Using International Investment Arbitration for compensating Victims of Torture

Abstract: The article deliberates upon the substantive overlap between rights protected through the human rights regime and privileges conferred to individuals by international investment agreements. In particular, it should be elaborated whether a State violates both human rights law as well as investment treaty provisions if it is responsible for torturing an individual. Subsequently, it will be discussed what consequences such an overlap would entail and what preconditions a victim of torture must fulfil to use the investor-State dispute settlement system as a means of redress. After a brief introduction into the matter, section two will give the reader a general overview of the most significant investment provisions and explain how individuals can bring a claim against a foreign State using the arbitration mechanism provided for in international investment treaties. Section three will analyse the commission of torture as a violation of investment provisions. Both Full Protection and Security clauses as well as International Minimum Standards will be considered as a possible treaty breach before the section will be concluded with deliberations on a potential application of investor-State dispute settlement in case of torture. Section four describes both the material (investment) and personal (nationality) requirements necessary for a victim of torture to bring a claim against a State through investment arbitration. The article will be completed with concluding remarks and final observations.

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I. Introduction

When discussing serious violations of international obligations, including infringements against the prohibition of torture, one does not automatically think of international investment law as providing a means to receive compensation. Human rights lawyers, notably, seem to shy away from issues relating to investment protection or trade regulations. This area of international law has, however, proven to be the most progressive field regarding individual protection. It has developed to such an extent as to give individuals an internationally enforceable right to claim responsibility even regarding States not affiliated to any regional or international human rights body. One single person may, using the investor-State dispute settlement (ISDS), receive an immense amount of reparations resulting from illegal State interference. One of the highest rewards ever granted to an individual involved the bankruptcy of a Russian Oil company (Yukos Universal limited) in 2006. Using the ISDS provision in the investment chapter of the Energy Charter Treaty[1], Russia was ordered to pay damages as high as USD 50 billion.[2] Interestingly, Yukos later filed a claim using a human rights mechanism to sue Russia before the European Court of Human Rights (ECtHR). The Court found a violation of Article 6 ECHR[3] and two separate violations of Article 1 of Protocol No. 1 ECHR. The Court, however, issued a significantly lower award of 1.9 billion Euros - as finding a violation was otherwise considered sufficient just satisfaction.[4]

This example shows how both the human rights mechanism and international investment arbitration may be used by an individual to receive reparation. The question arises under which circumstances a victim of torture might use ISDS to receive civil remedies without needing to rely on a regional human rights body or the domestic justice system of the perpetrating State. After a short introduction into the principles of international investment law, this article focuses on what different aspects of investment protection are violated by the State in case the latter should torture a foreign investor on its territory. Only in a second step, it should be discussed what personal preconditions must be fulfilled in case a victim of torture wants to

[1] See *Energy Charter Treaty*, 17 December 1994, 2080 UNTS 95 art 26, (entered into force April 1998) [Energy Charter Treaty].

[2] See *Yukos Universal Limited (Isle of Man) v The Russian Federation* (2014), 2005-04/AA227, at para 1827 (Permanent Court of Arbitration) (Arbitrators: L Yves Fortier, Charles Poncet, Stephen M. Schwebel).

[3] See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 art 6 (entered into force 3 September 1953).

[4] See *OAO Neftyanaya Kompaniya Yukos v Russia* (just satisfaction), 14902/04 (31 July 2014).

bring a claim against a State through ISDS. Lastly, an in-depth appreciation of the situation as it relates to the situation of torture victims will conclude the article.

II. International Investment Law in General

Bilateral Investment Treaties (BIT) and other International Investment Agreements (IIA) qualify as international treaties in the sense of Article 2 (1a) of the Vienna Convention on the Law of Treaties (VCLT)[5], by which two or more States agree on the terms and conditions for private investment by nationals and companies of one State in another State.[6] The main objectives of BITs are, on one hand, to "provide a stable and predictable legal environment for the management of foreign investment and to promote the economic development of the host State"[7]. As Gazzini points out, the particularity of bilateral investment treaties lies within their asymmetrical nature.[8] Similar to human rights treaties, BITs almost exclusively grant individual rights and protection from State interference while referring virtually all treaty obligations to the host State.

While the substantive obligations are subject of chapter three of this paper, it is crucial to understand the mechanism set in place by IIAs for an investor to bring a claim against a foreign State. On one hand, investors are encouraged to use the judicial system of the State in which they have invested. In distinction to the national population however, foreign investors are not limited to this option. In addition, and here investment law is unique in public international law, most IIAs provide for a direct access to international tribunals usually without the precondition of exhaustion of local remedies or prior negotiation or notification. While a majority of the approximately 3500 international investment agreements are bilateral in nature, in recent years a certain trend can be recognized to integrate investment chapters in

[5] See *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 article 2 1(a) (entered into force 27 January 1980).

[6] W Michael Reisman et al. International Law in Contemporary Perspective, 2nd edition, (New York: Foundation Press, 2004) at 460; see also Chester Brown "The Evolution of the Regime of International Investment Agreements: History, Economics, and Politics", in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 153 at 154.

[7] See Tarcisio Gazzini, "Bilateral Investment Treaties" in Tarcisio Gazzini & Eric de Brabandere, eds, *International Investment Law: The Sources of Rights and Obligations* (Boston: Martinus Nijhoff, 2012) 99 at 107; see also K Scott Gudgeon, "United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards" (1986) 4:1 BJIL 105 at 105.

[8] Gazzini, *ibid* at 107.

preferential trade agreements. The 1992 North American Free Trade Agreement (NAFTA)[9] concluded between Mexico, the United States and Canada contains provisions for investor-State dispute settlement. Also, Article 26 of the Energy Charter Treaty allows nationals and permanent residents of all contracting parties to file for arbitration at the International Centre for the Settlement of Investment Disputes (ICSID) or the Stockholm Chamber of Commerce. More than 50 States, including Japan, Australia, Afghanistan and most of European and former Soviet States are currently member of this treaty. Even the European Union (EU) and Euratom have ratified this convention, making it the only provision in international law by which an individual can bring a claim against the EU in an international tribunal. In 2015, the European Commission made a statement on behalf of the European Union regarding the dispute settlement system contained in the Energy Charter Treaty (ECT):

> It is declared that, due to the nature of the EU internal legal order […] the International Energy Charter Treaty on dispute settlement mechanisms cannot be construed so as to mean that any such mechanisms would become applicable in relations between the European Union and its Member States, or between said Member States […].[10]

By this declaration the EU indirectly recognizes the ISDS provision within the Energy Charter Treaty and specifically accepts it for investors originating from non-EU contracting parties. Investment protection has gone so far as to give an individual not only the means to bring a claim against a sovereign State but has developed to such an extent as to allow for a direct claim against a supranational organization.

While the ISDS provisions in NAFTA and the Energy Charter Treaty are most often cited by an investor to bring a claim against a foreign State, the importance of bilateral investment treaties should not be underestimated. The combined number of cases brought against a foreign State using a BIT provision makes up 80% of all known investment disputes.[11] While the ECT is limited to the energy sector, BITs englobe a wider range of investment and business branches.

