstances, authorities will respond to the threat of international investment arbitration by avoiding enacting or enforce regulatory measures, which may significantly reduce the effectiveness of those programs (Tienhaara, 2009). Notably, the latter crystalizes the stance of

[6] This may be explained by what M. Koskenniemi has called a "rhetoric of rights" which appeals to the prevalence of human rights in international law, *see* Steininger (2017).
[7] Due to the ambiguity of the scope of *jus* cogens, there is still ongoing discussion on the issue of whether human rights qualify as such, but many authors agree with this position, *see* Bianchi (2008).

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an important part of the literature that almost depicts investment arbitration and regulatory capacity as non-compatible concepts given their broad differences in terms of fundamental principles, key considerations, and underlying values.

An example of *regulatory chill* is the saga of the Marlin gold mine located in San Miguel Ixtahuacán; Guatemala studied by Pérez-Rocha (2016). Here, the Inter-American Commission on Human Rights advised the government to close the mine due to its severe environmental and social negative impacts, but the state decided to reopen it noting that foreign investors could bring international claims against the policy. Another case is that developed by Tienhaara (2006) on the mining bans imposed in Ghana for areas qualified as forest reserves due to a concern for the exponential depletion of the permanent forest estate. Despite the regulatory agenda of governmental agencies to afford protection to key environmental areas, the author shows that measures were overturned later because of threats of investment claims by foreign investors from Canada and the US who had mining titles to carry out extractive activities in the areas concerned.

This paper notes that this type of situations of *regulatory chill* may be reinforced by the specific circumstances of the state in question. Previous examples show that, as argued by Gross (2003), the threat of arbitration and the use of intimidation may be sufficient in developing countries with lesser capabilities to face these cases. Also, a country subject to several arbitrations in few years may be wary of implementing regulatory measures for a fear of increasing its rate of international litigation. For instance, recently Spain faced mass arbitrations in record time following a renewable energy policy, which to some extent causes concern about the consequences of regulatory action and may disincentivize policymaking (Simoes, 2016). These concerns are increased by what Matveev (2015) identifies as the interpretative indeterminacy of investment arbitration which means that states are in a difficult position to assess what treatment will tribunals afford to foreign investors.

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States that have been sued massively or that have been ordered to pay high sums in damages may also refrain from taking regulatory measures. In the end, if investment arbitration represents major difficulties to them in terms of financial capacity or international legitimacy, it is reasonable to think that they will refrain from adopting such initiatives. For instance, in 2019 an investment tribunal ordered Venezuela to pay around US $8.3 billion in a case against the oil & gas giant ConocoPhillips, which as argued by Kluding (2019), signifies a mighty blow to the state after a saga of measures that have led it to sink economically. Similarly, Argentina has faced 62 investment cases, which equates one tenth of all known claims and makes it the country with most cases in the history of these modern arbitration proceedings.[8] As explained by Titi (2014), these figures have led Latin American countries to reconsider the necessity of retaining investment treaties.

Even countries with strong in-house investment arbitration teams or a successful record as respondents in arbitration cases may instruct other authorities to avoid regulatory measures that could trigger arbitration or unintentionally create a fear of regulation among other state agencies. For instance, Bergen and Bergen (2021, 9-10) find that in states with a high bureaucratic capacity such as Canada,[9] once an investment claim against the country comes through, domestic authorities enter into close coordination with other agencies to assess and manage the case. Arguably, this could make that the threat of investment claims spreads into the language of domestic authorities. In support of this, Moehlecke (2020, 8) also demonstrates that in countries with well-developed bureaucracies such as France and the United Kingdom *regulatory chill* has been common upon an increasing number of investment cases for issues like the plain packaging of cigarettes.

[8] This data was obtained from UNCTAD Report "Investor-State Dispute Settlement Cases: Facts and Figures 2020" issued in September 2021.
[9] For further clarity, authors define "bureaucratic states" in a Weberian sense as states that have high bureaucratic features such as transparency and codification of intra bureaucratic communication and coordination procedures and expertise-based hiring procedures (9).

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But *regulatory chill* does not operate in the vacuum, it must be put in context with countries' reality to grasp its actual consequences. As demonstrated by Franck (2007), while investment claims against low-income countries are not massive, overall arbitrations versus developing countries do represent a significant part of the cases. Further, as argued by Zrilič (2019), the number of damages in these disputes could be an important obstacle to *transitional justice*. Transposing this to the context of post-conflict, most states involved in transition are developing nations (Harris, 2002). Then it is no secret that the *regulatory chill* of investment arbitration poses a major concern for the effective implementation of programs seeking a lasting peace. Not only states may be on the verge of being ordered to pay massive sums of money in situations of financial distress, but their whole transitional agenda may be paralyzed by the fear of being punished for taking regulatory action.

4. How the Application of Investment Standards Could Interfere with the Fulfillment of a *Transitional Justice* Framework

This section will examine the features of investment arbitration reviewed in Section 3 in light of the core principles of *transitional justice* and access to justice described in Section 2. It will consider three aspects: (i) *justice* and how it could be affected by arbitral awards that trigger a sense of unfairness in the community; (ii) *non-recurrence* and how the lack of access of victims to the investment arbitration system could lead to a default in their *recognition*; and (iii) *reparation* and how the fear of investment claims could result in shortcomings regarding the capacity of the state to provide *effective remedy*. By the end of this section, it will be clear why and how, if not addressed properly, various features of investment arbitration could pose a significant challenge to *transitional justice*.