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[9] See *North American Free Trade Agreement Canada, Mexico & United States*, 17 December 1992, Can TS 1994 No 2 at chapter 20 (entered into force 1 January 1994).

[10] Council of Europe, General Secretariat, *Declaration by the Commission on behalf of the European Union on the applicability of the part of the International Energy Charter devoted to dispute settlement mechanisms*, Notes, Doc 8917 (2015) at 2.

[11] Of the estimated 700 known investment cases roughly 550 used a BIT treaty provision to bring a claim against a State, while roughly 170 cases were brought using other treaties containing ISDS provision: http://investmentpolicyhub.unctad.org/ISDS/FilterByApplicableIia (last accessed: 1 November 2018).

Before a claim can be brought to the dispute centre, the specific procedure and preconditions of the BIT must be followed as otherwise the State's consent to international arbitration might be denied, leading to a lack of jurisdiction *ratione materiae* over the claim. As mentioned, the applicable BIT might contain the obligation of exhaustion of local remedies or provide for a minimum period of consultation between the investor and the State before a claim can be raised in an arbitration centre. Such provisions are, however, quite rare as their implementation could be circumvented by a most-favoured-nation clause, a provision guaranteeing the foreign investor not to be treated less favourably than other foreign investors or the national population.[12] In addition, BITs might contain a so-called "fork-in-the-road" clause by which the investor must decide to bring a claim either within the domestic court system or using international arbitration, but not both.[13]

III. Absolute Standards of Treatment

As the procedural privileges contained in a BIT will only be triggered once a substantive breach of a treaty can be identified, this chapter will focus on the obligations of a State regarding the treatment of foreign investors. What elements of an IIA are violated should the host State neglect its obligations regarding the prohibition of torture? For the purpose of coherence only the mistreatment suffered by a natural person amounting to a human rights violation should be considered, excluding any harm of business interests, such as the protection of legitimate expectations.

The so-called "absolute standards of treatment" are provisions found in a majority of IIAs guaranteeing the investor a minimum set of rights to be protected against unfair or damaging behaviour of the State.[14] In distinction to the relative standards, such as

[12] See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (The Netherlands: Kluwer Law International, 2009) at 233; see also Bungenberg, *supra* note 6 at 808; see also Zachary Douglas, "The MFN Clause in Investment Arbitration: Treaty Reinterpretation Off the Rails" (2011) 2:1 J Int'l Disp Settlement 97 at 97.

[13] *Toto Costruzioni Generali SPA v Republic of Lebanon* (2009), ICSID Case No ARB/07/12 at paras 203ff (International Centre for Settlement of Investment Disputes) (Arbitrators: Hans van Houtte, Alberto Feliciani, Fadi Moghaizel); see Bruno Simma & Dirk Pulkowski, "Two Worlds, but Not Apart: International Investment Law and General International Law" in Marc Bungenberg et al, eds, *International Investment Law: A Handbook* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 361 at 364.

[14] Newcombe & Paradell, *supra* note 12 at 233; see also Marc Jacob & Stephan W Schill, "Fair and Equitable Treatment: Content, Practice, Method" in Bungenberg M et al, ed, *International Investment*

non-discrimination and most-favoured-nation treatment, absolute standards apply regardless of any point of comparison.[15] The investor is therefore protected in any circumstances while the State cannot justify neglecting obligations with the fact that its nationals are treated the same way. Foreigners can consequently be in a more advantageous position as they can directly rely on international minimum standards to apply while domestic investors are excluded from such protection.

BITs usually contain three provisions qualifying as absolute standards: Full Protection and Security (FPS), Fair and Equitable Treatment (FET), and International Minimum Standard of Treatment (IMS). In the following chapter both FPS and IMS should be considered as possible treaty breaches in case torture occurred. Regarding FET provisions, it should be mentioned that FET might play a role for human rights litigation outside the spectrum of physical and mental abuse. FET clauses may be applied when actions of the State seem inopportune, discriminatory or inherently arbitrary. Human-rights-related interests, such as the protection of property or anti-discrimination proceedings, may in certain ways be taken into consideration for the appreciation of FET provisions. In the spirit of coherence, exclusively FPS and IMS obligation should be focused upon as official torture would unavoidably be considered unfair and inequitable behaviour of a State. While it is widely accepted that FET consists of an autonomous obligation,[16] distinguishing it from FPS and/or IMS is not an easy task and shall not be subject of this chapter. Many BITs even refuse to separate the clauses from one another as they are inherently intertwined[17] and even case law shows that physical harm may violate several norms for the same actions taken.[18] The author therefore includes FET standards within the realm of FPS and/or IMS as it relates to physical and mental harm amounting to torture.

Law: A Handbook (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 700 at 713ff (difficulty of defining absolute standards of treatment).

[15] Newcombe & Paradell, *ibid*; see also Jacob & Schill, *ibid* at 702; Bungenberg, *supra* note 6 at 808.

[16] Newcombe & Paradell, *ibid* at 234; Christoph H Schreuer, "Fair and Equitable Treatment (FET): Interactions with other Standards" (2007) 4:5 Transnational Dispute Management.

[17] Among others: Article 2 of the Agreement between the Government of the Republic of Indonesia and the Government of the People's Democratic Republic of Algeria concerning the Promotion and Protection of Investments of 21 March 2000.

[18] See *The Rompetrol Group NV v Romania* (2010), ICSID Case No ARB/06/3 (International Centre for Settlement of Investment Disputes) (Arbitrators: Donald Francis Donovan, Marc Lalonde) (the Tribunal found a violation of both FPS and FET provision for the physical harassment of individuals) [*Rompetrol v Romania*]; see also Desert Line Projects LLC v The Republic of Yemen (2008), ICSID Case No ARB/05/17 at para 213 (International Centre for Settlement of Investment Disputes) (Arbitrators: Jan Paulsson, Ahmed S EI-Kosheri) (in this case the harassment violated both IMS and FET norms).

1. Full Protection and Security (FPS)

"Full Protection and Security" are clauses found in bilateral or multilateral investment treaties that aim at the physical and legal protection of the investor and his or her assets.[19] The State agrees to take active measures to protect the investor and his or her investment from any adverse effects, may they originate from private third parties, such as demonstrators, employees or other private organizations, or be the direct result of the exercise of State power.[20] Within this chapter only the latter should be discussed and the author focuses on human rights violations being committed by the exercise of State authority such as police actions, government investigations or any other use of armed forces or coercion mechanisms within or outside an armed conflict.

As examples for FPS provision one might name Article 1105 (1) NAFTA, Article 10 (1) ECT, or Article 3 (1) of Dutch Model BIT which reads:

> Each Contracting Party shall accord to […] investments full physical security and protection.[21]

Most inherent FPS obligation consists of the guarantee to protect the physical security of the investor or the investment. While a majority of cases are filed by legal entities, the main application of FPS provisions tends to demand compensation for damages caused to an object of property, such as a building, the machinery used for fabrication, the raw material or the finished goods. The State party has, however, the additional obligation to protect "the physical integrity of an investment against interference by the use of force."[22] This obligation is, nevertheless, one of performance and not of

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[19] See Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials*, 1st ed (Cheltenham, UK: Edward Elgar, 2013) at 312; Ralph Alexander Lorz, "Protection and Security (Including the NAFTA Approach)" in Bungenberg M et al, ed, *International Investment Law: A Handbook* (Baden-Baden: Nomos Verlagsgesellschaft, 2015) 764 at 764ff [Lorz]; see also Jacob & Schill, *supra* note 14 at 764ff.

[20] See Christoph Schreuer, "Full Protection and Security" (2010) 1:2 J Intl Disp Settlement 353 at 353; see also Giuditta Cordero Moss, "Full Protection and Security" in August Reinisch, ed, *Standards of Investment Protection,* (New York: Oxford University Press, 2008) 131.

[21] Internetconsultatie, "Netherlands draft model BIT" (2018) art 9(1), online (pdf): Global Arbitration Review <globalarbitrationreview.com/digital_assets/820bcdd9-08b5-4bb5-a81e-d69e6c6735ce/Draft-Model-BIT-NL-2018.pdf>.

[22] Saluka Investments BV (the Netherlands) v The Czech Republic, Partial Award of March 17, 2006 (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier, Peter Behrens) at para 484; Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Republic of Kazakhstan (2008), ICSID Case No ARB/05/16 (International Centre for Settlement of Investment Disputes) (Arbitrators: Steward Boyd, Marc Lalonde) at para 668; Olivier de Frouville, "Attribution of Conduct to the State: Private Individuals" in James Crawford et al.,

result.[23] Italy was not held responsible for the damages caused to an American Company by Italian employees during a demonstration as it took all precautionary and protection measures necessary to fulfil its FPS obligations.[24] In *AMT v Zaire*[25], the arbitrators specified that FPS obligations were violated in case armed forces would have illegally entered the premises of foreign investors and caused material damage in the process. During several armed conflicts, the Zairian army had destroyed, damaged and confiscated certain property and objects of value belonging to an American Company situated in what later became the Democratic Republic of Congo (DRC). The DRC-United States BIT of 1986[26] had contained a provision guaranteeing full protection and security in its Article 2. As a consequence of these actions, Zaire was ordered to pay 9 Million USD in damages for having violated its obligations under the Bilateral Investment Treaty.

It is not excluded that FPS provisions may also protect a human being from illegal use of force, meaning his/her physical and mental integrity. Most authors agree that "full protection and security" must be understood as protecting the investor from bodily injuries, harassments, or threats caused by government acts.[27] Even the International Court of Justice (ICJ) distinguished the FPS provision as giving two separate obligations: One with regard to the person of the investor and another one with regard to his/her assets.[28] In *Eureko v Poland*, the ICSID arbitrators had accepted that FPS provisions may be applicable in case the police would physically harass foreign investors, however mentioned that a certain minimum threshold regarding the seriousness of the actions must be reached in order to consist of a treaty breach.[29] States hence accept the obligation to protect the physical and mental integrity of a person when it concludes an investment treaty containing a FPS provision. Should an

eds, The Law of International Responsibility, 1st ed (New York: Oxford Universty Press, 2010) 257 at 277–78.

[23] See Nadakavukaren Schefer, *supra* note 19 at 312.

[24] *United States of America v Italy*, See *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, [1989] ICJ Rep 15 at para 136 [*Unites States v Italy*].

[25] *American Manufacturing & Trading, Inc v Republic of Zaire* (1997), 36 ILM 1534 (International Centre for Settlement of Investment Disputes) (Arbitrators: Stomping Suchritkul, Heribert Golsong, Kéba Mbaye).

[26] The Treaty between the United States of America and the Republic of Zaire concerning the reciprocal encouragement and Protection of Investment, signed in Washington 3 August 1986.

[27] See Nadakavukaren Schefer, *supra* note 19 at 312; Schreuer *supra* note 20 at 354; see also De Frouville, *supra* note 22 at 277–78.

[28] See *United States of America v Italy, supra* note 24 at 102–12.

[29] *Eureko BV v Republic of Poland* (2005), at paras 236–37 (International Centre for Settlement of Investment Disputes) (Arbitrators: L Yves Fortier, Stephen M Schwebel, Jerzy Rajski).

individual therefore be severely mistreated or endure any other treatment that overpasses the *Eureko* threshold, that person would consequently be entitled to use the ISDS provision for claiming compensation.

In the case of *Rompetrol v Romania*[30], two Romanian employees of a Dutch company were arrested and detained by Romanian anti-corruption units. In addition, one of the employees, Mr. Patriciu, was further subjected to travel-bans and enhanced surveillance techniques, such as wire-tapping. ICSID arbitrations arrived at the conclusion that the conduct in question was politically motivated and thus constituted a State-sponsored harassment of the individuals through an unlawful criminal investigation. It further specified that Romanian police investigators had breached individuals' personal rights violating the full protection and security clause found in the Dutch-Romanian BIT[31]. Human rights violations therefore have been found to cause a breach of FPS in investment arbitration. Jurisprudence in the matter is, however, not consistent: The case of *Patrick Mitchell v the Democratic Republic of the Congo*[32] concerned the military intervention ordered by the Military Court of the Democratic Republic of the Congo (DRC) and its execution on the premises of an American-owned legal consulting firm. During the raid, compromising documents were seized and put under seal, additionally two local employees – both recognized lawyers – were put in prison and incarcerated for over nine months without trial. Despite the clear factual similarities between the *Mitchell* and the *Rompetrol* arbitrations, only the latter included a detailed analysis of the mistreatment endured by local employees. In *Mitchell* the arbitrators only identified an unlawful expropriation of documents and property belonging to an American investor, however refused to extend the merits of the case to breaches of FPS or FET provisions in relation to the harassment and mistreatment suffered by two local employees.[33] It must be mentioned that the *Mitchell* arbitration was later annulled by an *ad hoc* Committee as a consequence of an excess of power and failure to state sufficient reasoning.[34] The annulment was, however, based on a misqualification of the relevant services offered

[30] *Rompetrol v Romania*, *supra* note 18.

[31] Rompetrol, *supra* note 18 at para 193ff; *Agreement on encouragement of reciprocal protection of investments between the Government of the Kingdom of the Netherlands and the Government of Romania*, 19 April 1994, 2242 UNTS 41 at art 3 (entered into force 1 February 1995).

[32] *Patrick H Mitchell v Democratic Republic of Congo* (2002), Case No ARB/99/7 (International Centre for Settlement of Investment Disputes) (Arbitrators: Andreas Bucher, Yawovi Agboyibo, Marc Lalonde).

[33] *Ibid* at para 72.

[34] *Patrick H Mitchell v Democratic Republic of Congo* (2006), Case No ARB/99/7 (*Ad hoc* Committee of the International Centre for Settlement of Investment Disputes) (Arbitrators: Antonias Dimolitsa, Robert Dossou, Martina Polasek).

by the consulting firm as constituting a protected investment in the sense of international investment law. Whether the personal scope of protection may include both the investor and his/her employees remains unclear, showing the continued lack of consensus in this perspective.