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4.1 Justice: Arbitral Awards that Trigger a Sense of Unfairness

This paper explained before that *transitional justice* relates in great part to the concept of *justice* adopted in a transition. A big portion of this in contexts of post-conflict relates to the intervention of a state on traditional sources of inequality and its assessment of the fundamental differences between marginalized communities and traditional elites. The main issue with this principle of *transitional justice* considering investment arbitration is that inherent to the *victim-perpetrator cynicism* described above. Once a state is confronted with the need to affirm either the commitments of a BIT and those of a peace instrument, a decision in favor of the first will trigger a sense of unfairness in the community. And, while this may be reasonable in legal terms, it will not be perceived as such, damaging the sense of *justice* in transitional decisions. Extrapolating this to the reality, the precedent of certain investment arbitrations against African countries facing transition is crucial.

During the late XXth century, several countries such as South Africa and Zimbabwe implemented a series of measures known as black economic empowerment (BEE) programs, which were aimed at reducing poverty and increasing the share of black population ownership over domestic resources (Esser and Dekker, 2008). Before this transition, foreign investors or local elites had accumulated wealth through systems of oppression and abuse like the *apartheid* and several forms of colonialism. While these forms of enrichment may constitute valid rights in legal terms, there are always fundamental concerns on their legitimacy (Zenker, 2014). Then, BEE measures entailed the redistribution of wealth, meaning the possibility to affect the rights acquired by foreign investors during previous regimes. Because of such actions, some investors presented investment claims against these countries before international tribunals.

For the case of South Africa, as explained by Iheduru (1998), the end of the *apartheid* era triggered a series of BEE measures by the new government. This included the Mineral and Petroleum Development Act (MPDA), which asserted state's ownership of natural resources and requested rights holders

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to re-apply for permits considering that such authorizations would be assessed again based on BEE commitments. This led to the case of *Pietro Foresti v South Africa* (2010), brought by investors from Italy and Luxembourg under the Italy-South Africa and the Luxembourg-South Africa BITs. Investors alleged that BEE measures amounted to expropriation and a breach of the FET.[10]

As to the situation in Zimbabwe, Thomas (2003, 700) explains that, after its effective independence from the UK in 1980, the Government implemented a series of acts aimed at the redistribution of land among the local black community. In particular, the Indigenization and Economic Empowerment Act (IEE) of 2007, required indigenous Zimbabweans to own or control 51% of businesses in sectors such as mining and manufacturing. This resulted in two investment arbitrations, the cases of *von Pezold v Zimbabwe* (2015) and *Funnekotter v Zimbabwe* (2009). In both disputes, the tribunal found in favor of the claimants considering that BEE measures, in particular the occupation of local land by war veterans, amounted to expropriation, which was the focus of the decisions.[11]

These cases show a critical tension between investment arbitration and *transitional justice* from the perspective of *justice*. At the outset, tribunals seem to ignore the complexity of non-economic issues in post-conflict or prioritize investment rules and apply them narrowly. More importantly, they are deferential to the systemic issues behind specific regulations, for example, the tension inherent to the fact that investors' rights might have been acquired in a context of violent dispossession or the role of BEE policies in trying to address this inequality on the grounds of fairness. As concluded by Le Moli (2021, 25), the system seems to overemphasize the protection of foreign investment, downplaying "the broader dimension of inequality and abuse" that are also key to *distributive justice*.

[10] The case was discontinued at an early stage of the proceedings by agreement of the parties.
[11] For further detail, *see* Le Moli (2021, 18-18).

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4.2 Non-Recurrence: Default in the Recognition of Victims

Call (2012, 224-230) points out that, without state legitimacy, a *lasting peace* cannot be achieved, which means that having a post-conflict framework acceptable to the civil society is essential to securing an effective *transitional justice*. As the head of that transition in times of post-conflict, the state is responsible for achieving a long-term peace through regulatory action, including measures necessary to establish its own legitimacy. McDonough (2008) shows that, in cases of civil war that involve belligerent groups as guerrillas, *recognition* is the core of the bargain that leads these organizations to surrender their weapons with hopes of receiving political representation and participation in return. Hence, securing this exchange is paramount to maintain state legitimacy once war is over.

However, peacebuilding not only means legitimacy before domestic stakeholders. As explained before, a state has international commitments that it must fulfill and transition is not an exception. Schreuer (2019) clarifies that, under the general rules of international law, war and emergency situations will rarely suspend the obligations of states concerning the protection of foreign investments. Upon these circumstances, investment claims could place the state in a situation where it must decide between the discomfort of civil society and the respect to international commitments. Then, here appears another obstacle to *transitional justice*, this time concerning the achievement of a *lasting peace* through the *recognition* of victims. To understand this issue better it is necessary to go back to the *legitimacy dilemma*.

Investment arbitration poses a special challenge because it means that governments will put at stake local or international reputation due to transitional measures. In foreign affairs, consequences of default in state obligations are strong (Hurd 1999). But in *transitional justice* they may represent shattering the very foundations of a peace process. As a result of a government endangering the terms of transition by granting prevalent application to the rights of foreign investors, stakeholders such as victims and

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former armed groups may lose their trust in the system and opt out of the post-conflict program (Bonnitcha, 2014). Even if they do not do so intentionally, spending valuable resources in the reparation of foreigners while weaker communities do not get redress could delay reform and create a sense of injustice.