2. International Minimum Standards of Treatment (IMS)

The Encyclopaedia of Public International Law defines IMS as:

> [A] concept (sometimes called the international standard of justice) [which] affirms that there are rights created and defined by international law that may be asserted against States by or on behalf of aliens [that includes] the rights of aliens to fair civil or criminal judicial proceedings […] to decent treatment if imprisoned, and to protection against disorder, violence, and against deportation in abusive ways […].[35]

States should uphold a minimum threshold recognized by the international community or otherwise be confronted with paying damages. An effective implementation of IMS in favour of foreign investors implies that an equal treatment between a national and a foreign investor was not sufficient to comply with the obligation contained in IMS but that – in some circumstances – States are obliged to treat foreigners better than the national population. IMS obligations are detached from any domestic legislation and exclusively find their basis in international customary law.[36]

The origins of IMS in relation to investor protection can be traced to the early 20th century. Already in 1915, Borchard identified "the standard of a duty of the State towards aliens and its international responsibility for violation of its obligations may be considered the result of a gradual evolution in practice, States having in their mutual intercourse recognized certain duties incumbent upon them."[37] In the 1926 *Neer case*, the mixed Claims Commission between Mexico and the United States significantly clarified the meaning and content of IMS. The case concerned an

[35] Detlev Vagts, "Minimum Standard" in Rudolph Bernhardt, ed, *Encyclopedia of Public International Law* (Amsterdam: Elsevier, 1997) vol 3 at 408.

[36] See generally *CMS Gas Transmission Company v Republic of Argentina* (2005), (International Centre for Settlement of Investment Disputes) (Arbitrators: Francisco Orrego Vicuña, Marc Lalonde, Francisco Rezek) [*CMT*]; Tarcisio Gazzini, Interpretation of International Investment Treaties (Oxford: Hart Publishing, 2016) at 97; Gazzini T, *Interpretation of International Investment Treaties*, Hart Publishing, Oxford, 2016, pp. 97 ff.

[37] See Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Law Publishing Co, 1919) at 177–178.

American businessman who was travelling by horseback in the northern regions of Mexico, when a group of criminals intersected him and his family and killed Mr. Neer right in front of his wife and daughter. The Tribunal established that Mexican police forces did not fulfil their duty to investigate the murder of a foreign individual. The incompetence to apprehend and punish those responsible amounted to a denial of justice in violation of internationally recognized principles:

> The propriety of governmental acts should be put to the test of international standards […] the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.[38]

The same year, the Mixed Claim Commission found another violation of IMS in the case of Harry Roberts.[39] Mr. Roberts, an American citizen, was unlawfully arrested and held prisoner in Mexico for an unreasonably long period without trial. The arbitrators recognized the immense physical pain and mental anguish which Mr. Roberts had to endure for an extended period which not only violated the Mexican Constitution but also international standards of the treatment of aliens:

> [T]he jail in which he was kept was a room thirty-five feet long and twenty feet wide with stone walls, earthen floor, straw roof, […] and no sanitary accommodations, all the prisoners depositing their excrements in a barrel kept in a corner of the room; that thirty or forty men were at times thrown together in this single room: that the prisoners were given no facilities to clean themselves: that the room contained no furniture […] and that the food given them was scarce, unclean, and of the coarsest kind.[40]

The Tribunal qualified these conditions as inhuman and cruel treatment of an alien not in accordance with ordinary standards of civilization.[41]

Many authors tend to mention minimum standard of treatment as part of customary international law.[42] IMS clauses were only later integrated in international treaties for investment protection. Nowadays, it is broadly accepted that minimum standards of treatment apply in investment protection even when not specifically included in the text of the applicable BIT.[43] This consequently means that foreign investors will be able to use the ISDS provision integrated in an international investment agreement

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[38] *LFH Neer & Pauline Neer (USA) v United Mexican States* (1926), Reports of International Arbitral Awards vol IV 60 at 61–2 (Mixed Claims Commission).

[39] *Harry Robert (USA) v United Mexican States* (1926), Reports of International Arbitral Awards vol IV 77.

[40] *Ibid.*

[41] *Ibid.*

[42] See generally *CMT*, *supra* note 36 at para 284; Gazzini, *supra* note 36 at 97;

[43] See Lorz, *supra* note 19 at 771; see also Moss, *supra* note 20 at 136–137.

for violation of the minimum threshold of civilized societies. Relevant in this respect is a more recent case of 2008, whereas a Road construction business used the Oman-Yemen BIT[44] to bring proceedings against the Republic of Yemen.[45] The Tribunal had concluded that armed threats against personnel including investors' family members violated the international minimum standards and the fair and equitable treatment provision included in the BIT. In addition to paying reparations for the acts caused by Yemeni armed forces, the victims were awarded moral damages of 40 Mil. Omani Rial (1 Mil. USD).[46] The Tribunal justified this payment by the fact that "the Claimant's executives suffered the stress and anxiety of being harassed, threatened and detained by the Respondent as well as by armed tribes."[47]

3. Do Torture Claims fit within the Investment Mechanism?

Ben Hamida observes that certain substantive norms such as the prohibition of discrimination and the protection of property may be common to both investment and human rights law.[48] Following this premise, the case law of international investment arbitration and the legal opinions described above indicate that an overlap between investment protection and human rights also occurs in case of torture. As we have discovered, FPS provisions protect the physical and mental integrity and liberty of the investor from the exercise of use of force. Case law and doctrine seem to agree that this provision is violated in case of physical harassment, unlawful arrest, or bodily injuries. As torture necessarily implies severe pain and suffering for the individual concerned[49], one must consequently conclude that the "Full Protection and

[44] Agreement between the Sultanate of Oman and the Republic of Yemen for Promotion and Protection of Investment of 20 September 1998.

[45] Desert Line Projects LLC v Republic of Yemen (2008), (International Centre for Settlement of Investment Disputes) (Arbitrators: Pierre Tercier, Jan Paulsson, Ahmed S. EI-Kosheri).

[46] *Ibid* at para 283, see more information on moral damages within investment arbitration in Patrick Dumberry, "Moral Damages" in Christina L Beharry, ed, Contemporary and Emerging Issues on the Law of Damages and Valuation in International Investment Arbitration, (Boston: Brill Nijhoff, 2018) 142.

[47] *Ibid* at para. 286.

[48] Ben Hamida W, Investment Arbitration and Human Rights in: Wälde TW (ed) Transnational Dispute Management, Vol. IV/5, 2007 available: www.transnational-dispute-management.com (last accessed 1 November 2018), p. 10.