As peace agreements often take long and entail complex negotiations, the failure of the state to meet its commitments will often be seen as a disrespect and could potentially worsen the perception of unfairness among civil society (Subotic, 2013). *Non-recurrence* would then be at its lowest point because, once it has taken years to reach an agreement and parties have already made concessions, actions perceived as contrary to minimum standards of treatment motivate actors to affirm their initial disagreements. The case of former members of armed groups that have accepted to go back to the civil society despite stigma is a major example. Referring to the case of the Revolutionary Armed Forces of Colombia (FARC) in Colombia, Gutiérrez (2020) shows that, when belligerent groups feel that they are not offered equality of opportunities, adequate protection, and effective reparation they will most probably raise against the state again.

Previously, the paper described the bottom-up approach to transition and that its essence is giving the first place in peacebuilding to voices that have not been heard. When comparing transition and investment arbitration this gives place to a question about the *recognition* of victims. In political theory, this usually refers to the possibility to take part in decision making processes through representatives (Brennan and Hamlin, 1999). This article is not considering the issue of whether victims can or cannot participate directly in investment arbitration, which is not permitted *stricto sensu*. But it does question to what extent they may feel that their interests are underrepresented before international tribunals. And this is because, while local communities may not have a direct interest in taking part of these processes, *jus post bellum* means that they get to feel that they have a voice in decision-making when it concerns decisions that affect their interests (De Waardt and Weber, 2019).

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A well-known feature of international law is that individuals are often left aside from most fora (Clapham, 2010). Indeed, most international affairs are decided between states and, while communities are a key concern of the debate, they are frequently treated as a passive player and given a secondary role, if any. This has changed in recent years with systems that give a greater importance to individuals and communities, for example, the contemporary human rights regime (Buergenthal, 2017). However, this is still not the rule and the situation is more evident in international economic law. Subjects discussed in this system, such as international trade and investments, undoubtedly touch upon issues of great social interest like the protection of public health, the environment, and animal welfare. Nonetheless, the degree of participation of the civil society in international dispute settlement remains minimal and the civil society has shown a low capacity to influence these systems (Hopewell, 2015).

Overall, victims are underrepresented in the investment arbitration system. To this paper, it is not necessary that they are treated as parties to a dispute, but neither should they be completely excluded from the discussion. Potential investment claims against measures of *transitional justice* could affect their implementation and therefore the victims that would benefit from such programs. Consequently, the victim's sense that they were left out from a discussion deciding their future calls to question once more whether they are being part of a fair transition capable of securing *recognition*. As such, this could be a heavy hit on the guarantees of *non-recurrence* in a post-conflict environment.

4.3 Reparation: Shortcomings in Providing Effective Remedy

As extensively argued before, the access of victims to an *effective remedy* is a key consideration for *reparation*. In this regard, the threat of investment claims poses major concerns. The critical aspect here is the contrasting approach to property rights from the perspectives of *transitional justice* and investment arbitration. Under instruments like the Pinheiro Principles,

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transition looks at property as an essential part of reparation, granting a special recognition to remedies such as restitution. At the same time, most part of investment arbitration is centered on property rights, being claims on expropriation one of the core concepts of the system (Reinisch, 2005). Actually, as shown by Barrera (2018), tribunals have recognized the right to property as a human right.

Hence, at first glance, there would not seem to be a clash of values on the assessment of property. Both systems acknowledge the importance of property and put forward protections to property rights. However, the problem arises when there are parallel claims for the same property. This may happen because the state considers that a property is necessary for the reparation of war victims and this conflicts with the private rights of an investor over that property. Another example, though much more complicated, is when victims of an armed conflict had the customary tenancy of a property and were forcefully displaced from that location because of violence, but then a foreign investor acquired that property that was left vacant. *Transitional justice* regulations could make victims entitled to that property as an *effective remedy* for atrocities suffered and an investment instrument may grant a foreign investor protection of its regular ownership right over the same property.

Against this backdrop, the recent work of Velásquez (2016) and Von Ho (2016) on the Colombian case is relevant as it provides an overview of the potential implications of investment arbitration on the implementation of post-conflict policies. There are several theories on how and when did the Colombian conflict emerge. A common explanation is that it appeared since the last part of the XXth century because of the unequal distribution of land and the lack of political participation of non-traditional groups (Díaz 2018). As found by Goyes (2015, 79) land inequality was one of the main complaints of leftist guerrilla groups in Colombia that led to an over 50 years internal conflict. Then, it is generally accepted that conflict on property rights is a key consideration in post-conflict reconstruction in the country, specifically in

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terms of land reform (Saffon and Uprimny, 2010, 379-378). While this paper takes the Colombian case as a reference, these premises could be extended to other situations with similar features.

A necessary context to understand conflict in Colombia is that of the different armed groups that participated in the spiral of violence in the country. Two of these are of particular interest. On the one hand, there are several guerrilla groups, most of leftist ideas and founded on alleged ideals of promoting the redistribution of resources and political upheaval of peasants, indigenous communities, and other marginalized groups of society expecting better opportunities (Post 2009). As the 2016 Peace Process -which is the one that concerns the purposes of this paper- was exclusively with the largest guerrilla group at the time called FARC, the article focuses on it. On the other hand, there were paramilitary organizations, formed by right-wing groups as landowners in a reaction to guerrillas (Grajales, 2011). Of course, the complexity of the armed conflict in Colombia involves many stakeholders, including politicians, public figures, drug cartels, official armed forces, among others, but this paper will not delve deeper into these details.

As a consequence of the conflict in the country, more than 6 million people were forcefully displaced in Colombia (Attanasio and Sánchez, 2012, 2). In this context, as remarked above, the relation of armed conflict with property rights, as well as the role of foreign investors in such intricacies, is crucial to understand the clash of values between investment arbitration and *effective remedy*. To provide sufficient background, Thomson (2011, 347) explains that foreign corporations either sponsored paramilitary groups for taking property off from victims using force or knowingly purchased property that had been acquired by irregular means. Adding to this, Summers (2012, 222) has pointed out the fact that forceful displacement has been intensive in regions with intensive economic activity in sensitive industries such as mining.