[49] Kälin W/Künzli J, Universeller Menschenrechtsschutz, 3rd revised and updated edition, Bern, 2013, pp. 368 ff., McDonnell M/Nordgren L/Loewenstein G, Torture in the Eyes of the Beholder: The Psychological Difficulty of Defining Torture in Law and Policy, Vanderbilt Journal of Transnational Law, Vol. 44, 2012, p. 98, Anthony Cullen, "Defining Torture in International Law:

Security" covers acts of torture as well. Alternatively, IMS obligations apply even when FPS provisions are not specifically included in the treaty. States are under the obligation to provide for a minimum level of acceptable treatment to aliens or otherwise being confronted with a breach of IIA provisions. The minimum level of treatment is clearly undermined should a State commit torture, an act internationally recognized as a *jus cogens* violation.[50] Persons like Mr. Roberts in the *Roberts ruling* who endured months of inhuman and cruel treatment in prison were able to be compensated through international arbitration for violations of IMS. Of key interests are, however, the procedural rights linked to an investment treaty breach. Both international investment law and international human rights law have established a system by which individuals may bring a claim against a State. Suddenly, victims of torture would not be limited to the human rights system but could alternatively use ISDS to have their claims heard.

A significant overlap between several disciplines was identified by the International Court of Justice in the case of *Ahmadou Diallo*[51]. Mr. Diallo was arrested, incarcerated for almost 70 days, and deported to prevent him from conducting business in the DRC. The ICJ ordered the defending State to pay damages to Guinea for illegal actions taken against one of their nationals, however mentioned that the human rights aspect of the case would have qualified him to take proceedings directly against the DRC using the Banjul Charter[52], the regional human rights body. Interestingly, the ICJ also discussed investment law as providing a more suitable alternative to an inter-State claim.[53] The ICJ consequently accepts a substantive overlap between investment law, human rights, and diplomatic protection.

What consequences would a parallelism between the human rights and investment dispute resolution system for violations of torture entail? As Reiner and Schreuer

A Critique on the Concept Employed by the European Court of Human Rights" (2003) 34 Cal WL Rev 29 at 32.

[50] *Prosecutor v Furunžija*, IT-95-17/1-T, Trial Judgement (10 December 1998) at para 156 (International Criminal Tribunal for the former Yugoslavia); Questions relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), [2012] ICJ Rep 422.

[51] Case concerning Ahmadou Sadio Diallo (*Guinea v Democratic Republic of Congo*) [2007] ICJ Rep 582.

[52] "African Charter on Human and Peoples' Rights" (1986) online (pdf): African Commission on Human and Peoples' Rights <www.achpr.org/files/instruments/achpr/banjul_charter.pdf>

[53] *Supra* note 51 at 614.

convincingly point out, human rights law and investment law differ considerably.[54] On one hand, investment protection offers individuals a unique setting in public international law. In no other discipline can a private person bring a direct claim against a foreign country or, as we have seen, against an international organization, without relying on exhaustion of local remedies. Secondly, in distinction to human rights law, the question of nationality is crucial in investment protection. Both the applicability of the IIA as well as the procedure set in place for ISDS will depend on the positive and negative requirements regarding the nationality of the claimant – an aspect discussed in more detail below.[55] In contrast, human rights law is blind to the question of nationality. It does not matter what citizenship an individual possesses as long as the human rights violation took place in the jurisdiction of the perpetrating State.[56]

Nevertheless, it must be mentioned that investment arbitration is expensive and takes significantly longer than human rights proceedings. This essentially limits torture claims being introduced by individuals who can afford international arbitration or who are supported by a non-profit organization or any other intermediary claiming protection on their behalf. Once proceedings are introduced, however, investment protection is known to award much higher compensation payments than what is practiced in the human rights framework. It should, however, briefly be mentioned that the defending State might also have an interest that torture allegations be raised in an investment forum instead of a human rights court. Due to the limited transparency setting applicable in international investment law,[57] the potentially finite impact on the State's international reputation could encourage State representatives to actively collaborate in the proceedings and recognize responsibility where recognition is due.

Regarding the issue of human rights litigated within an investment setting, legal scholars disagree on the applicable legal provisions to the dispute, an issue that should

[54] Clara Reiner and Christoph Schreuer, "Human Rights and International Investment Arbitration" in Pierre-Marie Dupuy, Francesco Francioni, & Ernst-Ulrich Petersmann, eds, Human Rights in International Investment Law and Arbitration (New York: Oxford University Press, 2009) at 82.

[55] See chapter IV below.

[56] Among many: Kälin/Künzli (note 49), p. 129.

[57] Dimitrij Euler et al, eds, Transparency in International Investment Arbitration: A Guide to the UNICTRAL Rules on Transparency in Treaty-Based Investor-State Arbitration (Cambridge: Cambridge University Press, 2015); J Maupin, "Transparency in International Investment Law: The Good, the Bad and the Murky" in A Bianchi & A Peters, eds, Transparency in International Law (Cambridge: Cambridge University Press, 2013) at 143.

briefly be discussed here. The case of *Biloune v Ghana*[58] raised the question, whether human rights law was applicable as such in investment proceedings or if investment arbitration is a sort of "self-contained regime" not affected by rules of general international law. It concerned a Syrian investor who managed the remodelling of a restaurant situated in Accra, Ghana. During the restoration process, the Ghanaian government issued an order to stop the project, arrested and detained Mr. Biloune for 13 days and eventually deported him to Togo. Biloune specifically raised the issue of human rights violations as part of the UNICTRAL arbitration. The tribunal, however, refused to engage with the human-rights-related issues as it "lacks jurisdiction to address, as an independent clause of action, a claim of violation of human rights."[59] The Tribunal accepted that human rights made up an integral part of the minimum standard of treatment to be respected according to customary international law, however, limited its jurisdiction over a dispute in respect of foreign investment.

Reiner and Schreuer disagree as "human rights violations, cannot *per se* be excluded from its jurisdiction. If and to the extent that the human rights violation affects the investment, it becomes a dispute "in respect of" the investment and is hence arbitrable."[60] This opinion seems generally convincing as the practice of investment litigation would allow for the jurisdiction of an arbitration centre even in cases not directly linked to the investment at hand. ICSID, especially in cases regarding FET and FPS clauses, has accepted jurisdiction and found treaty breaches in relation to the mistreatment of personnel or investors, regardless of their affect to the investment. The harassment charges in *Rompetrol v Romania* were recognized as a clear breach of both FPS and FET provisions despite not having shown a direct impact on the investment at hand. Including human rights law as applicable in investment arbitration must necessarily be done as many human rights, including the prohibition of torture, are part of customary international law. Certain multilateral investment treaties, such as NAFTA (Article 1131) and ECT (Article 26 (6)), mention both the text of the treaty and the rules and principles of international law as applicable in case a dispute should arise. In addition, Article 42 (1) of the ICSID Convention states that "the Tribunal shall apply the law of the Contracting State party to the dispute and

[58] Antoine Biloune and Marine Drive Complex Ltd v Ghana Investment Center and the Government of Ghana (1989), 95 ILR 183 (UNCITRAL) (Arbitrators: Stephen Schwebel, Don Wallace, Monroe Leigh).

[59] Reiner & Schreuer *supra* note 54 at 84; see also Anthea Roberts, "Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States" (2010) 104:2 American J of Int Law at 215; see also Simma & Pulkowski, *supra* note 13 at 363.

[60] *Ibid* 54.

such rules of international law as may be applicable", a *lex specialis* provision with regard to the general rule of international treaty law contained in Article 31 (3c) VCLT. This conclusion is supported by ICSID arbitrators in a case against Sri Lanka, where they expressed their concern against the growing de-fragmentation of international law:

> Furthermore, it should be noted that the Bilateral Investment Treaty is not a self-contained closed legal system limited to provide for substantive material rules of direct applicability, but it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.[61]

The question of applying international human rights provisions within an investment context should, however, not be confused with the topic of this paper. The author proposes to reclassify severe mistreatment and violence against a person not as a human rights violation but as a violation of investment standards. Human rights law does not enter the equation directly in this scenario and the question of its applicability is rendered moot.

In January of 2016, the broadcasting network Al Jazeera filed a claim for damages at ICSID against the Arab Republic of Egypt.[62] The media company demands compensation in the name of its employees who allegedly became victims of serious human rights violations committed by the Egyptian security forces during the revolutionary period between 2011 and 2015. Al Jazeera had broadcasted images of the uprising against the Egyptian government despite a clear prohibition. As a consequence, Egyptian and foreign journalists were arrested and detained for months without charge, broadcasting facilities were attacked and destroyed as well as transmissions interrupted. Al Jazeera, with its headquarters in Doha (Qatar), used the Qatar-Egypt BIT[63] to demand redress for several international law violations as no other effective means of redress existed. Most claims forwarded by Al Jazeera focus on the breach of individual rights of its journalists, such as the liberty of expression, freedom of movement, the protection of press as prescribed by international treaties

[61] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka* (1990), No ARB/87/3 at 21 (International Center for the Settlement of Investment Disputes) (Arbitrators: Ahmed Sadek El-Kosheri, Berthold Goldman, Samuel Asante); see also Simma & Pulkowski, *supra* note 13 at 361.

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[62] *Al Jazeera v the Arab Republic of Egypt* (Pending), No ARB/16/1 (International Center for the Settlement of Investment Disputes) (Arbitrators: AJ Van Den Berg, N Ziadé, A Rigo Sureda).

[63] Agreement Between the Government of the Arab Republic of Egypt and the Government of the State of Qatar on the Promotion and Reciprocal Protection of Investments, 12 February 1999.

and customary international law and not just on the destruction of property and investment. It is yet unclear how Al Jazeera intends to classify violations of individual rights within this dispute: either as human rights violation applicable to the dispute or as violations of investment standards. The case nevertheless shows the growing trend towards using investment arbitration instead of a human rights mechanism for receiving redress for severe violations of individual rights.

IV. BIT Jurisdiction

Once a substantive treaty breach has been established, the possibility of an individual bringing a claim against a foreign State through investment arbitration will depend on several elements. Next to the obvious condition that a BIT must have been concluded and have entered into force between the two States in question, only foreign investors are subject to international investment protection. This chapter will thus focus on the two main jurisdictional elements that determine the applicability of a BIT. Firstly, the jurisdiction *ratione materiae*: What elements must be understood as forming an investment in the sense of a BIT? How can an investment be defined as it applies to international investment law? As a clear definition of the term of "investment" is missing in international law, this section will, first of all, exemplify the term of investment using a selection of international treaties as well as relevant case-law. Secondly, and more importantly from a human rights perspective, this article focuses on the precondition *ratione personae* regarding the nationality of the claimant. As mentioned previously, other than in international human rights law, international investment protection inherently depends on the nationality of the applicant. Who is understood as a foreign individual? Can dual-nationals use ISDS for bringing a claim against one of their State of nationality? Would torturous acts committed against the domestic population of a State fall outside investment arbitration? These and more questions will be discussed in section two of this chapter.

1. *Ratione materiae* (investment)

States enjoy a considerable margin of appreciation on what assets they intend to include in investment protection. The delimitation of the scope of a BIT will therefore

exclusively depend on the wording found in the applicable BIT.[64] Throughout the investment landscape, one might categorize different approaches on how States have defined investments within investment treaties. European countries typically take an asset-based, illustrative list approach. The so-called "Dutch Model" contains a broad definition stressing the investment's quality as an "asset" typically giving a non-exhaustive list of examples.[65] These types of BITs intentionally take a broad approach to cover a wide spectrum of investment assets, a fact that must be taken into consideration when an international tribunal determines the scope of application.[66]

> The term "investment" shall include every kind of asset and particularly:
>
> a) Movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;
> b) Shares, parts or any other kinds of participation in companies;
> c) Claims to money or to any performance having an economic value;
> d) Copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin, know-how and goodwill;
> e) Concessions under public law, including concessions to search for extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.[67]

The second group of treaties similarly contains a list of investment assets. In distinction to the "Dutch Model", however, the elements contained in the list are a mandatory and exclusive enumeration of assets protected by the treaty. No other kinds of investment shall be included, as otherwise the treaty could be used in a broader sense than initially intended by the contracting parties. Examples of "closed list" treaties include NAFTA or the Canadian Model BIT. At this point, it is important to mention that both the closed and non-exhaustive listing approaches do not distinguish between the purposes for which investments were acquired. In other words, it is not mandatory for an investment to be used in a business setting. A number of IIAs limit their applicability to investment exclusively performed in

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[64] See Nadakavukaren Schefer, *supra* note 19 at 60; Jan Bischoff & Richard Happ, "The Notion of Investment" in Marc Bungenberg et al, eds, International Investment Law: A Handbook (Portland: Hart Publishing, 2015) at 495.

[65] Nadakavukaren Schefer, *ibid*; Bungenberg, *ibid* at 500.

[66] *Fedax NV v Republic of Venezuela* (1997), No ARB/96/3 at 34 (International Center for the Settlement of Investment Disputes) (Arbitrators: Francisco Orrego Vicuna, Meir Heth, Roberts B. Owen).

[67] Agreement Between the Swiss Confederation and Barbados on the Promotion and Reciprocal Protection of Investments, Switzerland and Barbados, 29 March 1995, TRT/BB-CH/001 at 1(2).

connection to the economic activity in the territory of the contracting party. The Mauritius-Swaziland BIT for examples defines protected investments as:

> [E]very kind of assets admissible under the relevant laws and regulation of the contracting Party in whose territory *the respective business undertaking* is made […].[68] [emphasis added]

The United States typically considers a business relation necessary. In their opinion, investments are specifically characterized as capital or other resources used with the expectation of gain or profit. This necessarily implies assuming a risk to achieve business goals. Assets used for any other purposes should not be included in the BIT's jurisdiction.[69] Other IIAs even take a step further by only protecting investments that lead to the establishment of a lasting economic relation.[70] Occasional or minor investments are excluded. In relation to this issue one must cite the *Salini case*[71] before the ICSID international tribunal. The case concerned an Italian contractor commissioned to build a highway in the Kingdom of Morocco. The Moroccan government refused to pay the contractors as they finished the project with delay. The ICSID arbitrators, in a decision relating to the jurisdiction of the Tribunal, had to specify whether the work conducted by the Italian contractor consisted of an "investment" in the sense of the Italian-Moroccan BIT or a simple execution of a contractual obligations for which they received monetary compensation. The Tribunal concluded that the objective criteria of investments are their significant contribution to the host State's development.[72] The fact that Salini was remunerated for building a 50km highway does not change the fact that they had significantly contributed to the infrastructural and economic development of Morocco. It is important to notice that, what was later known as the "Salini test", was specifically intended to broaden the scope of the applicable BIT by including an element which would have otherwise fallen out of investment protection. The tensions created between the subjective definition of an investment contained in a BIT and the

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[68] Agreement Between the Government of the Republic of Mauritius and the Government of the Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments, Mauritius and Swaziland, 15 May 2000 at 1.