While the Colombian Peace Agreement was signed in 2016, there were previous measures aimed at providing *effective remedy* to war victims. In

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2004, the Constitutional Court in Judgement T-025 acknowledged that forceful displacement in the country was a serious problem and that it had not been addressed adequately by the state. Then, it declared the existence of an "unconstitutional state of affairs" in virtue of systemic and massive rights violations due to the forced displacement, ordering a land restitution program to redress the dispossession caused by years of armed conflict. In 2011, Congress passed the Victims' Law, which created an institutional legal framework to protect, assist, and repair victims of armed conflict that had lost their lands, were forcedly displaced, or had suffered other damages. Among its measures, it included the reversion of property titles acquired by illicit means or as a result of an irregular transaction. *De facto,* this includes the possibility of reverting titles from foreign investors that were obtained through the use of force on local communities.

Additional provisions of particular interest in the context of the Victims' Law are those related to the procedure that must be followed in these cases, in particular the burden of proof of such allegations. Broadly, the law states that, once a victim makes a claim that it was displaced from its land, the current owner bears the burden of proof to demonstrate that it acquired the territory in good faith. Otherwise, its ownership titles will be voided and deemed as if they had never occurred. There is also a presumption of illegality of the land property if the underlying contract with the victim was subscribed by a person convicted of actions associated to an armed group outside the law or if the price of the property was below 50% of its value, subject to additional conditions.

In this context, as found by Van Ho (2016) not only transitional measures as those set forth in the Victims' Law could give place to investment claims, but states duty to compensate if such arbitrations came forward would render financially difficult for the state to implement transition through measures such as restitution or economic compensation. The impact of this on the capacity of the state to serve *distributive justice* is clear. Measures on property rights, even if made in the context of favoring victims and sanctioning

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investors for property acquisition through irregular means, would be restricted by international protections under BITs. As a result, investment arbitration would be the material expression of how investment protection can put a straitjacket on *transitional justice* through wealth redistribution, getting in the way of the access of war victims to an *effective remedy*.

Von Ho (*Ibidem*) adds two impacts to the interaction of investment arbitration and *transitional justice*. First, that the effects of measures on investors' rights and the threat of international claims have an inhibiting effect on the very adoption of redistribution policies. Within the theoretical framework proposed in this article, this suggests the same conflicts presented before as a form of *regulatory chill*. Second, that this fear of action by public authorities ends undermining Colombia's compliance with its obligations under international human rights and humanitarian law, for example, facilitating reparation and preventing impunity as illustrated in cases such as *Barrios Altos v Peru* in Section 3. This consideration bears major importance and will be analyzed in depth in the closing remarks of the paper.

Lastly, as expressed in Section 3 on the understanding of the right of war victims to access to justice, there is another layer of the concept of *effective remedy.* This refers to matters of judicial proceedings such as the right of victims to get prompt redress of their claims and actual relief. In the context of post-conflict jurisdictions, access to justice is sometimes envisaged in the actions of transitional tribunals and other decision-making authorities. In Colombia, this role is in charge of different institutions, including the Special Jurisdiction for Peace (JEP) and the Unit for Land Restitution (ULR). A case brought before the ULR in 2017 is of particular interest to this analysis. In the decision rejecting the restitution of lands located in a conflict region, where local communities were forcefully displaced and later a foreign mining company carried out operations with government permits, the entity stated:

> "(...) the analysis of the legality of the contract must be careful, since requesting a declaration of annulment or non-existence of

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> the mining title through the referred presumptions suppose a risk of significant damage for the Victims Unit and the Colombian State. Particularly, *given the dispute resolution mechanisms Colombia has signed within Investment-Treaties, mining investment protection clauses, and the possibility of claims of direct reparation of damages* (…) Ultimately, public funds is what is at stake" (emphasis added, my translation).

Then, limits to an *effective remedy* are another front where investment arbitration and *transitional justice* clash. Considering contexts such as the Colombian case, the role of foreign investors in the direct dispossession of property rights, the *victim-perpetrator cynicism* plays once again a critical role. Investment claims may be read not only as an opposing force that of victim's rights, but as the force that promoted violence in the first place. All of the above should also be read in light of the ability of states to defend their transitional programs against international investment claims. As detailed when explaining the *asymmetry of rights* of states and investors in arbitral practice, the *status quo* would suggest that states have very limited chances to support transitional measures as long as they are contrary to the protections granted to foreign investors. Such a situation inevitably leads to an *impasse* between transition and investment arbitration.

5. Conclusions

This paper was aimed at studying the interaction of investment arbitration and *transitional justice*, particularly the features that could make them be in contrast. To this purpose, it considered essential values of *transitional justice* and confronted them with distinctive features of investment arbitration to review how they would relate to each other. The article found that, due to the strong frictions between these characteristics, investment arbitration could pose an important challenge for a country undergoing transition. Overall, it gives place to questions about the principles of *justice*, *non-recurrence*, and

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reparation. Specifically, for peacebuilding around the implementation of *distributive justice*, the *recognition* of communities, and the capacity of the state to offer victims an *effective remedy*.

The foregoing does not mean that the gap between investment arbitration and transition cannot be resolved. Authors like Lawry-White (2015) argue that it would be possible to have renewed approaches to investment claims in post-conflict, which would mean that, with a plural and holistic approach to investment arbitration, *transitional justice* may not be hindered but promoted. Currently, foreign investors see international investment law as an open door to obtain redress from the harm inflicted by armed conflict, which is a reason to praise investment arbitration. But a similar approach could be adopted when considering other type of victims, aiming to reduce the asymmetries of the system. Despite this, the current state of affairs of arbitral practice in investment cases shows that there is still an important degree of uncertainty as to a change of paradigm in this sense. Regulatory measures would then be at great risk of being challenged and affected by these disputes. This calls for a larger debate on the issue as omissions on the regulation of the interaction between investment protection and *transitional justice* would lead to nefarious results in a post-conflict framework. States could decide to bend before international commitments and allow the prevalence of investors rights over victims interests, affecting a *lasting peace*. But they could also prefer internal transition and downplay the importance of maintaining a working system of FDI protection. Whatever the result, the consequences are undesired and this calls to action for a larger consideration in academia and policymaking.

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https://doi.org/10.6092/issn.2724-6299/13761

References

Adam J. (2010). Post-Conflict Ambon: Forced Migration and the Ethno-Territorial Effects of Customary Tenure, in *Development and Change*, 41(3), 401–419.

Aggestam K., & Björkdahl A. (2012). Introduction: the study of just and durable peace, in *Rethinking Peacebuilding* (Routledge).

Anthowiak T. M. (2011). An Emerging Mandate for International Courts: Victim-Centered Remedies and Restorative Justice, in *Stanford Journal of International Law*, 47, 279.

Appel B. J., & Loyle C. E. (2012). The Economic Benefits of Justice: Post-conflict Justice and Foreign Direct Investment, in *Journal of Peace Research*, 49(5), 685–699.

Barrera E. B. (2018). Property Rights as Human Rights in International Investment Arbitration: A Critical Approach, in *Boston College Law Review*, 59(8), 2635–2662.

Bass G. J. (2004). Jus Post Bellum, in *Philosophy & Public Affairs*, 32(4), 384–412.

Beetham D. (2012). Political Legitimacy, in E. Amenta, K. Nash, & A. Scott (eds.), *The Wiley-Blackwell Companion to Political Sociology* (John Wiley & Sons).

Benson P. (1991). The Basis of Corrective Justice and Its Relation to Distributive Justice, in *Iowa Law Review*, 77, 515–601.

Bianchi A. (2008). Human Rights and the Magic of Jus Cogens, in *European Journal of International Law*, 19(3), 491–508.

Bodea C., & Ye F. (2020). Investor Rights versus Human Rights: Do Bilateral Investment Treaties Tilt the Scale?, in *British Journal of Political Science*, 50(3), 955–977.

Bothe M. (2021). Some Remarks on the Protection of Property Rights in Time of Armed Conflict, in A. de Guttry, H. H. G. Post, & G. Venturini (eds.), *The 1998–2000 Eritrea-Ethiopia War and Its Aftermath in International Legal*

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Perspective: From the 2000 Algiers Agreements to the 2018 Peace Agreement (pp. 469–473), (TMC Asser Press).

Boven T. V. (2009). Victims' Rights To A Remedy And Reparation: The New United Nations Principles And Guidelines. Reparations for Victims of Genocide, War Crimes and Crimes against Humanity, 17–40.

Brabandere E. D. (2013). Human Rights Considerations in International Investment Arbitration, in *The Interpretation and Application of the European Convention of Human Rights* (pp. 183–215), (Brill Nijhoff).

Brennan G., & Hamlin A. (1999). On Political Representation, in *British Journal of Political Science*, 29(1), 109–127.

Buergenthal T. (2006). The Evolving International Human Rights System, in *American Journal of International Law*, 100(4), 783–807.

Burt J. M. (2009). Guilty as charged: The trial of former Peruvian president Alberto Fujimori for human rights violations, in *International Journal of Transitional Justice*, 3(3), 384-405.

Call C. T. (2012). *Why Peace Fails: The Causes and Prevention of Civil War Recurrence* (Georgetown University Press).

Clapham A. (2021). *War* (Oxford University Press).

Clapham A. (2010). The Role of the Individual in International Law, in *European Journal of International Law*, 21(1), 25–30.

Cohen A. I. (2016). Corrective vs. Distributive Justice: the Case of Apologies. *Ethical Theory and Moral Practice*, 19(3), 663–677.

Dagher R. (2018). Legitimacy and post-conflict state-building: The undervalued role of performance legitimacy, in *Conflict, Security & Development*, 18(2), 85–111.

De Greiff P. (2012). Theorizing transitional justice, in J. Elster, R. Nagy, & M. Williams (eds.), in *Transitional justice* (pp. 31–77), (NYU Press).

De Greiff P. (2006). Truth-Telling and the Rule of Law, in T. A. Borer (ed.), *Telling the truths: truth telling and peace building in post-conflict societies* (pp. 181–206), (University of Notre Dame Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

De Brabandere E. (2015). Jus Post Bellum and Foreign Direct Investment – Mapping the Debate, in *The Journal of World Investment & Trade*, 16, 590–063.

De Waardt M., & Weber S. (2019). Beyond Victims' Mere Presence: An Empirical Analysis of Victim Participation in Transitional Justice in Colombia, in *Journal of Human Rights Practice*, 11(1), 209–228.

Díaz C. (2008). Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia, in K. McEvoy & L. McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (pp. 189–216), (Bloomsbury Publishing).

Díaz F. A. (2018). Conflict and peace in the making: Colombia from 1948–2010, in *Truth, Justice and Reconciliation in Colombia: Transitioning from Violence* (pp. 15–33), (Routledge).