[69] US Department of State, "2012 U.S. Model Bilateral Investment Treaty" (2012), online (pdf): US Department of State <www.state.gov/documents/organization/188371.pdf>.

[70] Free Trade Agreement, European Free Trade Association (EFTA) States and the United Mexican States, 27 November 2000 at 45 (entered into force 1 July 2001).

[71] *Salini Costruttori SPA and Italstrade SPA v the Kingdom of Morocco* (2001), 42 ILM 609 (International Centre for Settlement of Investment Disputes) (Arbitrators: Me Robert Briner, Me Bernardo Cremades, Pr Ibrahim Fadlallah)

[72] *Ibid* at para 52, see also Bischoff & Happ *supra* note 64 at 506.

objective requirements proposed by the *Salini ruling* is a matter that needs further development and clarification.

As this paper is only intended to give a swift summary over the issues related to the diverging definitions of investment rather than discussing the matter in detail, certain principles should be confirmed that apply in international investment law. Firstly, the realm of protection will predominantly depend on the wording found in the specific BIT. On one hand, the margin of appreciation left to States has led to a restrictive approach on investment protection where only significant investments that contribute to the lasting economic ties will enjoy investment protection. On the other hand, especially European countries, with an asset-based definition, seem to take a more liberal approach. Neither the nature nor the purpose of the asset is considered a precondition for the BIT jurisdiction. In addition, no monetary threshold exists. As even shares or other part of participation to a company incorporated in the host State, it is perfectly conceivable that even small shareholders might enjoy investment protection giving them access to ISDS. The same goes for movable or immovable property. It could be sufficient to be the owner of an apartment situated in the host State, despite the fact that it is exclusively used for personal reasons. The tendency to broaden the scope of an IIA is also shown by the introduction of the "Salini test". The way in which the proposed objective requirement limits the liberties of States to determine the material scope of a treaty is a matter that needs further development.

However small the threshold on BIT jurisdiction may be, it does not change the fact that a number of foreigners are precluded from using the inter-State dispute settlement system contained in the BIT. The distinction exclusively depends on the property or wealth of a person and the assets at his/her disposal. With a specific link to human rights victims not covered by investment protection, does it make sense to give additional means for retrieving damages to individuals simply because they own an apartment in the State in question or inherited some shares that happened to belong to a company incorporated in that State? This distinction is even more absurd when considering that investors typically choose to do business with a foreign State assuming a certain risk that the investment might not turn out profitable. The same cannot be said for victims of human rights abuses. Most victims never willingly entered in contact with the foreign government but just happen to suffer from the public authority held over them. Investment protection is often conceived as an asymmetrical system where business owners may benefit from getting access to a foreign market and receive a tool for damage control should any State action lead to unforeseeable losses.

2. *Ratione personae* (nationality)

The author would like to emphasize that the concept of nationality in investment protection was subject of an in-depth analysis within a publication he offers elsewhere.[73] For the purpose of a concise argumentation, only a brief overview should be given of the conclusions found in the mentioned article.

Firstly, when it comes to nationality, investment protection can be considered the "innovation house" within the public international framework. It proposes several unique solutions to problems found in other disciplines often emphasizing the *lex specialis* nature and choosing to take a different path to otherwise recognized principles and customary law. Usually issues related to nationality fall within the exclusive realm of sovereignty of a State constituting a classical concept of *domaine réservé*.[74] Nevertheless, investment tribunals have decided cases lifting the absolute sovereignty in this regard, so for example in *Hussein Soufraki v the United Arab Emirates*[75]. The Tribunal held that Mr. Soufraki did not possess Italian citizenship even though Italy had issued two valid passports, five certificates of nationality and a certificate specifically allowing him to use ISDS as an Italian citizen issued and signed by the Italian Foreign Ministry. Similar decisions were taken in *Siag v Egypt*[76]. In this ruling, the tribunal held that Mr. Siag was not an Egyptian national, even though Egypt had treated him as such since birth and had granted him governmental business incentives exclusive to Egyptian nationals. In addition, the practice in international investment law differs considerably in matters related to diplomatic protection as both dual citizens and permanent residents may be included in the personal scope of a BIT. Due to the continued inter-State provisions within investment treaties, the first implementation of a diplomatic protection *de jure domicili* was introduced in public

[73] Hemmi M, The Concept of Nationality and Diplomatic Protection in International Investment Law, in: Jusletter of 19 June 2017, available: https://jusletter.weblaw.ch/en/juslissues/2017/896.htmlprint (last accessed: 1 November 2018).

[74] Most notably expressed in Nationality Decrees Issued in Tunis and Morocco case (1923), Advisory Opinion, PCIJ (Ser A/B), No 4 at 24.

[75] *Hussein Nuaman Soufraki v The United Arab Emirates* (2007), ARB/02/7 (International Centre for Settlement of Investment Disputes) (Arbitrators: Florentino P Feliciano, Omar Nabulsi, Pr Brigitte Stern).

[76] *Waguih Elie George Siag and Clorinda Vecchi v the Arab Republic of Egypt* (2007), ARB/05/15 (International Centre for Settlement of Investment Disputes) (Arbitrators: Pr Michael Pryles, Pr Francisco Orrego Vicuna, David A R Williams).

international law. For more details regarding the concept of nationality and diplomatic protection the reader is referred to the opinions expressed by Hemmi[77].

In distinction to what is practiced in human rights litigation, an applicant must show - in order to receive compensation through an ISDS provision - that he/she fulfils the nationality requirement directly or that mistreatment took place because of his/her relation to a foreign investor as defined by the applicable treaty. For the purpose of this article, it is consequently important to understand who a "foreign" investor is and who may use ISDS for compensation claims. In this regard, it is certainly true that any person non-citizen of the host State will have access to ISDS if their State of origin has concluded a BIT with the country in question. Important to retain is that the personal scope of BIT may be extended to cover the national population of the host State in two ways. Firstly, dual-citizens of both the host and the State with which a BIT was concluded may use ISDS to bring a claim against one of their home States. This was most notably decided in the case of *García Armas v Venezuela*[78] where two Venezuelan-Spanish dual nationals (father and daughter) successfully brought a claim against Venezuela. According to the tribunal, having the nationality of the State party to the dispute does not preclude ISDS even though their Venezuelan citizenship was predominant in the case at hand.[79] The Paris Appeals court later annulled this case at the request of the Venezuelan government.[80] The Appeals Court nevertheless reaffirmed the lower Court's findings on nationality and the continued jurisdiction *ratione personae* for dual-citizens, however annulled the arbitral decision based on a lack of jurisdiction *ratione materiae*.[81] ISDS is consequently open to dual-citizens as well as foreigners, must however be brought outside the ICSID framework as Article 25 ICSID prohibits a claim being raised against the home state of an investor.