Dixon P. J. (2017). The Role of Reparations in the Transition from Violence to Peace, in *Oxford Research Encyclopedia of Politics* (Oxford University Press).

Dupuy P. M., Petersmann E. U., & Francioni F., eds. (2009), Human Rights, in *International Investment Law and Arbitration* (Oxford University Press).

ECtHR, Isayeva v. Russia, 57950/00, 24 February 2005, available at: https://www.refworld.org/cases,ECHR,4223422f6.html.

Elster J. (2004). *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press).

Esser I.-M., & Dekker A. (2008). Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles, *in Journal of International Commercial Law and Technology*, 3(3), 157–169.

Farer T. (1992). The Hierarchy of Human Rights, in *American University Journal of International Law and Policy*, 8(1), 115–119.

Flournoy M., & Pan M. (2002). Dealing with demons: Justice and reconciliation, in *The Washington Quarterly*, 25(4), 111–123.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Francioni F. (2009). Access to Justice, Denial of Justice, and International Investment Law, in *European Journal of International Law*, 20(3), 729–747.

Franck S. D. (2005). The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions, in *Fordham Law Review*, 73(4), 1521–1625.

Franck S. D. (2007). Empirically Evaluating Claims about Investment Treaty Arbitration, in *North Carolina Law Review*, 86, 1–87.

Franke U., Magnusson A., Dahlquist J., Schwebel S., eds. (2016). Introduction, in *Arbitrating for Peace: How Arbitration Made a Difference* (Wolters Kluwer).

Gaillard E., & Penushliski I. (2020). State Compliance with Investment Awards, in *ICSID Review - Foreign Investment Law Journal*, 35(3), 540–594.

Gallen J. (2015). Odious Debt and Jus Post Bellum, in *The Journal of World Investment & Trade*, 16(4), 666–694.

Galtung J. (1969). Violence, Peace, and Peace Research, in *Journal of Peace Research*, 6(3), 167–191.

Grajales J. (2011). The rifle and the title: Paramilitary violence, land grab and land control in Colombia, in *The Journal of Peasant Studies*, 38(4), 771–792.

Gray C. D. (1990). *Judicial Remedies in International Law* (Clarendon Press).

Gready P., & Robins S. (2014). From Transitional to Transformative Justice: A New Agenda for Practice, in *International Journal of Transitional Justice*, 8(3), 339–361.

Gross S. G. (2002). Inordinate Chill: Bits, Non-NAFTA Mits, and Host-State Regulatory Freedom - An Indonesian Case Study, in *Michigan Journal of International Law*, *24*, 893.

Hampton J. (1984). The Moral Education Theory of Punishment, in *Philosophy & Public Affairs*, *13*(3), 208–238.

Handelsman S. (2003). Mining in conflict zones*, in *Business and Human Rights* (Routledge).

Happold M. (2008). Child Soldiers: Victims or Perpetrators, in *University of La Verne Law Review*, 29, 56.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Harris G. (2002). *Recovery from Armed Conflict in Developing Countries: An Economic and Political Analysis* (Routledge).

Harten G. V. (2013). *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press).

Henham R. (2004). Conceptualizing Access to Justice and Victims' Rights in International Sentencing, in *Social & Legal Studies*, 13(1), 27–55.

Honneth A. (1996). *The Struggle for Recognition: The Moral Grammar of Social Conflicts*. (MIT Press).

Hopewell K. (2015). Multilateral trade governance as social field: Global civil society and the WTO, in *Review of International Political Economy*, 22(6), 1128–1158.

Hurd I. (1999). Legitimacy and Authority in International Politics, in *International Organization*, 53(2), 379–408.

IACtHR, Case of La Cantuta v Peru, Muñoz Sánchez and ors v Peru, Interpretation of the judgment on merits, reparations, and costs, IACHR Series C No 173, IHRL 1546 (IACHR 2007), 30th November 2007.

IACtHR, Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, Mayagna (Sumo) Awas Tingni Community v Nicaragua, Merits, reparations, and costs, IACHR Series C No 79, [2001] IACHR 9, IHRL 1462 (IACHR 2001), 31st August 2001.

ICSID, Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990).

ICSID, Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award (14 July 2006).

ICSID, L.E.S.I. S.p.A. and ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire, ICSID Case No. ARB/05/3, Award (12 November 2008), https://www.italaw.com/cases/618.

ICSID, Lundin Tunisia B. V. v. Republic of Tunisia, ICSID Case No. ARB/12/30, Excerpts of the Award (22 December 2015), https://www.italaw.com/cases/2268.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

ICSID, Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), https://www.italaw.com/cases/1087.

Jacoby T. A. (2015). A Theory of Victimhood: Politics, Conflict, and the Construction of Victim-based Identity, in *Millennium*, 43(2), 511–530.

Joshi M., & Quinn J. M. (2020). Civil war termination and foreign direct investment, 1989–2012, in *Conflict Management and Peace Science*, 37(4), 451–470.

Kalicki J., & Medeiros S. (2007). Fair, Equitable and Ambiguous: What Is Fair and Equitable Treatment, in *International Investment Law? ICSID Review - Foreign Investment Law Journal*, 22(1), 24–54.

Kamber K. (2017). Limiting State Responsibility under the European Convention on Human Rights in Time of Emergency: An Overview of the Relevant Standards, in *European and Comparative Law Journal*, 5(1), 11–29.

Keating T., & Knight A., eds. (2004). *Building Sustainable Peace. University of Alberta Press* (United Nations University Press).

Kluding K. (2019). Oil-rich and out of options: Venezuela's international arbitration saga of expropriation, enforcement, and settlement, in *The Journal of World Energy Law & Business, 12*(3), 260-270.

Knuts G., (2012). Jura Novit Curia and the Right to Be Heard – An Analysis of Recent Case Law, in *Arbitration International*, 28(4), 669–688.

Korzun V. (2017). The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-outs, in *Vanderbilt Journal of Transnational Law*, 50, 355.

Lawry-White M. (2015). International Investment Arbitration in a Jus Post Bellum Framework, in *The Journal of World Investment & Trade*, 16(4), 633–665.

Lawther C., & Moffett L. (2017). Introduction – Researching transitional justice: The highs, the lows, and the expansion of the field, in C. Lawther, L.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Moffett, & D. Jacobs (eds.), *Research Handbook on Transitional Justice* (Edward Elgar Publishing).

Le Moli G. (2021). Intruders in a Balancing Act: Black Economic Empowerment, Transitional Justice, and Investment Arbitration Tribunals, in *International Journal of Transitional Justice*, 15(1), 7–25.

Leckie S., ed. (2003). *Returning Home: Housing and Property Restitution Rights for Refugees and Displaced Persons* (Brill Nijhoff).

Lundy P., & McGovern M. (2008). Whose Justice? Rethinking Transitional Justice from the Bottom Up, in *Journal of Law and Society*, 35(2), 265–292.

Lykes M. B., & van der Merwe H. (2017). Exploring/expanding the reach of transitional justice, in *International Journal of Transitional Justice*, 11(3), 371-377.

Mandel R. (1986). The Effectiveness of Gunboat Diplomacy, in *International Studies Quarterly*, 30(1), 59–76.

Mani R. (2005). Reparation as a Component of Transitional Justice: Pursuing "Reparative Justice" in the Aftermath of Violent Conflict, in *Out of the ashes: Reparation for victims of gross and systematic human rights violations* (pp. 53–82), (Intersentia).

Marshall P. D. (2011). A Comparative Analysis of the Right to Appeal, in *Duke Journal of Comparative & International Law*, 22(1), 1–46.

Martinez A. (2010). Invoking State Defenses in Investment Treaty Arbitration, in M. Waibel (ed.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International).

Matveev A. (2015). Investor-State Dispute Settlement: The evolving balance between investor protection and state sovereignty, in *University of Western Australia Law Review*, 40, 348.

May L., & Edenberg E. (2013). *Jus Post Bellum and Transitional Justice* (Cambridge University Press).

Mayer-Rieckh A. (2017). Guarantees of Non-Recurrence: An Approximation, in *Human Rights Quarterly*, 39, 416.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

McCallin B. (2013). The role of restitution in post-conflict situations, in *Land and post-conflict peacebuilding* (pp. 99–114), (Routledge).

McDonough D. S. (2008). From Guerrillas to Government: Post-conflict stability in Liberia, Uganda, and Rwanda. Third World Quarterly, 29(2), 357–374.

McEvoy K., & McGregor L. (2008). *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Bloomsbury Publishing).

Morris C. (2008). State Legitimacy and Social Order, in J. Kühnelt (ed.), *Political Legitimization without Morality?* (pp. 15–32), (Springer Netherlands).

Murcia A. M. P. (2019). *Contesting Courts, a Case of Rights' Protection in Colombia*, in ILSA Journal of International and Comparative Law, 25(3), 393–532.

Muvingi I. (2009). Sitting on powder kegs: Socioeconomic rights in transitional societies, in *International Journal of Transitional Justice*, 3(2), 163-182.

Neumayer E., & Spess L. (2005). Do bilateral investment treaties increase foreign direct investment to developing countries?, in *World Development*, 33(10), 1567–1585.

Nichols S. S. (2014). Reimagining Transitional Justice for an Enduring Peace: Accounting for Natural Resources in Conflict, in D. N. Sharp (ed.), *Justice and Economic Violence in Transition* (pp. 203–231), (Springer).

Nussbaum A. (1952). The Significance of Roman Law in the History of International Law, in *University of Pennsylvania Law Review*, 100(5), 678–687.

Offe C. (1999). How Can We Trust Our Fellow Citizens?, in P.M.E. Warren & M.E. Warren (eds.), *Democracy and Trust* (pp. 42–87), (Cambridge University Press).

Ortino F. (2018). The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far Have We Come?, in *Journal of International Economic Law*, 21(4), 845–865.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Paige P. (2009). How Transitions Reshaped Human Rights: A Conceptual History of Transitional Justice, in *Human Rights Quarterly*, 31, 321.

Paris R. (2008). Post-Conflict Peacebuilding, in Daws S. & Weiss T. G. (eds.), *The Oxford Handbook on the United Nations* (Oxford University Press).

Pattyn S., Van Hiel A., Dhont K., & Onraet E. (2012). Stripping the Political Cynic: A Psychological Exploration of the Concept of Political Cynicism, in *European Journal of Personality*, 26(6), 566–579.

Pérez-Rocha M. (2016). Free Trade's Chilling Effects. NACLA Report on the Americas, 48(3), 233–238.

PCA, Copper Mesa Mining Corporation v. Republic of Ecuador, No. 2012-2, https://www.italaw.com/cases/4206.

PCA, South American Silver Limited v. Bolivia, Case No. 2013-15, Respondent Counter-Memorial (31 March 2015), https://www.italaw.com/cases/2121.

Pham P., & Vinck P. (2007). Empirical Research and the Development and Assessment of Transitional Justice Mechanisms, in *International Journal of Transitional Justice*, 1(2), 231–248.

Phiri M. Z. (2012). The political economy of Mozambique twenty years on: A post-conflict success story?, in *South African Journal of International Affairs*, 19(2), 223–245.