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[77] Hemmi *supra* note 73, para 12ff, see for more details on the personal scope of bilateral investment treaties: Reed L/Davis J, Who is a Protected Investor?, in: Bungenberg M et al., International Investment Law: A Handbook, Baden-Baden, 2015, pp. 614 ff., See also Roberto Aguirre Luzi & Ben Love, "Individual Nationality in Investment Treaty Arbitration: The Tension between Customary International Law and Lex Specialis" in Andrea K Bjorklund, Ian A Laird & Sergey Ripinski, eds, Investment Treaty Law: Current Issues III (London: British Institute for International and Comparative Law, 2009) 183.

[78] *Serafín García Armas and Katarina García Gruber v Bolivarian Republic of Venezuela* (2014), CPA No 2013-3 (UNCITRAL) (Arbitrators: Pr Eduardo Grebler, Pr Guido Santiago Tawil, Rodrigo Oreamuno) [Garcia Armas].

[79] Garcia Armas, *supra* note 78, at para 167-175.

[80] CA Paris, 25 April 2017, *Bolivarian Republic of Venezuela v Serafín García Armas* [2017] No 15/01040.

[81] *Ibid* at p 4-980.

Secondly, even regarding the national population of a State, case law has established certain mechanisms by which nationals of the defending State might enter the scope of protection of an IIA. In *Rompetrol v Romania*[82], the Tribunal was asked to analyse a BIT treaty breach regarding harassment charges and the unlawful arrest and detention of two Romanian employees of a Dutch company. The Tribunal mentioned that a simple connection to a foreign company would not suffice to bring mistreatment of a national into the jurisdiction of the BIT.

> To come within the zone of protection something more would be required. […]. Either the conduct complained about could have been directed against the individuals for actions taken on behalf of and in the interest of the investor or its investment […]. Or the conduct complained about could have been directed against individuals (even in their personal capacity) for the purpose of harming the investor or its investment through the medium of injury to the individuals.[83]

Evidently, persons concerned, not carrying a foreign passport or a passport of a country with which an IIAs has been concluded, necessarily would need to use an intermediary claiming investment protection on their behalf. Private transnational corporations may consequently enter the sphere of providing redress for violations of individual rights in a unique way. By qualifying acts of torture as a violation of FPS and/or IMS provisions, transnational corporations may therefore hold a States responsible for the severe mistreatment of its national and foreign population. This approach is especially valuable for actions brought against States not affiliated to any individual complaint mechanism in the human rights field. The vast network of bilateral and multilateral investment treaties may – to a certain extent – reach beyond the traditional human rights spectrum by providing an implementation mechanism for actions that would have otherwise fallen within the gaps of human rights enforcement.

Additionally, *Rompetrol* considerably extends the personal scope of a BIT. Suddenly, a State may be confronted with compensation claims resulting from a damaging behaviour towards its own nationals even though foreign investment protection was meant to exclude such a scenario. This includes nationals who did not perform any investments. The jurisprudence in this respect is far from being coherent. In *Patrick Mitchell v the Democratic Republic of the Congo*[84], the Tribunal was confronted with comparable facts of local employees being harassed and unlawfully detained. The tribunal refused to include the harassment in the merits of the dispute as they did not

[82] *Supra* note 18.
[83] *Ibid* at para 200.
[84] *Supra* note 32.

have sufficient impact on the investment in question. In *Biwater v Tanzania*[85], on the other hand, the tribunal specifically applied the absolute standard of treatment to cover the local employees of the investor as well. Board member, other employees or even family members[86] consequently enter the sphere of protection if a violation of rights has occurred for the purpose of harming a foreign investor.

Furthermore, it shall only be mentioned that legal entities may be used for circumventing nationality provisions. In the *Soufraki ruling*, Mr. Soufraki could have used a shelf company incorporated in Italy in order to receive standing in the international investment arbitration. In *Tokios Tokeles v Ukraine* investors used a Lithuanian corporation almost entirely owned by Ukrainian citizens for the unique purpose of bringing a claim against Ukraine using the ISDS provision in the Lithuania-Ukraine BIT[87]. The Tribunal held that it did not qualify as abusive behaviour and granted Ukrainian nationals an award of compensation.[88]

V. Conclusions

This paper evaluated the overlap between human rights and investment protection for acts of torture. The author believes to have shown that torture consists on one hand of a violation of the fundamental values represented by human rights law and simultaneously represents a breach of obligations found in international investment treaties. Consequently, victims of torture would already today have standing to rely on the procedural rights found in IIAs to bring a claim against a foreign State in an international tribunal. This thesis, however, remains difficult to enforce. Firstly, an investment treaty must have been concluded and entered into force between the home State of the individual and the State that has tortured the person concerned. With more than 3500 treaties concluded among States, including innumerable investment chapters found in multilateral preferential trade agreements, this obstacle does not seem insurmountable. In reality, there are certain countries where only a

[85] *Biwater Gauff Ltd v United Republic of Tanzania* (2008), ARB/05/22 (International Centre for Settlement of Investment Disputes) (Arbitrators: Gary Born, Toby Landau, Bernard Hanotiau) at para 709.

[86] *Desert Line Projects LLC v Republic of Yemen* (note 45).

[87] Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments, 8 February 1994, 2711 UNTS 39 at art 8 (entry in force 6 March 1995).

[88] *Tokios Tokelés v Ukraine* (2004), ARB/02/18 (International Centre for Settlement of Investment Disputes) (Arbitrators: Pr Prosper Weil, Pr Piero Bernardini, Daniel M Price).

small number of investment treaties are in place which leaves a considerable gap of protection. Secondly, a person concerned would need to show that it has invested in the perpetrating State prior to the treaty breach. Depending on the BIT in question, this might be challenging as either a low or high threshold of applicability exists where only significant contributions to the economy of the host State will be considered an investment relevant for the IIA. Thirdly, certain hurdles relating to the nationality of the victim exist which might hamper access to international arbitration. Foreign nationals, dual nationals of both the host State and the sending State, and even permanent resident of a sending State have standing to bring cases in international investment tribunals.[89] FPS and IMS provisions found in bilateral investment treaties and other IIAs may even cover board members, local employees or family members of a foreign investor regardless of their nationality or whether they have undertaken an investment. This fact significantly opens the possibility of using ISDS for all persons that have become victims of torture because of their relation to a foreign investor regardless of the nationality. The broadcasting network Al Jazeera has recently filed for arbitration in order to receive compensation in the name of both its Egyptian and non-Egyptian employees for individual rights violations suffered by the Egyptian authorities.[90] Whether the claimant will be successful remains to be seen, this might however represent an emerging path for a future human rights litigation: Individual rights enforcement through international arbitrations introduced by transnational enterprises.

Whether or not the approach described in this paper is of practical use, it does not change the fact that public international law has significantly shifted towards empowering individuals to have their rights implemented. Even if this development is somewhat less significant in the human rights context, in international investment law individuals meet sovereign States and international organizations on an equal footing.

[89] Hemmi *supra* note 73, para. 23 ff.
[90] *Supra* note 62.