Post J. M. (2009). Revolutionary Armed Forces of Colombia (FARC), in M. T. Kindt, J. M. Post, & B. R. Schneider (eds.), *The World's Most Threatening Terrorist Networks and Criminal Gangs* (pp. 235–245), (Palgrave Macmillan US).

Przeworski A. (1986). Transitions from Authoritarian Rule: Comparative Perspectives, in G. O'Donnell, P. C. Schmitter, & L. Whitehead (eds.), *Transitions from Authoritarian Rule: Comparative Perspectives* (JHU Press).

Rhode D. L. (2003). Access to Justice: Connecting Principles to Practice, in *Georgetown Journal of Legal Ethics*, 17(3), 369–422.

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Reinisch A. (2005). Expropriation, in *Transnational Dispute Management* (TDM), 2(5).

Risvas M. (2019). Non-discrimination and the Protection of Foreign Investments in the Context of an Armed Conflict, in K. Fach Gómez, A. Gourgourinis, & C. Titi (eds.), *International Investment Law and the Law of Armed Conflict* (pp. 199–215), (Springer International Publishing).

Saffon M. P., & Uprimny R. (2010). Distributive Justice and the Restitution of Dispossessed Land in Colombia, in M. Bergsmo, C. Rodriguez-Garavito, P. Kalmanovitz, & M. P. Saffon (eds.*), Distributive Justice in Transitions* (Torkel Opsahl Academic EPublisher).

Sandel M. J. (2009). *Justice: what's the right thing to do?* (Farrar, Straus, and Giroux).

Sandoval C. (2014). Transitional Justice and Social Change, in *Sur - International Journal on Human Rights*, 20, 181.

Schill S. W. (2011). Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach, in *Virginia Journal of International Law*, 52, 57.

Schneiderman D. (2008). *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge University Press).

Schreuer C. (2015). Do We Need Investment Arbitration?, in *Reshaping the Investor-State Dispute Settlement System* (Brill Nijhoff).

Schreuer C. (2019). War and Peace in International Investment Law, in K. Fach Gómez, A. Gourgourinis, & C. Titi (eds.), *International Investment Law and the Law of Armed Conflict* (pp. 1–21), (Springer International Publishing).

Simoes F.D. (2016). When Green Incentives Go Pale: Investment Arbitration and Renewable Energy Policymaking, in *Denver Journal of International Law & Policy*, 45, 251.

Smith D. (2004). Trends and Causes of Armed Conflict, in A. Austin, M. Fischer, & N. Ropers (eds.), *Transforming Ethnopolitical Conflict: The Berghof Handbook* (pp. 111–127), (VS Verlag für Sozialwissenschaften).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Stahn C. (2006). 'Jus ad bellum', 'just in bello'... 'jus post bellum'? – Rethinking the Conception of the Law of Armed Force, in *The European Journal of International Law*, 17(5), 921-943.

Steininger S. (2018). What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration, in *Leiden Journal of International Law*, 31(1), 33–58.

Subotic J. (2013). Bargaining justice: A theory of transitional justice compliance, in *Transitional Justice Theories* (Routledge).

Teitel R. G. (2003). Transitional Justice Genealogy, in *Harvard Human Rights Journal*, 16, 69.

Teitel R. G. (2000). *Transitional Justice* (Oxford University Press).

Teubal M. (2008). Peasant struggles for land and agrarian reform in Latin America, in *Peasants and Globalization* (Routledge).

Tienhaara K. (2006). Mineral investment and the regulation of the environment in developing countries: Lessons from Ghana, in *International Environmental Agreements: Politics, Law and Economics*, 4(6), 371–394.

Tienhaara K. (2009). *The Expropriation of Environmental Governance | Environmental law* (Cambridge University Press).

Torres G. (2008). Indigenous Peoples, Afro-Indigenous Peoples and Reparations, in *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press).

Townsend G. (2019). The United Nations Compensation Commission: Mass Reparations Apotheosis, in *Loyola of Los Angeles International and Comparative Law Review*, 42, 325.

Turner C. (2008). Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law, in *International Journal of Transitional Justice*, 2(2), 126–151.

Van der Merwe H., & Schkolne M. (2017). The role of local civil society in transitional justice, in C. Lawther, L. Moffett, & D. Jacobs (eds.), *Research Handbook on Transitional Justice* (pp. 221–243), (Edward Elgar Publishing).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761

Van Ho T. (2016). Is it Already Too Late for Colombia's Land Restitution Process? The Impact of International Investment Law on Transitional Justice Initiatives, in *International Human Rights Law Review*, 5(1), 60–85.

Velásquez M. A. (2016). *The Colliding Vernaculars of Foreign Investment Protection and Transitional Justice in Colombia: A Challenge for the Law in a Global Context* [Doctoral Thesis]. Osgood Hall Law School of York University.

Wälde T. (2004). Investment Arbitration as a Discipline for Good-Governance, in *NAFTA Investment Law and Arbitration*, 475–492.

Webber J. (2012). Theorizing transitional justice, in J. Elster, R. Nagy, & M. Williams (eds.), *Transitional justice* (pp. 98–129), (NYU Press).

Zenker O. (2014). New Law against an Old State: Land Restitution as a Transition to Justice in Post-Apartheid South Africa?, in *Development and Change*, 45(3), 502–523.

Zrilič J. (2019). *The Protection of Foreign Investment in Times of Armed Conflict* (Oxford University Press).

ISSN 2724-6299 (Online)
https://doi.org/10.6092/issn.2724-6299/13761